

*Proceedings of the Bruges Colloquium*

# The Additional Protocols at 40: Achievements and Challenges

**18<sup>th</sup> Bruges Colloquium**  
**19-20 October 2017**

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*Actes du Colloque de Bruges*

# Les protocoles additionnels à 40 ans: Accomplissements et Perspectives futures

**18<sup>ème</sup> Colloque de Bruges**  
**19-20 octobre 2017**



College of Europe  
Collège d'Europe

Brugge



Natolin



**CICR**

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# PROCEEDINGS OF THE BRUGES COLLOQUIUM ACTES DU COLLOQUE DE BRUGES

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## Opening Remarks

### WELCOME ADDRESS

**Jörg Monar**

Rector of the College of Europe

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Dear Vice-President Beerli, dear Mr Füllemann, dear distinguished guests and speakers, dear students of the College of Europe, it is with great pleasure that I welcome you here to the 18<sup>th</sup> edition of the Bruges Colloquium on International Humanitarian Law. The College has always been very honoured to have this cooperation with the International Committee of the Red Cross (ICRC). There are not many flags in the world which have not been stained by historical events, by decisions taken by some authorities, linked to armed conflicts or other issues. But the emblem of the Red Cross on its white background, as a flag, stands everywhere in the world as a sign of hope and a symbol for the defence of fundamental values which should unite us all.

Millions and millions of people everywhere on the globe have, since the founding of the Red Cross, benefitted from the force for good that the Red Cross constitutes. The College of Europe cannot claim any similar international role, but there is a link, as the College was founded in 1949 with the mission to contribute to the cooperation and integration in Europe, which was still affected by the effects of the Second World War. Its mission was to contribute to cross-border cooperation and to find common solutions to common problems. And the ICRC has always strived to find common solutions to problems through cooperation everywhere in the world. From this perspective, the College of Europe, with its much more modest mission, overlaps with the Red Cross and has therefore always appreciated being able to host this Bruges Colloquium.

The subject of this year's edition hardly needs any justification. This year marks the 40<sup>th</sup> anniversary of the adoption of the 1977 Additional Protocols to the 1949 Geneva Conventions. These are two international legal instruments which belong to the most widely ratified international conventions. They reflect a large degree of international consensus on humanitarian standards which lay at the heart of the Geneva Conventions: 174 parties to Additional Protocol I and 168 to Additional Protocol II so far. The focus of the Protocols is on protecting civilians

against the worst effects of armed conflicts. What is very important – as the Protocols were and continue to be pioneering – is that they cover both international and non-international armed conflicts. This is an unsettled world where we see, almost each week, a new armed conflict emerging, often of a non-international nature. This mission, especially of Additional Protocol II, is as important as ever. If we look at the programme of this Colloquium, we can see the extent of the range of the challenges which the Protocols are faced with in their different fields of application, and the urgency to make progress on the various fronts which still require constant attention, further evolution and a lot of commitment by international and national authorities.

One has to say that the composition of the programme is in line with a very established College tradition, namely to bring together as speakers very distinguished practitioners and academics. The College tries to do the same in its Master programmes, as we feel it is the most promising formula not only for teaching but also for making a contribution to the search for solutions to today's problems.

I would like to hand over the word to Mr Füllemann, Head of the Brussels Office of the International Committee of the Red Cross, to add, from his perspective, further reflections on the subject.

# DISCOURS DE BIENVENUE

**Walter Füllemann**

Head of Delegation, ICRC Brussels

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Monsieur le Recteur, Madame la Vice-Présidente, Excellences, Mesdames et Messieurs, j'ai le grand plaisir de vous accueillir, au nom du Comité international de la Croix-Rouge (CICR), au 18<sup>ème</sup> Colloque de Bruges qui portera sur différents aspects liés aux deux Protocoles additionnels de 1977 aux Conventions de Genève de 1949.

Cela ne vous aura pas échappé, nous célébrons cette année les 40 ans de ces instruments juridiques. Et d'ailleurs, je suis sûr qu'un certain nombre d'entre vous ont participé cette année à d'autres conférences célébrant ce même anniversaire.

Si, nous aussi, nous avons choisi de mettre les Protocoles additionnels à l'honneur pour cette 18<sup>ème</sup> édition du Colloque de Bruges, ce n'est ni par manque d'originalité ni par ignorance des autres événements sur ces mêmes instruments. Je dirais, au contraire, que c'était un choix délibéré, posé en pleine connaissance de cause. Il nous faut rappeler l'apport considérable des Protocoles additionnels de 1977 à l'édifice du Droit international humanitaire (DIH). Il nous faut souligner les avancées importantes, mais également en discuter les failles, ou les clarifications nécessaires. Et vous le savez, nos rendez-vous de Bruges offrent un cadre particulier, propice à des discussions juridiques à la fois concrètes et passionnées.

Je souhaite utiliser le temps qui m'est imparti pour revenir quelque peu sur l'histoire de ces deux Protocoles additionnels de 1977. En effet, bien souvent l'on ne fait référence qu'aux quatre sessions de la Conférence diplomatique à Genève qui se sont étalées de février 1974 à juin 1977. Ce fut bien entendu la période cruciale, celle des négociations autour des propositions de texte émanant du CICR, mais ce ne fut que la dernière, après une longue épopée que je voudrais évoquer ici.

Cette épopée débute dès le 12 août 1949, dès l'adoption des quatre Conventions de Genève. Si celles-ci ont constitué une refonte complète de ce que l'on appelait le « droit de Genève », elles n'abordaient pas, ou très peu, les questions liées à la conduite des hostilités. De ce fait, la codification la plus récente en la matière remontait à la codification faite à La Haye en 1907. Entretemps, les méthodes et les moyens de combat avaient considérablement évolué. Ce constat laissa au CICR le sentiment d'un succès inachevé. Et comme vous le savez, le CICR ne se satisfait pas d'un demi-succès. Il a donc voulu se remettre à la tâche en vue de compléter le droit de la conduite des hostilités.

Mais l'histoire politique de cette période nous a passablement compliqué la tâche. Bien vite, la Guerre de Corée a été déclarée, et, comme vous le savez bien, il est beaucoup plus difficile de discuter de questions aussi délicates lorsqu'un conflit majeur, impliquant les grandes puissances de l'époque, fait rage. Le CICR a dû se résoudre à mettre ses dossiers de côté pour quelque temps. Relevons, en passant, que cela a très certainement permis à Monsieur Jean Pictet de se pencher sur la rédaction des Commentaires aux Conventions de Genève, Commentaires qui sont actuellement en cours de révision.

A l'occasion de la 19<sup>ème</sup> Conférence internationale de Croix-Rouge qui s'est tenue à New Delhi en 1957, le CICR a présenté aux Etats un document intitulé « Projet de règles limitant les risques courus par la population civile en temps de guerre ». Il s'agissait d'un texte relativement bref, comprenant seulement 20 articles consacrés à la conduite des hostilités. N'ayons pas peur des mots, le CICR s'est ramassé une claque, face à un refus catégorique des Etats d'entrer en matière.

Mais, vous le savez, le CICR est également déterminé. Certains diraient têtue. Et en 1965, la 20<sup>ème</sup> Conférence internationale de la Croix-Rouge, qui s'est tenue à Vienne, adopte quelques principes de base liés à la conduite des hostilités. Notez, en passant, que c'est la même Conférence internationale qui a adopté les sept Principes fondamentaux du Mouvement international de la Croix-Rouge et du Croissant-Rouge, qui nous sont si chers encore aujourd'hui. La même année, l'Assemblée générale des Nations Unies se penche sur le Droit international humanitaire et adopte sa Résolution 2444 sur « le respect des Droits de l'Homme en période de conflit armé ». Le paysage géopolitique évolue, et les Etats nouvellement indépendants semblent intéressés à s'engager sur le DIH. D'une part, parce que généralement ils sont eux-mêmes nés suite à un conflit armé, et d'autre part parce qu'ils ont la ferme intention de participer au développement d'un droit auquel ils seront liés.

De fait, une nouvelle impulsion est donnée lors d'une conférence des Nations Unies organisée à Téhéran en 1968. Bien que cette conférence soit officiellement dédiée aux Droits de l'homme, elle se mue bien vite en Conférence de droit international humanitaire. Un regain d'intérêt de la part des Etats pour discuter de la conduite des hostilités se fait clairement sentir.

Fort de ce retournement de situation, le CICR soumettra un rapport sur ce sujet à la 21<sup>ème</sup> Conférence internationale de la Croix-Rouge, à Istanbul en 1969. Ce rapport a ensuite servi de base de travail à deux réunions d'experts gouvernementaux qui se sont tenues à Genève en 1971 et 1972.

Suite à ces réunions, le CICR publie deux projets de protocoles additionnels qui seront approuvés par la 22<sup>ème</sup> Conférence internationale de la Croix-Rouge, organisée à Téhéran en 1973.



Cette Conférence les recommande comme base de travail pour la Conférence diplomatique qui sera convoquée par la Suisse, en sa qualité d'Etat dépositaire des Conventions de Genève, dès l'année suivante.

Comme vous le voyez, la genèse des Protocoles additionnels ne se limite pas à la Conférence diplomatique de 1974-77, mais les Protocoles ont dû prendre un chemin semé d'embûches pendant environ 25 ans avant d'arriver à cette conférence diplomatique.

Lorsque l'on se penche sur cette histoire, on se sent, peut-être, un peu rassuré face aux difficultés actuelles que l'on rencontre dans certaines initiatives contemporaines du CICR, telles que celle sur le respect du droit, l'initiative « Compliance » ou encore celle sur la détention.

Notre épopée nous amène maintenant à Genève, en février 1974, ouverture de la Conférence diplomatique. Il est remarquable de constater qu'aux côtés des 124 Etats qui ont pris part aux négociations, se sont retrouvés 11 mouvements de libération nationale – ce que l'on appellerait aujourd'hui des groupes armés organisés ou des acteurs non étatiques. Bien entendu ces derniers n'avaient pas le droit de vote, mais ils pouvaient partager leur expérience et exprimer leur point de vue. Une telle configuration serait très certainement impossible aujourd'hui.

Je n'aborderai pas le contenu des Protocoles. Madame Beerli en évoquera les apports majeurs au Droit international humanitaire dans un instant. Je vais uniquement me limiter à souligner que le programme du présent Colloque est construit autour des thèmes qui nous semblent les plus importants à discuter au regard des conflits actuels, à savoir le respect de la mission médicale, l'accès humanitaire et le droit à l'assistance, le lien entre ces Protocoles et le Droit international des droits de l'homme, sans oublier le volet lié à la conduite des hostilités, une question centrale dans le Protocole 1 principalement, ainsi que, bien entendu, les responsabilités en cas de violation de ces normes.

Je voudrais maintenant continuer notre épopée avec quelques considérations relatives aux négociations qui ont mené à l'adoption du deuxième Protocole additionnel. Comme le relève notre collègue, Monsieur François Bugnion, « l'histoire du Protocole 2 est l'histoire d'un naufrage ».

En effet, le projet de Protocole 2 présenté en 1973 par le CICR comprenait 47 projets d'articles, fruits des réunions d'experts gouvernementaux de 1971 et 1972. Pas moins de 77 séances ont été consacrées à l'étude de ce projet, complétées par d'innombrables groupes de travail, avant qu'un Etat ne vienne avec une contre-proposition de 28 articles qui sera discutée en six séances et aboutira au Protocole que nous avons aujourd'hui. Il est intéressant de noter que ce

sont malheureusement les Etats à l'époque nouvellement indépendants qui ont montré le plus de réticence à offrir une protection juridique un peu plus étendue aux victimes des conflits armés non internationaux.

On ne s'étonnera dès lors pas que sur certains aspects, et je pense en particulier à la détention en conflit armé non international, l'étendue de cette protection ne soit pas suffisante. Tout comme n'est pas suffisant le niveau de ratification de ces instruments, avec respectivement 174 et 168 Etats parties aux Protocoles 1 et 2. Je me permettrai dès lors de rappeler aux Etats représentés ici qui n'auraient pas encore ratifié ces instruments de DIH, que la Suisse en est le dépositaire et qu'elle accueillera avec plaisir toute nouvelle ratification.

Avant de céder la parole à Madame Christine Beerli, Vice-Présidente du CICR, je voudrais remercier notre partenaire, le Collège d'Europe, non seulement pour son hospitalité dans cette belle ville de Bruges, mais également, voire surtout, pour la confiance que le Collège nous a renouvelée cette année encore, tant pour le Colloque annuel que pour les cours de DIH dispensés aux étudiants des deux campus du Collège. Je voudrais également remercier nos orateurs et modérateurs d'avoir accepté de venir partager leur expertise et confronter leurs idées lors de ce Colloque.

Mesdames et Messieurs, je me réjouis d'avance des débats que nous allons partager pendant ces deux jours qui s'annoncent très stimulants et je cède maintenant la parole à Madame Beerli, qui nous fait l'amitié de participer encore une fois au Colloque de Bruges. Cette participation sera sa dernière en tant que Vice-Présidente du CICR, vu que Madame Beerli quittera ses fonctions l'année prochaine, et je vous demande de l'accueillir sous vos applaudissements.

## KEYNOTE ADDRESS

**Christine Beerli**

Vice-President of the ICRC

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Ladies and gentlemen,

It is a great pleasure to be with you at the 18<sup>th</sup> session of the Bruges Colloquium and to have the privilege of making a few introductory remarks on the topic under discussion for the next two days. This year, the Colloquium gives us the opportunity to celebrate the 1977 Additional Protocols to the Geneva Conventions of 1949 and to recognise their influence on contemporary armed conflicts and the way they are fought.

Without any doubt, the Additional Protocols of 1977 can be considered as a landmark in the development of International Humanitarian Law (IHL). With the Geneva Conventions of 1949, they form the foundations of IHL and are the cornerstones for the protection of human life and dignity in times of armed conflict.

Forty years ago, the Protocols codified the basic principles and rules of IHL. They also developed new rules to reflect the constantly changing nature of armed conflicts. Today, these contributions still stand at the front line of current armed conflicts, protecting those affected by them and providing guidance to belligerents in the new realities of belligerency.

Marking the 40<sup>th</sup> anniversary of the Additional Protocols, the Colloquium will look back at the normative impact of these treaties and foster a discussion on their practical relevance today, focusing on issues of particular interest in the current humanitarian environment.

Undoubtedly, the Additional Protocols have fulfilled their primary objective of reaffirming and developing IHL in light of new challenges in armed conflicts.

During the 1974-1977 Diplomatic Conference, one of the main objectives of the International Committee of the Red Cross (ICRC) was to reaffirm the existing principles of IHL. These principles were already part of treaty and customary law but had been negotiated before decolonisation and the resultant tripling in the number of States.

The universality of participation in the negotiation of the Protocols was unprecedented. While the 1949 Conventions were largely negotiated by European States, all States party to the Geneva Conventions or members of the United Nations (UN) were invited to attend the Diplo-

matic Conference at which the Protocols were negotiated. Ultimately, 124 States participated, representing more than double the number of States that had taken part in the Diplomatic Conference to draft the 1949 Geneva Conventions. The concerns and priorities of newly independent States drove the negotiation agenda and were taken into account in the Protocols, which remained true to a universally accepted humanitarian goals. Thus, new States gained a greater sense of ownership of IHL, and the reaffirmation of basic IHL principles by the wider international community of the 1970s was an important goal in itself.

Also, the Additional Protocols aimed to codify and progressively develop essential rules on the conduct of hostilities. In 1949, States were not able to agree on these rules, in particular due to the irreconcilable differences on nuclear weapons. In addition, The Hague Law dealing with hostilities and the use of weapons had not undergone any significant revision since 1907. Thus, the rules on the conduct of hostilities were due to have a healthy dose of universal scrutiny, codification and development.

Among the most important rules contained in the Protocols dealing with the conduct of hostilities are those on the protection of the civilian population and objects. For instance, Additional Protocol I includes definitions of the key notions of ‘combatant’, ‘armed forces’, ‘military objectives’ as well as of ‘civilians’ and ‘civilian objects’. It prohibits attacks on the civilian population and on civilian objects. It also defines key principles to guide military targeting, including the principles of distinction, proportionality and precautions – all of which save lives on battlefields around the world every day while preserving the possibility for belligerents to achieve their military and strategic purposes.

Recognising the increase in non-international armed conflicts, another important contribution of the Protocols was to improve the fate of civilians affected by these situations. In non-international armed conflicts, civilians were often the main victims and were largely left beyond the protection of IHL, benefiting only those essential measures laid down in common Article 3 to the Geneva Conventions. Acknowledging this growing need, the international community came together to create, with Additional Protocol II, the first ever treaty entirely devoted to non-international armed conflict which secures greater protection for civilians and civilian objects.

Ladies and Gentlemen,

I would also like to highlight some of the concrete successes of the Additional Protocols. There are many, but let me subjectively address two important ones.

The Additional Protocols have significantly contributed to the formation of customary law. Although these elements alone are not sufficient for a customary rule to come into effect, the broad participation in the negotiation of the Additional Protocols and the fact that the majority of its provisions were adopted by consensus were crucial factors. Many of the rules adopted by consensus contributed to the formation of customary IHL rules which bind all States – including those not party to the treaties. Significantly, the crystallisation of customary law has particularly impacted the law applicable to non-international armed conflicts. For example, the ICRC’s Study on Customary IHL identifies 161 rules – 149 of which also apply in non-international armed conflicts.

Furthermore, the Protocols established the groundwork for, and inspired the development of, multiple other IHL treaties, in particular concerning weapons. During the discussions at the 1974-77 Diplomatic Conference on Article 35 of Additional Protocol I, which establishes that the right to choose methods and means of warfare is not unlimited, delegates decided to convene a special conference under the UN framework. Its aim would be to draft what ultimately became the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, which prohibits several particularly cruel weapons or restricts their use. A range of other treaties have since been concluded to proscribe certain weapons, including the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines (1997). There is no doubt that the adoption of the Additional Protocols contributed to these processes, and that the weapons treaties that have proliferated since 1977 reduce the pain and suffering of victims of war every day.

Mesdames, Messieurs,

Nous assistons malheureusement à la réapparition de certains discours visant à décrédibiliser le Droit international humanitaire (DIH) (y compris les Protocoles additionnels de 1977), notamment par la stigmatisation de sa soi-disant incapacité à répondre efficacement aux défis posés par les nouvelles formes de conflictualité. En conséquence, l’applicabilité du DIH est fréquemment contestée ou niée par les parties au conflit démontrant ainsi des réticences à considérer ce corps de droit comme applicable à leurs actions. Et même lorsque l’applicabilité du DIH est acceptée, il n’est pas rare que des belligérants affirment qu’il s’applique différemment à leurs opérations ou ne s’appliquerait qu’en tant que politique.

L’invocation croissante par certains responsables de la notion d’« exceptionnalisme » risque à terme de remettre en cause les principes mêmes qui sous-tendent l’ensemble du DIH et de saper ainsi les avancées proposées par les Protocoles additionnels.

Non, le contenu et l'application du DIH ne sauraient être les objets de négociation et de chantage lorsque les conditions pour l'existence d'un conflit armé sont objectivement constatées. Non, l'application du DIH ne saurait être conditionnée par la dénomination subjective dont l'ennemi se voit affublé ou par la perception par des parties au conflit de leur légitimité à recourir à la force. Aucun de ces arguments ne peut exempter des parties au conflit de leurs obligations en vertu du DIH, ni priver quiconque de la protection offerte par cette branche du droit.

Mesdames, Messieurs,

Je voudrais réaffirmer ici avec force la pertinence du DIH et de la logique qui le structure: protéger les plus vulnérables en situation de conflit armé tout en permettant aux belligérants de neutraliser leur ennemi et d'atteindre leurs objectifs stratégiques.

Notre expérience et conviction, certainement partagées par cette salle, démontrent que négliger le DIH et les limites qu'il impose – notamment quant aux méthodes et moyens de guerre – nourrit les cycles de violence mais aussi éloigne les perspectives de réconciliation.

Le droit est loin d'être parfait. Le DIH ne fait pas exception. Ses normes peuvent indubitablement être améliorées, clarifiées, voire développées. Cependant, le Comité international de la Croix-Rouge (CICR) est d'avis que si les conflits armés actuels génèrent autant de souffrance, ce n'est pas parce que le DIH n'est pas suffisamment adapté ou flexible afin de fournir des réponses pratiques aux enjeux humanitaires qui découlent des conflits armés contemporains. Au contraire, notre expérience démontre que les règles de DIH pourraient clairement continuer de remplir leurs fonctions humanitaires si elles étaient appliquées de bonne foi.

Mesdames, Messieurs,

En l'absence de solution politique face aux situations dramatiques que constituent les conflits armés dont nous sommes témoins, le respect du DIH et de ses valeurs fondamentales par toutes les parties au conflit est primordial. Il ne peut être contesté que la souffrance humaine présentement constatée et les besoins humanitaires engendrés par les conflits armés seraient moindres si le DIH était respecté par les parties, qu'elles soient étatiques ou non étatiques.

Pour illustrer ce point, permettez-moi de vous poser quelques questions concernant le respect de ce droit à la lumière de certains des conflits armés actuels. Par exemple, prenons les règles du DIH liées au choix des moyens et méthodes de guerre et demandons-nous ce que les sociétés en Syrie, au Yémen ou en Libye seraient aujourd'hui si les belligérants avaient tenu

compte des principes de distinction, de précaution et de proportionnalité dans la conduite de leurs opérations militaires. Quelle serait la situation actuelle de certains conflits si les demandes d'accès humanitaires avaient été accordées à temps aux organismes humanitaires impartiaux, si les établissements médicaux et le personnel médical avaient été protégés et respectés comme le DIH l'exige, ou si le sort fait aux détenus avait été plus conforme aux règles pertinentes des Conventions de Genève de 1949 et de leurs Protocoles additionnels de 1977 ?

Je vous laisse juger si le problème provient des règles du DIH ou de leur violation. Je vous laisse juger des conséquences de leur inobservation sur les structures mêmes des sociétés affectées par ces situations. Je vous laisse aussi vous demander si le respect de ces règles ne pourrait pas constituer un élément essentiel favorisant l'établissement d'un environnement propice aux processus de réconciliation et de paix.

Tout comme les autres branches du droit international, le respect du DIH soulève plusieurs questions concernant l'efficacité des mécanismes de mise en œuvre du droit. Ceci nécessite une volonté politique. Le renforcement du respect du DIH constitue donc un défi constant mais pas insurmontable.

En vertu de son mandat, le CICR cherche, par le biais d'un dialogue confidentiel et bilatéral avec les Etats et les porteurs d'armes impliqués dans les conflits armés, à améliorer leur connaissance, leur acceptation et leur adhésion au DIH. Dans cette optique, nos délégations qui sont présentes dans plus de 80 pays ainsi que nos services au siège interagissent avec de nombreux acteurs. Etant convaincu que le DIH demeure un régime juridique essentiel afin de préserver des vies et la dignité humaine durant les conflits armés, le CICR travaille sans relâche pour un meilleur respect du DIH. Toutefois, nous ne pouvons faire seuls ce travail.

Il est essentiel que les Etats démontrent leur engagement à améliorer le respect du DIH par le biais d'efforts individuels, mais également collectifs.

Mesdames et Messieurs,

Les Etats, individuellement et collectivement, ont un engagement et une responsabilité envers le DIH. Ceci se reflète notamment dans l'obligation contenue à l'article 1 commun aux Conventions de Genève ainsi qu'à l'article 1 du premier Protocole additionnel. Ces dispositions prévoient que les Etats s'engagent à respecter et à faire respecter le DIH en toutes circonstances. Il est temps que les Etats assument pleinement cette responsabilité, non seulement lorsqu'ils sont impliqués dans un conflit armé, mais également lorsqu'ils sont en mesure d'influencer le comportement des belligérants. Le CICR est actuellement impliqué dans un

dialogue bilatéral et confidentiel avec des Etats influents afin de mettre en pratique cette obligation de faire respecter le DIH, notamment quant aux conflits armés faisant rage au Moyen-Orient. Ce n'est pas tâche aisée, mais elle apparaît importante si l'on pense aux gains humanitaires qui pourraient en résulter.

L'obligation première des Etats de respecter et faire respecter le DIH est multidimensionnelle. Cette dernière comprend la création d'un environnement propice au respect du droit, à la prévention des violations, en arrêtant ces dernières lorsqu'elles se produisent, ainsi qu'en punissant les auteurs de telles violations.

Dans l'objectif d'assurer un meilleur respect du DIH et de garantir une protection renforcée des victimes des conflits armés, nous devons développer nos actions de façon complémentaire au niveau national, régional et universel.

Cet effort collectif est reflété dans le système global actuel du respect du DIH où chaque acteur et mécanisme a un objectif et une contribution à apporter. Les Etats sont d'autant plus efficaces pour respecter et faire respecter le DIH qu'ils agissent en coopération avec d'autres ou collectivement. De fait, il est nécessaire de combiner ces efforts sur divers fronts afin de garantir une meilleure protection des hommes, des femmes et des enfants contre les conséquences désastreuses des conflits armés.

Dans ces temps difficiles, j'ose croire qu'une convergence des forces est possible. Toutefois, il y a un besoin urgent d'accroître nos efforts.

Mesdames, messieurs,

Nous nous engageons maintenant dans deux journées d'intenses discussions qui, j'en suis sûre, s'annoncent passionnantes et instructives. Nul doute qu'elles démontreront l'importance pratique et le rôle joué par les Protocoles additionnels de 1977 pour une meilleure protection des victimes des conflits armés. Je me réjouis de suivre et participer à ces débats et vous souhaite un excellent 18<sup>ième</sup> Colloque de Bruges.



## Session 1

# The Protection of the Delivery of Health Care under the Additional Protocols

Chairperson: **Knut Dörmann**

ICRC Legal Division

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## THE ADVANCES OF THE ADDITIONAL PROTOCOLS RELATED TO THE PROTECTION OF CIVILIAN WOUNDED AND SICK, MEDICAL PERSONNEL, UNITS AND TRANSPORTS

**Marco Sassòli\***

University of Geneva

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### Résumé

*Dans cette présentation, Marco Sassòli dresse les contours de la protection octroyée par les Protocoles additionnels aux civils blessés, malades et naufragés, au personnel civil, médical et religieux, ainsi qu'aux unités médicales et moyens de transports. Il explique d'abord comment le premier Protocole additionnel a renforcé la protection octroyée à ces trois catégories de personnes et de biens (1). Il met ensuite en évidence les différences existant entre ces catégories dans le cadre de conflits armés internationaux (2). Enfin, il décrit de manière succincte les règles qui leur sont applicables dans le cadre de conflits armés non internationaux (3).*

### **1. Le régime des Protocoles additionnels applicable aux civils blessés, malades et naufragés**

*Marco Sassòli met en exergue l'existence d'une protection antérieure – mais limitée – aux Protocoles additionnels, dans la 4ème Convention de Genève (CG IV) qui oblige les Etats parties à traiter les civils blessés et malades avec « une protection et un respect particuliers ». Toutefois, aucune obligation ne s'imposait à l'Etat de recueillir les civils blessés et malades.*

*En outre, les civils blessés, malades et naufragés, le personnel civil médical et religieux, ainsi que les unités médicales et moyens de transports bénéficiaient déjà de la protection dite « générale » prévue par le droit humanitaire et octroyée à toutes les personnes et tous les biens civils en tant*

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\* I would like to thank Ms. Alessandra Spadaro, PhD student at the Graduate Institute of International and Development Studies and research assistant at the University of Geneva, to have formulated this contribution based upon my oral presentation at the Roundtable.

que tels. La grande nouveauté du premier Protocole additionnel réside toutefois dans l'extension aux blessés, malades et naufragés militaires, ainsi qu'au personnel, aux unités et moyens de transport médicaux militaires, de la protection octroyée à leurs homologues civils. De plus, le premier Protocole additionnel renforce également la protection générale de toutes les personnes et biens visés, et particulièrement des activités médicales et du personnel religieux.

## **2. Les différences persistantes entre civils et militaires blessés, malades et naufragés dans le cadre des conflits armés internationaux**

Malgré les apports du premier Protocole additionnel, il demeure encore des différences majeures entre les personnes et biens protégés, en fonction de leur caractère civil ou militaire :

- Les civils capturés par l'ennemi d'une part, et les membres des forces armées se trouvant dans la même situation d'autre part, sont soumis à des régimes juridiques différents qui leur imposent un statut dissimilaire. Ceci implique notamment que les règles présidant à la rétention et au rapatriement s'appliquent exclusivement au personnel militaire médical et religieux, à l'exclusion du personnel médical civil.
- L'exigence d'être affecté par une partie au conflit à une mission médicale prévue par le Protocole additionnel I ne s'applique pas de la même manière en matière de protection du personnel médical civil d'une part, et militaire d'autre part. Ce critère revêt en effet une importance particulière en ce qui concerne la protection du personnel médical civil étant donné que le personnel médical militaire est par définition affecté par une partie au conflit en raison même de sa participation aux forces armées.
- Le traitement des soldats blessés, malades et naufragés en mer est réglé par la CG III qui en fait des prisonniers de guerre. Leurs homologues civils ne sont, au contraire, pas forcés de se rendre à un navire ennemi, et sont protégés par la CG IV et le Protocole additionnel I.
- Des règles plus restrictives s'appliquent en matière de liberté de circulation du personnel médical civil, selon l'article 15 (4) du Protocole additionnel I. Cette liberté est en effet soumise à deux limitations : le personnel médical civil n'a accès qu'aux lieux où ses services sont essentiels, et sa liberté de circulation peut être restreinte à la discrétion de la partie au conflit concernée.
- Le seul personnel religieux protégé par le Protocole additionnel I est celui qui s'engage exclusivement dans le travail de son ministère et qui est attaché soit aux forces armées, soit aux unités ou moyens de transport médicaux, soit à des organisations de défense civile.

### **3. La protection des civils blessés, malades et naufragés dans le cadre des conflits armés non internationaux**

*L'article 3 commun aux CG de 1949 et le Protocole additionnel II n'opèrent pas de distinction entre les personnes et biens protégés en fonction de leur caractère civil ou militaire. Cela est dû au fait que la protection, en matière de conflits armés non internationaux, ne repose pas sur cette distinction civil-militaire mais plutôt sur l'absence de participation active aux hostilités.*

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The 1977 Additional Protocols have greatly contributed to the advancement of International Humanitarian Law (IHL), including by enhancing the protection afforded under IHL to wounded, sick and shipwrecked civilians as well as civilian medical and religious personnel, units and transports.

I will first explain how Additional Protocol I (AP I) has strengthened the protection afforded under IHL to these categories of persons and objects. I will then highlight the differences that still exist in international armed conflicts between civilian and military wounded, sick and shipwrecked persons as well as between civilian and military medical and religious personnel, units and transports. Finally, I will deal briefly with the rules applicable to these categories of persons and objects in non-international armed conflicts.

#### **1. The Novelty and Importance of AP I's Legal Regime with Respect to Wounded, Sick and Shipwrecked Civilians as well as Civilian Medical Personnel, Units and Transports**

At the outset, it is important to note that, even before the adoption of AP I, wounded, sick and shipwrecked civilians as well as civilian medical personnel, units and transports were not deprived of any protection under IHL. Even though these categories of civilian persons and objects did not benefit from the comprehensive protection regime afforded to their military counterparts by the first and second Geneva Conventions (GC), some of the fourth Geneva Convention's (GC IV) provisions nevertheless offered some protection to these categories of civilians and civilian objects under IHL prior to AP I's adoption.

Specifically, Article 16 of GC IV obliges all State parties to treat wounded and sick civilians with 'particular protection and respect'. Nevertheless, Article 16 does not impose on the parties to the conflict an obligation to collect wounded and sick civilians. Rather, parties to the conflict are obliged only to 'facilitate' such collection, and only if 'military considerations al-

low<sup>1</sup> or according to local agreements concluded by them.<sup>2</sup> GC IV does not contain an explicit obligation to care for wounded and sick civilians (but this is the implicit purpose of collecting them). In occupied territory, an occupying power's duty to care for wounded or sick civilians is implicit in its obligation to ensure and maintain the proper functioning of the occupied territory's medical establishments and services.<sup>3</sup> As for medical personnel, Article 18 of the first Geneva Convention (GC I) recognises the role of all civilians, which naturally includes civilian medical personnel, in the care of the wounded and sick, and it authorises them to do so. Finally, Articles 18 to 22 of GC IV establish rules protecting civilian hospitals and the staff of civilian hospitals as well as convoys of vehicles, trains, ships and aircraft transporting wounded and sick civilians.

In addition, although explicit rules protecting these categories of civilian persons and objects were more limited prior to the adoption of AP I, these specific categories nevertheless benefited from the general protection afforded under IHL to all civilian persons and objects as such. Indeed, the protection of military wounded, sick and shipwrecked as well as military medical personnel and objects was more urgent because, without explicit protection, they would otherwise have been legitimate targets of attack, because they are members of the armed forces.

The great novelty of AP I is that, as a matter of principle, it extends to their civilian counterparts the express protection afforded to wounded, sick and shipwrecked military personnel and to military medical personnel, units and transports under the 1949 Geneva Convention.<sup>4</sup> This has great practical importance given that, in armed conflicts, civilians become wounded, sick or shipwrecked as often as members of the armed forces. Moreover, military medical personnel are less numerous than their civilian counterparts and armed forces tend to have less dedicated military medical personnel who receive special protection under IHL. Rather, modern armed forces tend to train and use some combatants for medical tasks. Such combatants, however, may nevertheless also fight and do not count as specially protected medical personnel under IHL.

The extension of express rules protecting these categories of civilians and civilian objects is even more important as AP I has also enhanced the overall protection of all wounded, sick, shipwrecked persons as well as all medical personnel, units and transports.

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1 Geneva Convention IV, Article 16(2).

2 Ibid., Article 17.

3 Ibid., Article 56(1).

4 Additional Protocol I, Article 8 (a)-(j).

First, Article 8 of AP I defines for the first time the meaning of ‘wounded and sick’, ‘shipwrecked’, ‘medical personnel’, ‘medical units’, and ‘medical transports’, clarifying, e.g., that maternity cases, newborn babies and disabled in need of medical assistance also fall within the definition of the ‘wounded and sick’ provided they ‘refrain from any act of hostility’.

Second, medical activities, including medical ethics, are better protected and regulated under AP I. In fact, Article 16 of AP I enhanced the protection of medical duties by expressly prohibiting parties to request the disclosure of confidential medical information pertaining to the wounded and sick except pursuant to well-defined exceptions. Likewise, Article 11 of AP I improved upon the safeguards protecting the physical and mental health and integrity of persons in the power of a party to the conflict, particularly with respect to prohibited medical practices such as the taking of tissue, blood, and organs. Third, AP I has also clarified the role of the civilian population and relief societies in the collection and care of the wounded, sick and shipwrecked.<sup>5</sup> Fourth, AP I contains a completely new, more flexible and – most importantly – more realistic legal regime on the protection of medical aircraft.<sup>6</sup>

Finally, AP I also strengthened the protection of religious personnel under IHL. Prior to AP I, Geneva Conventions I and II applied only to military chaplains attached to the armed forces and the religious personnel of hospital ships<sup>7</sup>, respectively. GC IV, in turn, failed to include any express provision providing specific protection to civilian religious personnel. AP I thus enhanced the protection of religious personnel under IHL by providing equal protection to all religious personnel, but only if said personnel are attached to the armed forces, medical units or transports, or civil defence organisations of a party to the conflict or the medical units and transports made available to a party to the conflict for humanitarian purposes.<sup>8</sup> Moreover, given that the word ‘chaplain’ has a Christian connotation, the adoption of the broader term ‘religious personnel’ in AP I is to be welcomed as it also encompasses ministers of other religions.

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5 Ibid., Article 17.

6 Ibid., Articles 24-31.

7 GC I, Article 24; GC II, Article 36.

8 AP I, Articles 8(d), 9(2), 15(5).

## **2. The Remaining Differences between Military and Civilian Wounded, Sick and Shipwrecked Persons as well as Military and Civilian Medical and Religious Personnel, Units, and Transports in International Armed Conflicts**

Although AP I did much to bridge the legal differences with respect to the protection of military and civilian wounded, sick and shipwrecked persons as well as military and civilian medical and religious personnel, units, and transports in international armed conflicts, a number of key differences nevertheless remain.

First, while civilian and military wounded, sick and shipwrecked persons as well as civilian and military medical personnel are granted identical substantive protection, their legal status under IHL, if they fall into the hands of the enemy, remains different.<sup>9</sup> Indeed, civilians in the power of the enemy (including wounded, sick, shipwrecked and medical personnel) are protected under GC IV, while captured members of the armed forces are protected by GC III, and wounded, sick and shipwrecked members of the armed forces are equally protected under GC I or GC II. The persisting difference in status also implies that the retention and repatriation regime of GC III<sup>10</sup> applies to military medical and religious personnel only, and does not extend to civilian medical personnel.

Second, while Article 8 of AP I defines both civilian and military medical personnel as ‘those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated’, this assignment requirement bears more significance for the protection of civilian medical personnel than it does for military medical personnel. Indeed, military personnel are by definition assigned by the party in whose armed forces they serve. Conversely, not all civilian doctors or nurses fall within the abovementioned definition of civilian medical personnel<sup>11</sup> as mere admission to practice medicine as a doctor or nurse does not constitute an assignment. What is sufficient to satisfy the assignment requirement, however, is not immediately clear from the wording of Article 8. The assignment of medical personnel is justified because the relevant party to the conflict should be able to exert some form of control over its assigned medical personnel. In addition, while outside the scope of this contribution, only assigned civilian medical personnel may be authorised to use the distinctive emblem and specific identity cards similarly to military medical personnel (which requires an additional decision by the party on which they depend).

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9 Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht/Geneva, Martinus Nijhoff/ICRC, 1987, paragraph 304 (Article 8).

10 GC III, Article 33.

11 Sandoz, Swinarski and Zimmermann, *op cit.*, paragraph 354.

While medical personnel employed in the public health service can, in my view, be considered as being automatically 'assigned' within the meaning of Article 8 of AP I as the public health service is *ipso facto* part of the public administration of the party to the conflict, a specific act of the State is needed to satisfy the assignment requirement of medical personnel in the case of private hospitals or organisations.<sup>12</sup> The requested specific act of the State will take different forms depending on the domestic legal order.<sup>13</sup> For instance, a State might perform the necessary assignment by issuing laws and decrees, setting up registries, or signing memoranda of understanding. While the International Committee of the Red Cross (ICRC) recommends that States take appropriate measures to enhance the coordination of different stakeholders involved in the provision of health care in armed conflicts and other emergency situations, including by adopting legislation clearly defining each stakeholder's respective role and responsibilities,<sup>14</sup> it is doubtful whether in practice many States take such measures already in peacetime. It would indeed be impractical to make the assignments only after a conflict has broken out because at that point there will surely be more pressing priorities related to the conflict.<sup>15</sup> Accordingly, for practical reasons, States should make assignments of civilian medical personnel in peacetime or should, as a minimum, establish already in peacetime at least a system for making such assignments.

Third, IHL rules on the treatment of the wounded, sick and shipwrecked at sea in international armed conflicts also differ depending on military or civilian status. While Articles 14 and 16 GC II regulate the surrender of the wounded, sick and shipwrecked military personnel to a warship of an adverse party to the conflict and grant such personnel the protection of GC III as prisoners of war, respectively, these rules do not apply to wounded, sick and shipwrecked civilians.<sup>16</sup> Rather, an enemy warship may not require the surrender of wounded, sick and ship-

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12 Michael Bothe, Karl.J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2<sup>nd</sup> ed, Reprint revised by M. Bothe, 2013), at 105-106.

13 Ibid.

14 ICRC, *The Implementation of Rules Protecting the Provision of Health Care in Armed Conflicts and Other Emergencies: A Guidance Tool* (2015), at 370.

15 In 2012, the Ministry of Health and Social Protection of Colombia approved the "Manual de Misión Médica", which establishes a system for the identification and protection of medical personnel providing health care in armed conflict and other situations of violence (at: <<https://www.minsalud.gov.co/Documentos%20y%20Publicaciones/Manual%20de%20Misión%20Médica.pdf>>). See also the Belgian legislation: Arrêté royal du 10 novembre 1967 as modified by Arrêté royal du 17 octobre 1991, Moniteur Belge of 6 December 1991, Annex I A III, normes d'organisation, section 14 f).

16 See ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Armed Forces at Sea*, 2<sup>nd</sup> edition, 2017, paragraphs 1571-1573 (Article 16), on the implications of considering wounded, sick and shipwrecked members of the armed forces who are being cared for by medical personnel on hospital ships of the enemy to have fallen into enemy hands and to be prisoners of war.

wrecked civilians. They are protected by GC IV and AP I if they find themselves in the power of an adverse party to the conflict.<sup>17</sup>

Fourth, in contrast to the more liberal freedom of movement of military medical personnel under the 1949 Geneva Conventions, Article 15(4) of AP I establishes more restrictive freedom of movement rules with respect to civilian medical personnel. Indeed, the more liberal freedom of movement rules concerning military medical personnel naturally flow from the obligation of their own party to collect and care for the wounded and sick<sup>18</sup> and the obligation of the enemy to allow them to pursue their duties.<sup>19</sup> Conversely, the freedom of movement of civilian medical personnel is subject to two conjunctive limitations.<sup>20</sup> First, civilian medical personnel are only required to have access to 'place[s] where their services are essential'.<sup>21</sup> Therefore, as noted by the ICRC Commentary, 'apart from movements justified by their function, civilian medical personnel are, if necessary, subject to the same restrictions on movements as the rest of the civilian population'<sup>22</sup>. Second, the freedom of movement of civilian medical personnel can be restricted at the discretion of the relevant party to the conflict when supervisory or security reasons so require. The ICRC Commentary elaborates further on this second limitation, stating:

[I]n extreme cases movement may even therefore be prohibited, though the Party concerned must also take into account its responsibility towards public health in the territory which it controls, and must avoid imposing such categorical restrictions as far as possible. On the other hand, it is quite legitimate for the Party concerned to carry out checks, particularly identity checks, and to take various measures to ensure its own security, especially if it fears espionage or sabotage, or the safety of the medical personnel for whom it could, for example, provide an escort on dangerous journeys.<sup>23</sup>

Finally, military or civilian religious personnel protected under Article 8(d) of AP I are only those persons 'exclusively engaged in the work of their ministry and attached' to the armed forces, to medical units or transports or to civil defence organisations. Civilian religious personnel who do not meet these requirements, but exercise their function for the benefit of the civilian population, are not specially protected, but they are still protected as civilians.

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17 AP I, Article 22.

18 GC I, Article 15.

19 GC I, Article 19.

20 See generally Sandoz, Swinarski and Zimmermann, *op. cit.*, paragraphs 630-634 (Article 15).

21 AP I, Article 15(4).

22 *Ibid.* paragraph 633.

23 *Ibid.* paragraph 634.



### 3. The Protection of the Wounded, Sick and Shipwrecked Persons as well as Medical Personnel, Units and Transports under the Law of non-International Armed Conflicts

With respect to non-international armed conflicts, common Article 3 of the 1949 Geneva Conventions and AP II do not distinguish between civilian and military wounded, sick and shipwrecked persons or civilian and military medical personnel, units and transports. This is due to the fact that protection in non-international armed conflicts does not rest on the distinction between civilians and the military. Rather, persons are protected in so far as they are not or no longer actively participating in hostilities or if they have been placed *hors de combat* by sickness, wounds or other causes. This protection should cover both wounded, sick and shipwrecked and medical personnel.

AP II has certainly added much detail to the rules regulating the treatment of the wounded and sick in non-international armed conflicts by setting forth explicit rules protecting medical personnel, facilities and transports as well as rules regulating the use of the emblem.<sup>24</sup> Nevertheless, one may argue that much of this protection is already implicit in the basic obligation to collect and care for the wounded and sick as provided in common Article 3.<sup>25</sup> Spelling these obligations out in greater detail is nonetheless surely useful, and thus the inclusion of such provisions in AP II is a welcome development.

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24 AP I, Articles 7-12.

25 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2<sup>nd</sup> edition, 2016, paragraph 732 (common Article 3). See also Waldemar A. Solf, "Development of the protection of the wounded, sick, and shipwrecked under the Protocols Additional to the 1949 Geneva Conventions", in: C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (1984), at 239.

# SPECIFIC PROTECTION OF MEDICAL UNITS V. GENERAL PROTECTION OF CIVILIAN OBJECTS UNDER THE ADDITIONAL PROTOCOLS

Alexander Breitegger

ICRC Legal Division<sup>1</sup>

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## Résumé

*Alexander Breitegger présente les interactions entre le régime de protection générale des biens civils et le régime spécifique de protection des unités médicales, selon les Protocoles additionnels. Plus précisément, il se concentre sur les similarités (1) et différences (2) entre ces régimes de protection dans la mesure où ils ont trait aux biens que sont les infrastructures médicales.*

*A ce sujet, les Protocoles additionnels prévoient que ces dernières doivent être respectées et protégées en tout temps, et qu'elles ne peuvent faire l'objet d'attaques. Ce principe est basé sur l'obligation de distinction entre civils et biens civils d'une part, et objectifs militaires d'autre part.*

### **1. Similarités en termes de biens protégés et de protection contre les attaques directes, indiscriminées et disproportionnées**

*Les régimes de protection, générale et spécifique, présentent un point commun important en ce que les biens protégés peuvent être des unités médicales soit civiles soit militaires. La protection de ces dernières pose davantage question, mais il est certain que le simple fait qu'il s'agisse de biens utilisés par des forces armées ne suffit pas à les qualifier d'objectif militaire. En effet, pour ce faire, il faudrait que les unités médicales militaires fournissent une contribution effective à l'action militaire et que leur destruction totale ou partielle, leur capture ou leur neutralisation offre un avantage militaire indéniable.*

*Une question faisant particulièrement débat est celle de l'inclusion des infrastructures médicales militaires dans l'évaluation de la proportionnalité lorsque des objectifs militaires à leur proximité sont attaqués. La position du Comité international de la Croix-Rouge (CICR) est de considérer les biens médicaux militaires comme des biens civils, et en conséquence de les inclure dans l'évaluation de la proportionnalité – et ce en raison de l'équilibre délicat entre nécessité militaire et considérations humanitaires.*

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<sup>1</sup> The views expressed in this presentation are those of the author alone and do not necessarily reflect the views of the ICRC.

*A ce sujet, le professeur Jann Kleffner a envisagé trois options pour résoudre cette question dans le contexte du personnel militaire blessé et malade.*

- La première option est d'interdire tout dommage incident aux infrastructures médicales et cela en raison de l'obligation de respecter et de protéger en toutes circonstances les installations médicales militaires.*
- La deuxième option est d'exclure dès le départ les infrastructures médicales militaires de l'évaluation de la proportionnalité.*
- La dernière option est de considérer les infrastructures médicales militaires comme partie intégrante de l'évaluation de la proportionnalité, de manière identique à ce qui est prévu en ce qui concerne les biens civils sous le Protocole additionnel I.*

## **2. Différences en matière d'identification et de circonstances menant à une perte de protection**

*La différence la plus visible sur le terrain entre les infrastructures médicales bénéficiant de la protection spécifique et d'autres biens civils « généralement » protégés est que les infrastructures médicales peuvent déployer l'emblème de la Croix-Rouge, du Croissant-Rouge ou du Cristal-Rouge. Cela permet une visibilité de la protection spécifique dont bénéficie l'installation médicale.*

*En ce qui concerne la perte de protection des infrastructures médicales, trois différences principales peuvent être soulignées entre les régimes de protection générale et spécifique.*

- Les circonstances dans lesquelles une infrastructure médicale peut perdre sa protection spécifique sont plus restrictives que celles qui président à une perte de protection générale d'un bien civil.*
- Les mesures prises en réponse à une perte alléguée de protection spécifique ne sont pas automatiques, mais sujettes à un avertissement obligatoire, accompagné le cas échéant d'un délai pour s'y conformer. La perte de protection ne devient alors effective qu'en cas d'absence de réaction à cet avertissement.*
- Enfin, il n'est pas évident d'établir si la perte de protection spécifique est temporaire, ou au contraire permanente.*

*Pour conclure, Alexander Breitegger insiste sur la nécessité de maintenir l'équilibre fondamental entre considérations humanitaires et nécessités militaires, qui a guidé l'ensemble de sa réflexion sur la protection des unités médicales.*

One of the most significant contributions of the 1977 Additional Protocols in relation to the protection of medical care has been the strengthening of specific protections for *civilian* medical personnel, units and transports. Another contribution is of course the development and clarification of the general rules on the conduct of hostilities, often referred to as affording *general* protection, as opposed to *specific* protection regimes such as the one protecting the medical mission.

Today, my main focus will be on the interaction between specific protection and general protection as they relate to *objects*, thus on commonalities and differences between the specific protection of medical units (which I shall refer to as ‘medical facilities’ throughout), and the general protection of civilian objects. I will not focus on the protection of *persons*, i.e. of civilians, wounded and sick or medical personnel, nor will I deal with medical transport of all kinds, whether by land, sea or air, although I am happy to discuss these afterwards, should there be questions or comments on these aspects.

In this regard both Additional Protocols circumscribe the specific protection of medical facilities in that they ‘shall be respected and protected at all times and shall not be the object of attack.’<sup>2</sup> In terms of general protection relating to objects, the central feature of the rules governing the conduct of hostilities is that civilian objects shall not be the object of attack. At its core is obviously the obligation to distinguish between civilians and civilian objects on the one hand, and military objectives on the other<sup>3</sup>.

## **1. Overlap in Terms of which Objects are Protected and on Protection from Direct, Indiscriminate and Disproportionate Attacks**

Where specific protection and general protection overlap is in relation to which objects benefit from these protections. In this regard, specific protection extends to both civilian and military medical facilities. Both types of medical facilities are also entitled to general protection, as both constitute civilian objects to begin with. While for civilian medical facilities this is straightforward, in terms of *military* medical facilities (indeed military medical objects more broadly, with medical supplies and equipment, even outside a medical facility), it must be emphasised that the mere fact that they belong to, or are used by, armed forces or armed groups, for exclusively medical purposes, is not sufficient to qualify them as ‘military objectives’. This is because to qualify as ‘military objectives’ they would have to make an effective contribution to military action and their total or partial destruction, capture or neutralisation

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2 See Articles 12(1) AP I and 11 AP II; see also, for military medical facilities in IAC, Article 19 GC I; ICRC Customary IHL Study, rule 28.

3 Ibid., Articles 48, 51(2), 52(1), AP I; ICRC Customary IHL Study, rules 1 and 7.

would have to offer a definite military advantage.<sup>4</sup> At least as long as military medical objects are not used outside their humanitarian function to commit acts harmful to the enemy, they would not fulfil either requirement. Hence, military medical facilities are also civilian objects for the purposes of general protection.

If that is the case, then both civilian and military medical facilities must be protected from direct, indiscriminate, but also *disproportionate* attacks. However, the conclusion that *military* medical facilities legally have to be considered in the proportionality assessment when attacking military objectives in their proximity is not universally acknowledged. That said, the International Committee of the Red Cross (ICRC), and some academics, hold the view that the conclusion that military medical objects must be treated as civilian objects and thus have to be included, as a matter of law, in the proportionality equation, not only follows the logic that civilian objects are all those that are not military objectives but also reflects the delicate balance between military necessity and humanitarian considerations.<sup>5</sup>

In this regard, Professor Jann Kleffner has usefully outlined three fundamental options to approach this question in the context of military wounded and sick (to which this question would similarly arise)<sup>6</sup>:

- 1) **The first option could be to prohibit any incidental harm to military medical facilities**, on the basis that military medical facilities must be respected and protected *in all circumstances*. However, this would be unreasonable, as it would preclude any attacks against military objectives in the vicinity of military medical facilities. This is certainly not borne out by State practice, and would be difficult to reconcile with the delicate balance between humanitarian considerations and military necessity.
- 2) **The second option is to exclude military medical facilities from the proportionality evaluation at the outset.** This is the view put forward notably by the United States (US) in its 2016 Law of War Manual,<sup>7</sup> as well as some academics. This is justified firstly by

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4 Article 52(2) AP I; ICRC customary IHL Study, rule 8.

5 See, for instance, Laurent Gisel, "Can the incidental killing of military doctors never be excessive?", in: *International Review of the Red Cross*, no. 889, 2013, pp. 215-230.

6 Jann Kleffner, "Transatlantic Workshop on International Law and Armed Conflict: Wounded and Sick and the Proportionality Assessment", 12 October 2017, available at: <<http://intercrossblog.icrc.org/blog/transatlantic-workshop-on-international-law-and-armed-conflict-wounded-and-sick-and-the-proportionality-assessment>> (last visited 24 November 2017).

7 US Department of Defense, *Law of War Manual*, 2015, updated 2016. See, in particular, sections 5.10.1.2; 7.8.2.1; 7.10.1.1; Geoffrey Corn, "Transatlantic Workshop on International Law and Armed Conflict: Wounded and Sick, Proportionality, and Armaments", 10 October 2017, available at: <<https://www.lawfareblog.com/transatlantic-workshop-international-law-and-armed-conflict-wounded-and-sick-proportionality-and>> (last visited 24 November 2017).

the fact that such specifically protected objects are not explicitly included among those benefiting from a proportionality assessment, in contrast to the obligation to verify that objects to be attacked are not military objectives. According to proponents of this view, this is striking, as the explicit reference to ‘specifically protected objects’ evidences that the drafters of the Additional Protocols must have been aware of the issue but chose to restrict the proportionality equation only to civilian objects, and not extend it to specifically protected military objects. This would be justified in their view by the fact that military medical facilities that are positioned near military objectives are deemed to have accepted the risk of harm due to their proximity to military operations. Nevertheless, proponents of that view recognise that certain feasible precautions must be taken to minimise incidental harm to military medical facilities, including doing everything feasible to verify the nature of intended targets in order to implement distinction, issuing warnings to enable the adversary to mitigate that risk, or employing methods or means of warfare that would mitigate that risk.

- 3) **The final option is to consider military medical facilities as part of the proportionality assessment in exactly the same manner**, as this is generally specified for civilian objects under Additional Protocol I, namely to preclude excessive incidental harm that may be expected to those facilities in relation to the concrete and direct military advantage anticipated from the attack on a nearby military objective. We believe that this is the position that best reflects existing law and that strikes the best balance between humanitarian and military considerations. Apart from the legal reasoning based on the negative definition of civilian objects, and on the stringent character of the obligation to respect and protect military medical facilities in all circumstances, excessive incidental harm to military medical facilities would undoubtedly constitute an impediment to discharging their humanitarian function. Thus, excluding consideration of such harm would not sufficiently appraise the humanitarian side of the equation. Moreover, whether the only possible reading of the fact that ‘specifically protected objects’ have been explicitly mentioned in the feasible precautions to verify targets to be attacked while not with regard to proportionality is to evidence a limitation in relation to military medical facilities, is debatable. Firstly, there is no evidence from the drafting debates of the Additional Protocols whatsoever that this was the intended meaning. In contrast, one can also cite the ICRC’s 1973 Commentary on the draft Additional Protocols for the opposite view that ‘civilian objects’ encompass specifically protected objects, including military medical ones.<sup>8</sup> There are no indications from the drafting debates that this interpretation was rejected. Thirdly, the argument that military medical facilities are deemed to have accepted the risk of harm due to their proximity to military operations ignores the reality that the same could be said of civilian

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8 See Gisel, *op. cit.*, pp. 228-229.

medical facilities operating in close proximity to front lines. However then, it would not be justifiable to deny proportionality to military medical facilities while accepting its relevance for their civilian counterparts, also in light of the stated fundamental objective to align protections between civilian medical facilities and military medical facilities. Finally, while the prohibition of disproportionate attack is absolute, the precaution required to assess whether incidental harm would be excessive is qualified by what is feasible, which in turn would depend on the circumstances ruling at the time.<sup>9</sup> With this, there are enough entry points to accommodate both military necessity and humanitarian considerations.

Difference: Specific Identification by Virtue of the RC/RC/RC Emblem of Medical Facilities v. no Specific Identification for Generally Protected Civilian Objects

The visible difference on the battlefield between medical objects entitled to specific protection and other generally protected civilian objects is that specifically protected medical facilities may display the red cross, red crescent or red crystal emblem.<sup>10</sup> This serves as the visible manifestation of specific protection of a medical facility, bearing in mind that displaying the emblem is not a precondition for specific protection. Evidently, it helps to identify a specifically protected object on the battlefield and generally the emblem should be displayed. However, for instance, military commanders may decide that the emblem may not be displayed if it would rather facilitate direct attacks against medical facilities or when military necessity requires that military objectives in the vicinity of mobile medical facilities are not to be revealed to an adversary.

## **2. Difference in Circumstances Leading to Loss of Protection and Modalities upon which a Loss of Protection Becomes Effective**

There are notably key differences between specific protection and general protection when it comes to a loss of protection.

- 1) A loss of specific protection of medical facilities may occur only when they are *used to commit, outside their humanitarian function, acts harmful to the enemy/hostile acts*.<sup>11</sup> In contrast, civilian objects may turn into military objectives *not only by their use, but also by their location or purpose, that is intended future use*, if they make an effective contribution to military action besides offering a definite military advantage. This demonstrates the more restricted circumstances on which a medical facility would lose its specific protection

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<sup>9</sup> See Articles 57(2)(a)(iii) and 57(2)(b), AP I.

<sup>10</sup> In addition, the Geneva Conventions and their Additional Protocols also recognise the use of the red lion and sun, which, however, is currently not used.

<sup>11</sup> See Article 13(1) AP I; Article 11(2) AP II; see also, Article 21 GC I.

when compared to a loss of general protection of a civilian object. This is also consistent with the essence of specific protection as going beyond general protection and the fact that this protection is derived from the protection of the wounded and sick and medical personnel who would often be uninvolved in acts harmful to the enemy but for whom the consequences of an act harmful to the enemy may be particularly severe.

The notion of ‘acts harmful to the enemy, outside their humanitarian functions’ is not positively defined in the Conventions and their Additional Protocols. Rather, Additional Protocol I lists, in a non-exhaustive manner, a number of factual scenarios or acts that must *not* be considered acts harmful to the enemy specifically in the context of civilian medical facilities. This includes:

- that medical personnel of a given medical facility are equipped with light individual weapons for purposes of self-defence or defence of the wounded and sick in their charge;
- the presence of armed guards;
- the temporary presence of small arms and ammunition taken from the wounded and sick not yet handed over to the proper military authority;
- or that combatants are in the unit for medical reasons only.<sup>12</sup>

That said, the ICRC in 1949 had suggested a working definition of ‘acts harmful to the enemy’ namely ‘acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations’, which is cited with approval by some States and academic commentators.<sup>13</sup> Recurrent practical examples recognised as ‘acts harmful to the enemy’ by military manuals and academics include firing at the enemy for reasons other than individual self-defence, installing a firing position in a medical facility, using a medical facility as a shelter for able-bodied combatants, as a command and control centre, as an arms or ammunition dump, or as a military observation post, or in a manner as to shield it from enemy military operations.

In this regard, the boundaries between arming medical personnel and medical facilities that would not lead to an act harmful to the enemy and armaments that would cross the boundaries towards an act harmful to the enemy have been a thorny issue in operational practice. On the one hand, the purpose for which medical personnel or medical facilities may be armed has been fairly clear since the Conventions, where the same issue is tackled for military medical facilities in Article 22 of the First Convention, namely for individual

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12 See Article 13(2) AP I; see also Article 22 GCI.

13 See 2016 Commentary on GC I: commentary on Article 21, paragraph 1840.



defence against unlawful violence directed either at medical personnel themselves or at the wounded and sick in their care, or in order to maintain order among convalescent wounded and sick in a facility. The unlawful violence may be, for instance, attacks by criminals such as pillagers or unlawful attacks by an adversary. It has also been clear that the scope of such individual defence would not cover armed resistance against enemy advances to take control of the area where a medical facility is located or to prevent the capture of such a facility by the enemy.

On the types of weapons that medical personnel may be equipped with to act in accordance with these strictly defensive purposes, Additional Protocol I specified for the first time that this also extends to the personnel of civilian medical facilities (on the basis that they would be exposed to the same risks as their military medical counterparts) and that these must be light individual weapons. The understanding reached during negotiations of the Additional Protocols of this concept is that this refers to weapons which can generally be carried and used by a single individual. This includes pistols, rifles or even sub-machine guns but not machine guns and any other heavy weapons which cannot easily be transported by an individual and which have to be operated by a number of people. During the same negotiations, while the Conventions do not explicitly state what type of weapons personnel of military medical facilities may be equipped with for individual defence, it was clarified that the same restrictions to light individual weapons were applicable in that context as well.<sup>14</sup>

The last part has led to challenges to this restriction particularly in terms of which weapons may be mounted on military medical transports themselves, but the same could also arise for military medical facilities, including military mobile medical facilities. This has come up where armed forces conclude that in order to defend themselves against the nature of the threats posed by unlawful attacks by an enemy, heavier weapons to oppose fire from attackers at a range beyond the capability of light individual weapons would be necessary.

Nevertheless, the ICRC's view is that loosening the restrictions to render the use of heavier weapons on military medical facilities possible without the consequence of an act harmful to the enemy would be dangerous for two reasons. First, the availability of heavier weapons would make it difficult to guarantee that they would always be used only for strictly defensive purposes. And secondly, the greater the weapons system, the greater the risk that an adversary may conclude that the weapons might be used for offensive purposes and thus, the facility may no longer be entitled to specific protection. Ultimately, what

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14 See 1987 ICRC Commentary on the Additional Protocols, paragraphs 559-564.

is at stake is to preserve the distinction between military objectives and specifically protected medical facilities, which would be even more challenging to maintain if these restrictions on armaments were relaxed. This is why the ICRC is of the view that any weapons going beyond individual weapons mounted on medical facilities or medical vehicles would entail a loss of specific protection. In this regard, there are tactical alternative choices, in accordance with International Humanitarian Law (IHL), that may be made without entailing the same challenges, namely to station heavier weapons separately, at a reasonable distance, from a medical facility, or, if it is concluded that a facility itself must have such a mounted system, to accept its loss of specific protection and remove any distinctive emblem at the same time.

With the lists of acts not harmful to the enemy and the examples of acts harmful to the enemy recognised in practice and academic commentary not being exhaustive, other examples may come to mind under either category. For instance, where combatants or fighters visit wounded and sick comrades in a hospital, this would not be using the hospital for an act that would facilitate or impede the adversary's military operations, nor would this be outside the hospital's humanitarian function. Nor would there appear to be an act harmful to the enemy where a combatant accompanies a detained wounded adversary to a civilian hospital in order for that wounded person to receive medical treatment.

On the other hand, systematically using medical facilities to collect military information from patients, over and above information they must provide under IHL (e.g. prisoners of war (POW) under the third Convention, certain information establishing their identity and rank) would appear to amount to acts harmful to the enemy, as military information undoubtedly facilitates military operations.

- 2) In any event, whether it is manifest or not for a party to an armed conflict that a medical facility is being used for committing an act harmful to the enemy, measures in response to an alleged loss of specific protection are *not automatic but subject to an obligatory warning, accompanied, whenever appropriate, by a time limit for complying with such a warning. A loss of specific protection becomes effective only after such a warning has remained unheeded.* This is notably another demonstration that the protection of specifically protected medical facilities is more stringent than that of civilian objects. In the case of a loss of specific protection, non-compliance with the warning requirement would make unlawful any direct attack on a medical facility, or undue interference with the medical functions of a medical facilities in response to such a loss of specific protection.

This has the primary purpose to literally give those that commit an act harmful to the enemy a final chance to cease their acts – bearing in mind the serious consequences that will result for the medical facility and the wounded and sick and medical personnel therein, when a loss of specific protection becomes effective. Moreover, it may be difficult for a party to a conflict to establish with certainty that an act harmful to the enemy is being committed, as military presence within a medical facility may be for a variety of reasons, as we have seen from the examples given earlier. Thus, a warning coupled, whenever appropriate, with a time limit, also permits clarifying the situation, especially when an allegation of committing an act harmful to the enemy is unfounded.

In contrast, in the case of a loss of general protection where a civilian object has turned into a military objective by use, there is no warning requirement before directly attacking such a military objective. The precautionary obligation to issue an advance warning for the purposes of general protection has the different purpose of avoiding or minimising harm to the civilian population that may be affected by a direct attack on a military objective. Furthermore, that precautionary obligation is not absolute but subject to the *caveat* ‘unless circumstances permit’.

In any event, even where a medical facility has lost its specific protection, proportionality and precautions in relation to wounded and sick and medical personnel that are inside the medical facility at the time of the commission of an act harmful to the enemy must be complied with.

- 3) Finally, it is not entirely clear whether a loss of specific protection is only temporary (can be regained once no longer used for an act harmful to the enemy) or permanent (once lost, lost for the duration of a conflict).

The mere wording of IHL treaty provisions about protection to ‘cease’ may suggest that such loss of protection is permanent. Another possible view is that it is temporary. After all, specific protection is more stringent than general protection; a loss of general protection of a civilian object turning into a military objective by use may be temporary, due to the fact that the qualification of a military objective depends on the circumstances prevailing at a given moment of time. In light of this, the suggestion that loss of specific protection is permanent would be hard to reconcile with its more stringent character compared to general protection. While this solution would work well in a case where an act harmful to the enemy remains an isolated incident, where such acts are repeatedly committed, the adversary’s trust that medical facilities are used exclusively for their humanitarian function may not easily be regained, and consequently, this may jeopardise

the regime of specific protection as a whole. Acknowledging this problem, the 2016 Commentary on Geneva Convention I posits that in order to regain specific protection in cases where acts harmful to the enemy do not remain isolated incidents, something more might be required to justify renewed protection than simply switching back to medical activities – for instance reorganising the medical facility or removing the persons who have committed acts harmful to the enemy, thereby making the intention clear to the adversary that, in the future, the medical facility will again be exclusively used for medical purposes.<sup>15</sup>

To briefly conclude, I tried to demonstrate with regard to proportionality and scenarios of loss of protection of medical facilities that it is vital to continue to work towards practicable solutions upholding the fundamental balance between humanitarian considerations and military necessity to stay true to the essence of IHL. This is ever more important in an age where we know how dangerous it has become for health care providers to attend to the wounded and sick in contemporary conflict environments.

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15 See 2016 Commentary on GC I: commentary on Article 21, paragraphs 1856-1859.

# FLOOR, SWORD, COMPASS, SHIELD: EVALUATING THE CONTRIBUTION OF THE 1977 ADDITIONAL PROTOCOLS TO THE RESPECT OF MEDICAL ACTIVITIES IN LINE WITH MEDICAL ETHICS

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## **Résumé**

*Dustin Lewis examine la contribution des Protocoles additionnels de 1977 à la protection des activités médicales accomplies en conformité avec l'éthique médicale. L'enjeu de cette question réside dans le rôle potentiel du droit international pour fournir au personnel médical une base juridique suffisante afin qu'il puisse – en dépit des turbulences de la guerre – prioriser les intérêts du patient et ce, peu importe à quelle partie ils appartiennent.*

*Cette question fut déjà traitée – de manière certes insuffisante et inégale – dans les quatre Conventions de Genève (CG). Les Protocoles additionnels ont ensuite constitué l'occasion de développer les protections existantes, notamment au travers de la notion d' « éthique médicale », qui constitue (2) :*

- un socle établissant des règles, standards et principes ;*
- une arme permettant de contrer les interférences illégitimes ;*
- un compas pour guider la prise de décisions médicales ;*
- un bouclier de protection contre les demandes et ordres illégitimes.*

*Le manque de clarté de la notion d' éthique médicale risque cependant d'en réduire la sécurité juridique (1).*

## **1. Définir la notion d' « éthique médicale » contenue dans les Protocoles additionnels**

*Dans la littérature académique, deux écoles peuvent être distinguées en ce qui concerne la définition de la notion d' éthique médicale dans les Protocoles additionnels :*

- Selon la première école, ce concept concerne les règles, standards et principes juridiques ayant une valeur morale médicale et qui sont intégrés dans les différents traités pertinents de droit humanitaire.*
- Selon la seconde, le concept d' éthique médicale doit être lu non seulement à la lumière des dispositions pertinentes de droit humanitaire, mais également, par exemple, des différentes*

*législations, règles et codes de conduite développées par les forces armées, les Etats ou la profession médicale.*

*Le concept d' éthique médicale paraît ainsi comprendre au minimum des principes moraux guidant les prestataires de soin lorsqu'ils sont impliqués dans le traitement d'un patient.*

*Avant l'apparition de cette notion via les Protocoles additionnels, certaines règles préexistantes traitaient déjà de la question dans le cas de conflits armés internationaux, comme l'interdiction de condamner le personnel médical pour avoir traité des blessés et malades. Certains principes et standards plus généraux servaient également de base à des considérations liées à l'éthique médicale, comme l'interdiction de distinction non liée à des raisons médicales ou encore l'interdiction des tortures et mutilations, par exemple.*

## **2. La protection prévue par les Protocoles additionnels**

*Quatre éléments de protection en matière d'éthique médicale peuvent être identifiés dans les Protocoles additionnels :*

- l'interdiction du recours à toute procédure médicale qui n'est pas indiquée dans l'état de santé du patient concerné et qui n'est pas conforme aux standards et principes médicaux communément admis ;*
- l'interdiction de l'usage de la contrainte sur du personnel médical afin qu'il accomplisse des actes contraires aux règles de l'éthique médicale, ou toute autre interdiction relative au traitement des blessés et malades ;*
- l'interdiction de toute sanction à l'encontre du personnel médical pour avoir accompli des actes médicaux conformes aux principes et standards en vigueur ;*
- enfin, des dispositions traitent également de certains aspects de confidentialité vis-à-vis des patients. Leur champ d'application est cependant limité étant donné qu'elles dépendent, dans la majorité des cas, du droit national.*

## **3. Problèmes persistants, problèmes nouveaux**

*Quarante ans après la signature des Protocoles additionnels, deux types de problèmes peuvent être identifiés en ce qui concerne les protections liées à l'éthique médicale.*

*Le premier est lié au concept d'éthique médicale au sein même du droit humanitaire et du manque de clarté quant à son contenu, ce qui pourrait porter préjudice aux différentes formes de protections qu'il entend apporter. Ensuite, une deuxième question porte sur les interactions entre le droit humanitaire et les législations mises en place dans la lutte contre le terrorisme.*

*Ces dernières, en effet, tendent à remettre en cause la légitimité des soins médicaux prodigués de manière impartiale et normalement protégés par le droit humanitaire.*

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## 1. Introduction

I have been asked to evaluate the contribution of the 1977 Additional Protocols (AP) I and II to the protection of medical activities in line with medical ethics.<sup>1</sup>

What is at stake in this question? In essence, the key concerns are whether international law can, should, and does provide a sufficient basis for a medical health care provider – amid the tumult of war – to prioritise the interests of the patient irrespective of their affiliation, to guide decision-making aimed at effective and equitable care, and to not face illegitimate risks in pursuing those objectives. Those concerns had already been addressed, though at uneven levels of depth and breadth, in the four 1949 Geneva Conventions (GC). Due partly to perceived insufficiencies in existing rules, many delegations sought during the drafting of the APs, to work out more extensive protections of impartial medical care in relation to both international and non-international armed conflicts.<sup>2</sup>

I argue that the APs contributed to the protection of medical activities in line with medical ethics essentially by laying down a concept of ‘medical ethics’ that can be understood figuratively as:

- a *floor* of minimal rules, standards, and principles;
- a *sword* to overcome illegitimate interference;
- a *compass* to guide medically related decision-making; and
- a *shield* to protect against illegitimate requests or commands.

At least in some key respects, however, lack of specificity as to what constitutes ‘medical ethics’ in the APs may undermine legal certainty and comprehensiveness, and, in doing so, may impede

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1 I am grateful to Naz K. Modirzadeh and Jessica S. Burniske for feedback on an initial draft; to Hayley Evans and Yang Liu for research assistance; and to Thomas Ewing, Yang Liu, and Andrew March for translation assistance. This presentation draws on the work of the Harvard Law School Program on International Law and Armed Conflict, including the September 2015 Legal Briefing titled “Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism” by Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, at: <<https://pilac.law.harvard.edu/medical-care-in-armed-conflict-international-humanitarian-law-and-state-responses-to-terrorism/>>, archived at: <<https://perma.cc/GQ6U-A8EE>>.

2 See especially Volumes XI and XII of the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77)*, Bern, 1978 (O.R.).

the realisation of corresponding protections. Those protections may be most fragile where different regulatory regimes, including counter-terrorism frameworks, do not share, or even reject, certain foundational normative commitments in International Humanitarian Law (IHL).

## 2. Defining the APs' Concept of Medical Ethics

What is entailed in the concept of medical ethics set down in the APs? A useful starting point is to note the different nature of *ethical* frameworks on the one hand, and international *legal* frameworks, on the other. In broad brush strokes, the former primarily address the formulation and weighing of moral principles and the elaboration of models of moral reasoning, while the latter primarily aim to establish and impose legally binding rules internationally. The two frameworks may intersect in some respects, but they are not coterminous. That may matter especially where an international legal protection pivots, at least in part, on the purported content of an ethical framework.

In the English text of the APs, express reference is made to 'medical ethics' in relation to *non-punishment of ethically sound medical care* (Article 16(1) of AP I and Article 10(1) of AP II) and to *prohibitions on certain forms of illegitimate compulsion* of those involved in medical care (Article 16(2) of AP I and Article 10(2) of AP II). Furthermore, two additional, related concepts are laid down in the APs: namely, 'generally accepted medical standards' that must be adhered to in respect of certain conduct (Article 11(1) and (3) of AP I and Article 5(2)(e) of AP II), as well as certain protections pertaining to confidentiality (or non-denunciation) (Article 16(3) AP I and Article 10(3)–(4) of AP II). 'Medical ethics' is not one of the medically related concepts expressly defined in Article 8 of AP I.

A review of the six authentic texts<sup>3</sup> of the four provisions that expressly refer in the English text to '[the rules of] medical ethics' reveals certain differences – at least through unofficial translations of the authentic texts – in how the relevant concept is formulated:

- The Chinese text refers in three instances to 'medical ethics' ('医疗道德'), but in a fourth instance (Article 10(1) of AP II) the Chinese text refers to 'medical responsibilities' ('医疗职责');
- The French text refers across the board to a concept ('déontologie') seeming to more closely approximate 'ethics' generally (without the 'medical' qualifier), as does the Spanish text ('deontología'); and
- The Arabic text refers to the 'honor [*sharaf*] of the medical profession' ('هَيِّبْ طَلَاةَ نَهْمَلَا فَرَشْ').<sup>4</sup>

3 See Vienna Convention on the Law of Treaties (1969), Article 33 (VCLT).

4 Of the five other (non-English) texts, the Russian text – 'медицинская этика' ('medical ethics') in Article 16(1) of AP I and Article 10(1) of AP II and 'нормы медицинской этики' ('rules/norms of medical ethics') in Article 16(2) of AP I and Article 10(2) of AP II – appears to align most closely with the English text.



Whether these possible textual differences – at least in appearance – give rise to distinctions in legal meaning<sup>5</sup> merits analysis that is beyond this presentation’s scope.

In academic literature, two general schools of thought emerge regarding the definition of ‘medical ethics’ in the APs. According to one school, which might be dubbed the ‘intra-IHL’ approach, the concept of ‘medical ethics’ in the APs concerns legal rules, standards, and principles with a medical moral valence that are ‘built into’<sup>6</sup> the framework established in relevant IHL treaties, especially the GCs and APs, including relevant grave breaches.<sup>7</sup> According to the second school,<sup>8</sup> which might be dubbed the ‘intra-and-extra-IHL’ approach, the concept of ‘medical ethics’ in the APs may be discerned by reference not only to provisions of IHL but also to, for example, armed forces’ policies,<sup>9</sup> national-level codes of ethics,<sup>10</sup> other codes of ethics, as well as tool kits designed for medical practitioners<sup>11</sup> and International Human Rights Law.<sup>12</sup>

Bearing those considerations in mind, the concept of medical ethics laid down in the APs appears to encompass, at a minimum, moral principles that guide medical care providers when involved in the medical treatment of patients and that are discernible by reference at least to

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5 See Articles 33(3) and 33(4) of the VCLT.

6 See M.J. Gunn and H. McCoubrey, “Medical Ethics and the Laws of Armed Conflict”, in: *Journal of Armed Conflict Law* 133, 133 (1998); see also H. McCoubrey, “Medical Ethics, Negligence and the Battlefield”, in: *Military Law and Law of War Review* 103, 104–105 (1995).

7 On the concept of medical war crimes, see Sigrid Mehring, “Medical War Crimes”, in: *Max Planck Yearbook of United Nations Law* 229 (2011).

8 See, e.g., Alexander Breitegger, “The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies”, in: *International Review of the Red Cross* 83, 118–22 (2013); Françoise J. Hampson, “Conscience in Conflict: The Doctor’s Dilemma”, in: *Canadian Yearbook of International Law* 203, 211–13 (1989).

9 See, e.g., U.S. Dep’t of Def., *Instruction on Medical Program Support for Detainee Operations*, No. 2310.08E, June 2006.

10 See, e.g., Australian Medical Association, *Code of Ethics* 2004, revised 2016.

11 See, e.g., UN General Assembly, “Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment”, Annex of Resolution 37/194, U.N. doc. A/RES/37/194, Dec. 18, 1982; World Medical Association, “Regulations in Times of Armed Conflict and Other Situations of Violence”, revised at the 63rd WMA General Assembly, Bangkok, Thailand, Oct. 2012; World Medical Association, “International Code of Medical Ethics”, amended by the 57th WMA General Assembly, Piñanesberg, South Africa, Oct. 2006; World Medical Association, “Declaration of Geneva”, revised by the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006; World Medical Association, International Committee of Military Medicine, International Council of Nurses, International Pharmaceutical Federation, and International Committee of the Red Cross, “Ethical Principles of Health Care in Times of Armed Conflict and Other Emergencies”, 2015; British Medical Association, “Armed Forces Ethics Tool Kit”, 2016.

12 See, e.g., Article 7 International Covenant on Civil and Political Rights (1966). See generally Breitegger, *op. cit.* note 8.

relevant rules, standards, and principles established in the GCs and APs for the benefit of the wounded, sick, and shipwrecked *hors de combat*.<sup>13</sup> Those IHL provisions concern, for example, humane treatment, provision of medical care on an impartial basis, and prohibitions of various forms of maltreatment.

Partly with a view towards discerning ‘common principles’ of medical ethics, Sigrid Mehring examines, in a 2015 book, legal scholarship, philosophical discourse, national medical associations, sources of international law, and documents of the World Medical Association.<sup>14</sup> In doing so, Mehring identifies, through the most exhaustive review of these issues to date, five such principles:

- *Beneficence*: a moral obligation to act for the benefit of others, with the accompanying implication that medical treatment should always be to the benefit of the person treated.
- *Non-maleficence*: the wounded and sick should always be respected and never harmed.
- *Non-discrimination*: all those seeking or otherwise in need of medical care should be treated equally irrespective of affiliation.
- *Informed consent*: all competent patients who are capable of making a decision on their medical treatment should be given relevant information, in a language they understand, concerning their medical condition and proposed medical treatment, and based on this information those patients should be given an opportunity to voluntarily consent or refuse.
- *Confidentiality*: information attained by a care provider in the medical treatment of a protected person should not be disclosed to third parties, including authorities, though confidentiality may be breached, at least according to Mehring, where the physician is convinced that the person being treated poses an imminent and direct threat to others.<sup>15</sup>

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13 Compare this formulation with the ICRC’s 1987 *Commentary* on the APs: in relation to Article 16 of AP I, at p. 200, paragraph 655: ‘Thus the phrase [medical ethics] refers to the *moral duties incumbent upon the medical profession*. Such duties are generally decreed by the medical corps of each State in the form of professional duties. However, this should not be confused with the rules of the internal organization of medicine which obviously are not part of ‘medical ethics’ (emphasis added), and, in relation to Article 10 of AP II, at p. 1426, paragraph 4688: ‘It [medical ethics] consists of *moral duties incumbent on the medical profession*. Such duties are defined by the national and international corps of the medical profession’ (citation omitted). The *Commentary* argues that while certain referenced codes adopted by the World Medical Association have no binding force in international law, the rules in those codes nonetheless ‘constitute a valuable instrument of reference and no one contests the principles on which they are laid down. There is no doubt that these are the rules of medical ethics referred to in the context of the provision under consideration here’. *Ibid.* at p. 201, paragraph 656 (citation omitted); see also (concerning AP II). *Ibid.* at p. 1426, n.11.

14 See Sigrid Mehring, *First Do No Harm: Medical Ethics in International Humanitarian Law* (BRILL, 2015).

15 *Ibid.* at 427–33.

Mehring thereby makes a strong argument to (also) include, perhaps at least partly from a *lex ferenda* standpoint, those five medical-ethics principles in the IHL concept of medical ethics.

### 3. Before the Additional Protocols

While the APs expressly introduced the protective concept of medical ethics into IHL, what relevant IHL protections existed before the adoption of the APs? Several direct or indirect forerunners can be detected. For instance, at least in relation to international armed conflict, such precursors included:

- certain protections regarding ‘professional ethics’ or ‘professional etiquette’ for medical personnel retained by an enemy party;<sup>16</sup>
- a prohibition of convictions for nursing the wounded or sick;<sup>17</sup> and
- certain protections regarding medical ‘duties’.<sup>18</sup>

In addition, several discrete rules, standards, and principles laid out in IHL treaty provisions can be considered, when read in combination, to reflect a set of relevant baseline normative commitments. Those commitments include the obligation to engage in humane treatment,<sup>19</sup> the guideline that only urgent medical reasons will authorise priority in the order of treatment,<sup>20</sup> a prohibition on adverse discrimination not based on medical reasons,<sup>21</sup> and prohibitions of torture,<sup>22</sup> of mutilations,<sup>23</sup> of physical or moral coercion,<sup>24</sup> and of certain

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16 Article 28(2) GC I (concerning ‘professional ethics’) and Article 33(2) GC III (concerning ‘professional etiquette’); the term is ‘conscience professionnelle’ in the French text of both provisions. Note: paragraph enumerations are added to the GCs in the footnotes here, where relevant, to aid in discerning relevant provisions.

17 Article 18(3) GC I.

18 Article 28(2) GC I; Article 56(1) GC IV (concerning occupation); see also medical ‘functions’ in Article 33(2) GC III.

19 Articles 3(1) and 12(2) GC I; Articles 3(1) and 12(2), GC II; Articles 3(1) and 13(1) GC III; Articles 3(1), 27(1), and 37(1) GC IV. (See also, subsequently, Articles 10(2) and 75(1) AP I; Articles 4(1), 5(3), and 7(2) AP II).

20 Article 12(3) GC I; Article 12(3) GC II. (See also, subsequently, Articles 10(2) and 15(3) AP I; Articles 7(2) and 9(2) AP II).

21 Articles 3(1) and 12(2) GC I; Articles 3(1) and 12(2) GC II; Articles 3(1) and 16 GC III; Articles 3(1) and 27(3) GC IV. See also, subsequently, Articles 9(1), 10(2), 69(1), 70(1), 73, and 75(1) AP I; Articles 2(1), 4(1), 7(2), and 18(2) AP II.

22 Articles 3(1)(a), 12(2), and 50 GC I; Articles 3(1)(a), 12(2), and 51 GC II; Articles 3(1)(a) GC, 17(4), 87(3), and 130 III; Article 3(1)(a), 32, and 147 GC IV. See also, subsequently, Article 75(2)(a)(ii) AP I; Article 4(2)(a) AP II.

23 Article 3(1)(a) GC I; Article 3(1)(a) GC II; Articles 3(1)(a) and 13(1) GC III; Articles 3(1)(a) and 32 GC IV. See also, subsequently, Articles 11(2)(a) and 75(2)(a)(iv) AP I; Article 4(2)(a) AP II.

24 Articles 17(4) and 99(2) GC III; Article 31 GC IV. See also, subsequently, Article 11(3) AP I.

(unjustified) biological, medical, and scientific experiments or other acts or omissions not in the patient's interest.<sup>25</sup>

#### 4. Medical Ethics-related Protections Strengthened or Established in the Additional Protocols

In what ways did the APs strengthen or establish protections related to a protective notion of medical ethics? At least four sets of such protections can be perceived.

First, Article 11(1) of AP I and Article 5(2)(e) of AP II establish protections against certain forms of *unjustified endangerment*, through acts or omissions, of certain persons deprived of liberty. Both provisions prohibit subjecting a relevant person 'to any medical procedure which is not indicated by the state of health of the person concerned' and which is not consistent with the generally accepted medical standards applicable to certain other persons under similar medical circumstances.<sup>26</sup>

Second, a provision in each of the APs prohibits certain forms of *illegitimate compulsion*. In particular, both Article 16(2) of AP I and Article 10(2) of AP II – despite slightly different wording – establish that persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to, nor to be compelled to refrain from acts required by the rules of medical ethics or other rules designed for the benefit of the wounded and sick or by a referred-to instrument.<sup>27</sup> These and other provisions help medical care providers, perhaps especially those subject to military discipline, avoid being impaled on the horns of a dilemma, namely, follow military ethics mandating the paramountcy of allegiance to one's party, or fol-

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25 Articles 12(2) and 50 GC I; Article 12(2) and 51 GC II; Article 13(1) and 130 GC III; Articles 32 and 147 GC IV. See also, subsequently, Article 11 AP I; Article 5(2)(e) AP II.

26 Article 11(2) AP I also establishes that 'in particular' it is prohibited 'to carry out on such persons, even with their consent (...), physical mutilations, medical or scientific experiments, or removal of tissue or organs for transplantation, except where these acts are justified in conformity with the certain conditions'. Article 11(3) of AP I provides that '[e]xceptions to the prohibition in paragraph [11]2(c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient'. Under Article 11(5), 'The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient'. Article 11(4) establishes that '[a]ny wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol'.

27 See also Article 15(3) of AP I; Article 9(1) of AP II.

low medical ethics dictating impartial care guided first and foremost by medical need and by the interests of the patient.<sup>28</sup>

Third, a provision in both AP I and AP II *prohibits punishment* of ethically sound medical care. In particular, pursuant to Article 16(1) of AP I and Article 10(1) of AP II, '[u]nder no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom'.<sup>29</sup> The protection encompasses not only doctors and nurses but also others, such as secretaries and pharmacists, involved in medical activities.<sup>30</sup>

Fourth and finally, both APs contain provisions protecting certain aspects of *confidentiality* or otherwise (not) informing on or against patients. Yet these protections – established in particular in Article 16(3) of AP I and Article 10(3)–(4) of AP II – are, in effect, significantly limited in scope because they are, with one exception in AP I, subject to certain *national law*.<sup>31</sup> (That AP I exception concerns health care providers in relation to an international armed conflict governed by that Protocol; in such situations, including in a situation of occupation, the detaining power of an adverse side may not provide information protected by that provision.)

In summary, the APs thus contributed to the protection of medical activities in line with medical ethics by laying down a broad concept of medical ethics that can be understood figuratively as aiming to function in relation to armed conflict as:

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28 Seen in this light, such protections may be most salient in relation to those care providers who are subject to military discipline and who face this so-called 'dual loyalty' challenge where simultaneous obligations, express or implied, to a patient and to a third party, often the State, may arise.

29 See also Article 18(3) GC I; Article 17(1) AP I.

30 See ICRC *Commentary* on the APs (1987), pp. 202–203, paragraph 664 (concerning Article 16(1) of AP I) and p. 1426, paragraph 4686 (concerning Article 10(1) of AP II).

31 Information concerning communicable diseases can be compelled, as expressly recognised in AP I and as implicitly permitted in AP II. Article 16(3) of AP I and Article 10(3)–(4) of AP II impose limitations on providing certain information (not only medical information) about patients to authorities. Obliging those involved in medical activities to inform against patients – also known as denunciation – was one of the most disputed issues of the diplomatic conference. Indeed, Norway seemed to consider threatening to withdraw from the proceedings if the international legal protection was subjected to national law. O.R. Vol. XI, CDDH/II/SR.46, p. 513, paragraph 2. The upshot is that these non-denunciation protections are, with one important exception in AP I, subject to national law – whether that 'national law' is, in relation to AP I, the 'national law' of the Party of the person engaged in medical activities or whether that 'national law' is, in relation to AP II, the law of the relevant High Contracting Party or, perhaps, the 'national law' of the rebels (at least to the extent that such 'law' might be juridically cognisable). See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Den Haag, Martinus Nijhoff (2nd ed., 2013), pp. 140–42, 760–61.

- a *floor* of minimal normative rules, standards, and principles that no one may act under;<sup>32</sup>
- a *sword* to wield to overcome illegitimate interference in valid medical activities;<sup>33</sup>
- a *compass* to help guide medically related decision-making;<sup>34</sup> and
- a *shield* to protect against illegitimate requests or commands.<sup>35</sup>

## 5. Some Enduring and Emerging Challenges

Four decades after the APs were initially signed, both enduring and emerging challenges concerning the realisation of protections linked to medical ethics can be discerned. One set of challenges is largely internal to IHL, while another set arises at intersections between certain IHL protections and some counter-terrorism approaches.

With respect to intra-IHL concerns, despite consensus that the concept of medical ethics entails at least protections established in (other) IHL provisions, a lack of agreement on what that concept may additionally encompass may frustrate appeals to the universality, uniformity, and comprehensiveness of the corresponding protections.<sup>36</sup> In addition, the applicability of at least some of the APs' provisions concerning medical ethics in relation to non-contracting parties – on the theory that those provisions are now reflective of customary IHL – is currently

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32 For example: no torture; no inhumane treatment; no adverse distinction other than prioritisation of care based on medical grounds; and no unjustified endangerment.

33 For example: prohibition of compelling a medical care provider not to act where medical ethics requires acting; prohibition of unwarranted procedures; and prohibition of compelling a medical care provider to prioritise care to her own side where medical ethics dictate prioritisation of treatment of others first. Note that despite the 'sword' metaphor, in general medical care is *not* considered under IHL to constitute a hostile act.

34 For example: medical decisions shall be guided by medical grounds; there shall be no (other) adverse discrimination; care shall be provided based on the interests of the patient; and informed consent shall at least be sought.

35 For example: prohibition of torture as well as of certain other forms of ill-treatment, including biological experiments, mutilations, and non-therapeutic scientific or medical experiments not in the interest of the patient; and only urgent medical reasons may authorise priority in the order of treatment. This set of protections may be especially relevant for care providers subject to military discipline.

36 On a recent elaboration of the 'common denominator' approach, see WMA, ICMM, ICN, IPF, and ICRC, *Ethical Principles of Health Care in Times of Armed Conflict and Other Emergencies*, 2015.

disputable.<sup>37</sup> Furthermore, as noted above, the APs reflect an uneven level of commitment to some relevant protective interests. In particular, protections concerning confidentiality (or non-denunciation) are hampered by a key weakness: they are, with the one exception noted above, subject to certain national law.

With respect to challenges arising at the intersection of IHL and some counter-terrorism frameworks, the legitimacy of impartial medical care protected under IHL may be contested where counter-terrorism is central to the situation.<sup>38</sup> That is because many of those frameworks reject at least two premises underlying protections for such care. First, under IHL, impartial medical care to wounded *hors de combat* is not only legitimate, it is an *obligation* imposed on parties. Yet under at least some counter-terrorism frameworks, such support may be perceived primarily as dangerous because the provision of such care can, according to this theory, help free up the resources of the terrorist group. Second, certain IHL treaty provisions anticipate that all parties to an armed conflict (irrespective of an extra-IHL 'terrorist' designation) may assign their own medical personnel. Yet some counter-terrorism approaches implicitly or explicitly preclude medical care providers from acting under the control of a designated entity. In at least these ways, the ethical values and normative commitments entailed in these regimes are different.

Certain State responses to terrorism thus recast medical care, even care considered sound under a relatively narrow definition of medical ethics, as a form of illegitimate support to the enemy. Such instances have arisen at the international level as well as in some national systems. Examples of the former include references by the United Nations Security Council al-Qaida and ISIS Sanctions Committee to medical care, among other indicators, as a listing

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37 For instance, compare, on one side, Rules 26 and 92 (and the evidence adduced in support of those rules) of the ICRC's 2005 *Customary International Humanitarian Law Study* as well as portions of the preamble of U.N. Security Council Resolution 2286, May 3, 2016 ('Recalling that under international humanitarian law, persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and the sick' and 'Noting that medical personnel, and humanitarian personnel exclusively engaged in medical duties, in an armed conflict situation, continue to be under a duty to provide competent medical service in full professional and moral independence, with compassion and respect for human dignity, and always to bear in mind human life and to act in the patient's best interest and *stressing* the need to uphold their respective professional codes of ethics, and further noting the applicable rules of international humanitarian law relating to the non-punishment of any person for carrying out medical activities compatible with medical ethics') with, on the other side, the analysis in Mehring, *First Do No Harm*, op.cit. note 14, at pp. 189–235, and the absence of recognition in the December 2016 update of the 2015 U.S. Department of Defense *Law of War Manual* of the protections laid down in Article 16 of AP I and in Article 10 of AP II.

38 See generally Lewis et al., op.cit. note 1.

criterion for two individuals and two organisations.<sup>39</sup> And examples of the latter include anti-terrorism laws in Syria that ‘effectively criminalised medical aid to the opposition’,<sup>40</sup> as well as legal proceedings in, among other national jurisdictions, Australia,<sup>41</sup> Peru,<sup>42</sup> and the United States<sup>43</sup> that raise concerns, at the very least, about the risk of eroding foundational normative commitments laid down in IHL.

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39 See Dustin A. Lewis, “Humanitarian Exemptions from Counter-terrorism Measures: A Brief Introduction”, in: *Proceedings of the Bruges Colloquium*, No. 47 (2017), pp. 147–48, fns 34–35 and corresponding text.

40 See U.N. Human Rights Council, Report of the independent international committee of inquiry on the Syrian Arab Republic, U.N. doc. A/HRC/25/65, Feb. 12, 2014, Annex VII, “Assaults on Medical Care”, paragraph 21 (concluding that ‘[a]nti-terrorism laws issued on 2 July 2012 effectively criminalised medical aid to the opposition. Laws 19, 20 and 21 contravene the customary international humanitarian law rule that under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom’); see also Aryn Baker, “Syria’s Health Crisis Spirals As Doctors Flee”, in: *Time Blog*, February 4, 2014, available at <<https://time.com/3968/syrias-health-crisis-spirals-as-doctors-flee/>>, archived at <<https://perma.cc/LQ9F-G2KN>> (reporting that, ‘In July 2012, the Syrian government passed an anti-terrorism law that effectively made it a crime to provide medical care to anyone suspected of supporting the rebels. Ahmed[, a medical resident,] was caught between the Hippocratic oath – a doctor’s promise to treat every patient – and the growing pressure to take sides. The regime said ‘Why are you helping the Free Army?’ and the Free Army said ‘Why are you helping the regime?’).

41 See Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counter-terrorism legislation”, in: *International Review of the Red Cross* 235, 250–51 (2016).

42 *De La Cruz-Flores v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, paragraph 102 (Nov. 18, 2004) (concluding that Peru had, in its November 21, 1996 judgment convicting Dr. De La Cruz-Flores of the crime of unlawful collaboration with terrorists, ‘violated the principle of legality: by taking into account as elements that gave rise to criminal liability, membership in a terrorist organization and failure to comply with the reporting obligation, but only applying an article that did not define these behaviors; by not specifying which of the behaviors established in article 4 of Decree Law No. 25,475 [prohibiting the crime of terrorism of acts of collaboration] had been committed by the alleged victim in order to be found guilty of the crime; for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician’s obligation to provide; and for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession’).

43 See, e.g., *United States v. Warsame*, 651 F. Supp. 2d 978, 980 (D. Minn. 2009) (prosecution of a Canadian, Mohamed Abdullah Warsame, in part for providing English lessons in an al-Qaeda clinic in Afghanistan in order to assist nurses in reading medicine labels). On the involvement of medical practitioners in aspects of interrogation and other custodial circumstances in relation to the U.S. ‘War on Terror’, see, e.g., Mehring, *First Do No Harm*, op. cit., note 14, at pp. 49–76.



## Q&A SESSION

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At the end of this first session of the Colloquium, speakers were asked to elaborate on the following issues:

### **1. The Assignment by a Public Authority to Perform Medical Care**

A speaker who participated in the negotiations prior to the adoption of the Additional Protocols (AP), underlined how technical the health care issue was. This is important as the protection of civilian medical units and personnel is based on several technical concepts, a delicate issue that the negotiators had to bear in mind. That is why the idea was discussed to create a special emblem for medical activities not carried out by the Red Cross. That was abandoned, but the problem has still not gone away: no party can allow just anyone who has medical training to wander around claiming protection under International Humanitarian Law (IHL). There must be some order and that is the reason why there has to be an 'assignment', i.e. an act by a public authority which gives that function to certain persons or units. The use of the emblem then requires an additional act, as it is open to abuse and misuse. However, this has not been implemented and the acts that must be taken by public authorities are usually not performed.

### **2. The Military Medical Facilities Embedded into Military Units**

A participant noted that military medical facilities are embedded in all sizes of military units and usually as close to the front as possible. How can medical assets that are embedded at low levels be differentiated from large medical facilities for which the situation would be different?

According to a speaker, while the principle of proportionality is in theory absolute, its practical implementation requires the application of the concept of 'feasible precautions'. This allows taking various practical circumstances into account but not putting into question the fundamental balance between humanitarian needs and military necessity.

### **3. The Case of non-State Armed Groups that do not have Medical Facilities**

In the case of non-State armed groups supported by third States and which do not possess their own medical facilities, a participant asked whether the State is obliged to provide medical care to the non-State armed group as part of the obligation to ensure respect.

According to a speaker, there is flexibility in terms of obligations related to medical care. The non-State armed group might possess medical facilities itself, that is a possibility which is

recognised by Additional Protocol (AP) II. But there is also the possibility to commit others to undertake these tasks, so it is conceivable.

Another speaker added that in practice, non-State armed groups do not have military medical personnel. His position, nurtured by the common State scepticism against armed groups, is, rather than exhorting the latter in having their own medical facilities, to consider members of these groups that perform medical action as no more participating in hostilities and therefore protected by IHL against attacks. This is a minority position, but it is reconciling the law with practical considerations and taking advantage of the fact that AP II is less detailed than AP I.

#### **4. The Status of Military Sites in General**

A participant emphasised that besides medical units, military facilities can also comprise education facilities that would not meet the requirements of the definition of a military objective.

If they are used to perform acts harmful to the enemy, they lose their protection and still cannot be granted the protection that civilian medical objects receive. It is then interesting to think of the unwanted consequences of this situation and it would be laudable to increase the protection of these kinds of military sites.

There might also be unwanted consequences if we increase the protection – i.e. if we grant temporary protection as suggested in the International Committee of the Red Cross's (ICRC) Commentary, which might increase the misuse of the facilities by non-State armed groups.

There are needs to be considered when we are trying to uphold the balance between military considerations and humanitarian needs. Some solutions might not be feasible in practice for States involved in a conflict.

#### **5. The Concept of 'Feasible Precautions' and its Application in Practice**

An ICRC representative admitted struggling to find concrete examples of the application of the notion of 'feasible precaution' and 'mandatory warning' presented during the session. Has a mandatory warning ever led to enhanced protection or respect of the provisions of the Protocols?

A speaker uttered the conviction that these rules work in practice, although it is very difficult to find practical examples. One should look at the ICRC's data base 'IHL in Action', where it is still very difficult to find examples, as newspapers do not usually pass on information about

warnings. One then always has the feeling that hospitals are destroyed without any prior warning – this gives the impression that IHL is never complied with.

## **6. The Issue of Armed Medical Units**

A participant wished to share Denmark's experience in terms of arming its military medical facilities on the ground.

The country has started to armour its medical transport with light machine guns – which go beyond the light individual weapons – for two different reasons:

- Denmark thought about placing armoured units closer to its military medical facilities, but it might have been more harmful to the distinction than a slightly larger calibre weapon in the medical unit.
- Denmark took off the emblem in some instances, but that brought on another consideration about the care of civilian patients in units that are not marked as medical units, which might have been victims of lawful attacks by the enemy.

That is why Denmark is not taking off the emblem, and still providing those units with heavier armouries.

A speaker emphasised that what matters more than the kind of weapons, is the kind of use that is made of the weapons – i.e. this should remain a strictly defensive purpose no matter the type of weapons.

## **7. The Criminalisation of Medical Care Provided to 'Terrorist' Organisations**

A participant asked whether there is any recommendation for States on how to avoid the potential use of medical care by terrorists to get access to some areas.

The speaker considered this issue as one of the most challenging aspects in contemporary IHL. Today there is no clear approach of the law with respect to specific cases of people providing medical care in the context of an armed conflict. The speaker therefore did not have any specific recommendation, other than to think carefully about what the ethical commitments are.

An ICRC Representative asked how to argue against new ideas such as not providing the enemy with medical care so as to not assist them getting back to the battlefield.

In one of the speakers' view, providing medical care to the enemy does contribute to military efforts – which contradicts the view of the majority on this question. But there is a *lex specialis* that should be applied, it is the special protection granted to medical units under IHL. For

another speaker, the protection that wounded and sick fighters enjoy is temporary and once soldiers have healed and returned to the battlefield, they are again a military target.

## Session 2

# Humanitarian Access and Assistance in Light of the Additional Protocols

Chairperson: **Elzbieta Mikos-Skuza**

College of Europe, University of Warsaw

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## HUMANITARIAN ASSISTANCE POST-1977: DO THE ADDITIONAL PROTOCOLS MEET ALL THE CHALLENGES?

**Michael Bothe**

Goethe University of Frankfurt

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### Résumé

*Dans le cadre de cette intervention inaugurant la deuxième session du Colloque relative à l'accès et à l'assistance humanitaires, Michael Bothe aborde la question du délicat compromis recherché durant la conférence diplomatique de 1974-77 ayant accouché des Protocoles additionnels (PA) : celui de combiner le droit de recevoir et de fournir une assistance humanitaire, avec la crainte des Etats de voir la position de l'une des parties à un conflit renforcée grâce à l'aide humanitaire reçue.*

*C'est ainsi que les Protocoles prévoient un tel droit de recevoir et de fournir une assistance humanitaire (article 70 PA I), tout en le soumettant à l'accord des acteurs concernés aux fins d'autoriser la délivrance de l'aide. Plusieurs questions découlent naturellement de cette ambivalence, et particulièrement quant à l'accord requis. Les protocoles donnent une réponse nuancée à la question de savoir quelle partie doit émettre un tel consentement, selon que le conflit armé soit international ou non international :*

- *Dans le cadre d'un conflit armé international, un accord est requis de la part des parties « concernées », c'est-à-dire l'Etat d'origine de l'opération humanitaire, l'Etat de transit par lequel doit passer l'aide, ainsi que l'Etat de réception. Plusieurs questions restent ouvertes à ce propos, notamment celle de savoir si le refus d'un Etat d'autoriser la délivrance d'une aide dans un territoire contrôlé par une organisation qualifiée de terroriste, est légal.*
- *Dans le cadre d'un conflit armé non international, l'accord du gouvernement de l'Etat sur le territoire duquel le conflit armé se déroule est nécessaire. D'après l'article 18 PA II, l'accord des parties non étatiques au conflit n'est ainsi pas requis. Cependant, en pratique, ce dernier est indispensable. En outre, la question de savoir si l'accord du gouvernement de l'Etat par*

*lequel l'aide transite est requis lorsque celle-ci est destinée à une partie du territoire qui n'est pas sous son contrôle effectif, cette question est toujours ouverte.*

*Par ailleurs, Michael Bothe met en lumière une question transversale aux deux Protocoles additionnels : la partie dont l'accord est nécessaire a-t-elle le pouvoir discrétionnaire absolu de refuser cet accord ? Il est aujourd'hui généralement admis qu'un Etat ne peut refuser de manière arbitraire de donner son autorisation à la fourniture ou à la réception d'aide humanitaire. En conséquence, un Etat opposant un tel refus agirait une nouvelle fois de manière contraire au droit international.*

*En conclusion, il existe des fondements juridiques certains pour garantir l'accès humanitaire. Toutefois, les règles juridiques doivent servir en premier lieu d'outil pour soutenir les demandes d'accès humanitaire, étant donné qu'elles donnent rarement lieu à des décisions de justice contraignantes.*

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How to reach the victims of humanitarian disasters, natural or man-made? This is a key question for the survival of victims, in particular for the protection of the most vulnerable.

I am grateful to the organisers of the Conference who have tasked me with trying to answer this question. This subject has been dear to me for more than 40 years. At the Diplomatic Conference of 1974-77, I had the privilege of being involved in the negotiations of the relevant provisions of the Additional Protocols (AP). Then and now, the same fundamental problems have been vexing us. They shaped the negotiations, and they are still the object of political controversy. Humanitarian disasters which have occurred during some recent conflicts have even exacerbated these controversies.

The basic humanitarian interest pursued by a number of States in the negotiations was free and unrestrained access for relief operations to the victims of armed conflicts, a right to provide and a right to receive humanitarian relief. But there were also interests militating for restraints on these rights, based on the fear that humanitarian relief might have an undesirable impact on the armed conflict, and might in particular unduly enhance one party's chance to win or its capacity to resist. This was the challenge.

Thus, a compromise had to be found: there is a right to receive relief or to have access to the victims. Relief operations 'shall be undertaken' (Article 70 AP I). But the right is limited. The access was made 'subject to the agreement' of the relevant parties involved. Is this a valid answer to the problem?

Two fundamental questions follow:

- Whose agreement is necessary?
- Can that agreement be refused arbitrarily?

As to international armed conflicts, the first question is clarified by the formula 'subject to the agreement of the Parties concerned in such relief actions'. This means different rights or obligations for different 'concerned' addressees:

- the State of origin of an operation,
- the transit State an operation has to pass through,
- the receiving State, i.e. the State controlling the territory where relief is provided.

In relation to all three kinds of State, specific questions arise.

- The State of origin: is it, for example, acceptable under international law for a State to refuse an agreement by prohibiting a non-governmental organisation to carry out a relief operation in a country controlled by an alleged terrorist organisation? This is, for example, a very practical problem for relief actions sent to the Gaza Strip by a number of European countries or by the United States.
- The transit State: what is the scope of the duties of cooperation imposed upon that State in order to facilitate relief operations?
- The receiving State: only the State *de facto* controlling the territory where relief is provided or distributed is 'concerned'. The requirement of an agreement does not give a veto power to the other party to the conflict.

What about non-international armed conflicts (NIAC)? Article 18 AP II modifies the corresponding text of Article 70 AP I to: 'subject to the agreement of the High Contracting Party concerned'. Some authors maintain that this is a clear text, meaning: the agreement of the government of the State on the territory of which a NIAC is taking place is necessary. That government is 'concerned' even if it does not control the area where relief is provided, and only the agreement of that government is required.

Yet it has to be noted that the text resulting from earlier phases of the negotiating process of the Diplomatic Conference contained a formulation similar to that of AP I: 'party or parties concerned', which also included the non-State party. That latter element disappeared due to an amendment adopted at the very last minute. This drafting decision not to mention the non-State party in AP II, was based on Conference politics, which legally speaking made no sense. It is clear that for a number of practical reasons, the consent of the non-State party is

necessary. In terms of treaty interpretation: is it possible to consider as ‘clear’ a text which obviously does not make sense?

The second problem relating to the final text of Article 18 AP II is whether or not the agreement of the government in place is necessary even for relief operations which pass through, and are destined to, parts of the State territory no longer controlled by that government. That issue has been particularly controversial in relation to Syria where it was, and apparently still is, possible to send relief from the Turkish border to areas held by opposition forces without touching areas controlled by the Assad forces, so-called ‘cross-border operations’. The view that the agreement of the Assad government was necessary interprets the word ‘concerned’ in Article 18 as relating to the formal territorial sovereignty, not to the *de facto* control over the area where relief operations are passing through or where relief is delivered. Yet for the text adopted during the earlier phases of the drafting process, the latter meaning of ‘concerned’ clearly applied, i.e. had the same meaning as in AP I. If the text is now understood differently, it means that by adopting the new formulation, by replacing a plural (‘parties’) by a singular (‘party’), the Conference changed the meaning of the word ‘concerned’ from one moment to the next. Possible, but ‘clear’?

No, Article 18 AP II is not clear as to the question of whose agreement is necessary. In the light of the massive denial of access in Syria, the issue was finally addressed by the Security Council (SC), which authorised ‘cross-border operations’ for specific border crossings and specific times (Resolution 2165 (2014), OP 2). If the word ‘concerned’ in AP II was understood as relating to the *de facto* control of the relevant area, the SC Resolution meant a clarification and to a certain extent a restriction of Article 18 AP II. If the consent requirement relates to the entire national territory, the resolution created a new right for relief operations which did not exist independently of the Resolution. There were voices in the Security Council debate which suggested the latter version. Yet I think the question remains open.<sup>1</sup> This is where we stand regarding the question of whose agreement is necessary for relief action in the case of a NIAC. AP II opened a question – it is still open.

The second fundamental issue of interpretation raised by both Article 70 AP I and Article 18 AP II is whether the party whose agreement is necessary has unlimited discretion to refuse it. In this connection, it has to be emphasised that the relevant parties have a duty to allow relief operations. Operations fulfilling certain criteria ‘shall be undertaken’. There is thus a certain tension in the text between two elements: ‘obligation’ on the one hand, and ‘requirement of agreement’ on the other. A reasonable interpretation of the provision must grant practical significance to both elements of the text. This is the rationale of the interpretation already put

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1 For further argument see the contribution by Anyssa Bellal.



forward, and not contested, in the debate at the Conference and then maintained in the International Committee of the Red Cross's Commentary. It has now become generally accepted in international practice: agreement may not be refused in an arbitrary manner.

This rule entails two further questions:

- What constitutes an 'arbitrary' refusal?
- What is the consequence if agreement is unlawfully withheld?

Some clarifying light is shed on the first question by a recent document drafted and published with UN support, though not as an official UN document, which shows the politically delicate character of the issue. The conclusions are published under the name 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict' and are based on two background papers co-authored by two well-known experts in the field, Dapo Akande and Emanuela-Chiara Gillard. The 'Conclusions' convincingly list the following criteria which provide a useful concrete interpretation of the prohibition of arbitrary refusal:

Consent is withheld arbitrarily if it is withheld:

- in circumstances that result in a violation of obligations under international law with respect to the civilian population in question, including in particular obligations under International Humanitarian Law and International Human Rights Law; or
- in violation of the principles of necessity and proportionality; or
- in a manner that is unreasonable or that may lead to injustice or lack of predictability, or that is otherwise inappropriate.

Note that the final clause equates 'arbitrary' to 'inappropriate'. Both words are vague and general. Yet in sum, the first question has found a satisfactory answer in an interpretation which is widely accepted in practice.

As to the second question, a distinction must be made between a formal legal and a practical consideration: if an operation is conducted without the necessary agreement, claiming that the refusal was unlawful, this is simply dangerous, as the State concerned will enforce its view that the operation is illegal, regardless of the fact that other actors consider that State's behaviour to be illegal. From the point of view of international law, however, if the State enforces its illegal refusal, it means that it must rely on its own illegal behaviour to enforce its position. There is however a general principle of law that no State may derive a right from its own unlawful behaviour. If some Latin is permitted: *'ex iniuria ius non oritur'* and *'nemo auditur allegans turpitudinem suam'*. Under international law, a State enforcing its unlawful refusal acts unlawfully.

Our starting point was the crucial need for access for relief operations in favour of the victims of armed conflicts. The Protocols of 1977 have contributed to a better legal basis for satisfying this need. Yet challenges remain and will remain. My legal arguments, as you have noted, were inspired by the wish to give a good legal basis for that access. But to be realistic: these are issues which will rarely lead to a binding court decision clarifying the law. In this situation, the law is first of all a tool which can be used to strengthen the demand for access. It is then a question of negotiating tactics whether or not to use it. But beyond these negotiations between the actors immediately concerned, it is important that the international community at large internalises and supports this legal position strengthening the humanitarian goal of access to victims of armed conflicts open.

# HUMANITARIAN ACCESS AND IHL: THE ICRC PERSPECTIVE<sup>1</sup>

**Tristan Ferraro**

ICRC Legal Division

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## **Résumé**

*Tristan Ferraro présente le cadre juridique des Protocoles additionnels (PA) relatif à l'accès humanitaire, partant du constat que les organisations humanitaires impartiales telles le Comité international de la Croix-Rouge (CICR) se voient régulièrement refuser – tant de la part d'Etats parties à des conflits armés que de celle de groupes armés non étatiques – l'accès à des zones où des besoins humanitaires existent.*

*C'est pourquoi le CICR a souvent émis publiquement des réserves quant aux refus d'accès auxquels il fait face. Toutefois, l'organisation reste peu loquace en ce qui concerne le cadre juridique régissant l'accès humanitaire, que l'on tend généralement à simplifier, à tort.*

*Ce cadre peut être articulé en quatre différentes parties :*

- *l'obligation de chaque partie au conflit de satisfaire aux besoins essentiels de la population sous son contrôle ;*
- *le droit des organisations humanitaires impartiales d'offrir leurs services dans le but de mener des opérations à caractère humanitaire ;*
- *l'assujettissement des opérations humanitaires accomplies dans une situation de conflit armé à l'accord des parties au conflit concernées ;*
- *enfin, il est attendu des parties à un conflit armé qu'elles permettent et facilitent le passage des convois humanitaires sujets à leur contrôle.*

## **1. L'obligation de satisfaire aux besoins essentiels de la population**

*Il est difficile de localiser cette obligation en Droit international humanitaire (DIH), contrairement au Droit international des droits de l'homme. Il n'existe en effet aucune règle conventionnelle de DIH en ce sens, à l'exception de celles concernant l'occupation. Le CICR est cependant d'avis que cette obligation peut dériver de l'objet même du DIH de manière générale. De plus, il est possible d'argumenter qu'elle dérive également de l'obligation de traiter humainement les personnes qui sont soumises au contrôle d'une partie à un conflit armé.*

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<sup>1</sup> This document was written in a personal capacity and does not necessarily reflect the views of the ICRC.

## **2. Le droit des organisations humanitaires impartiales d'offrir leurs services**

*Le droit des organisations humanitaires impartiales d'offrir leurs services est appelé le « droit d'initiative ». Ce dernier, tel que prévu par le DIH, n'est octroyé qu'aux organisations humanitaires impartiales, et est inconditionnel.*

*Les activités humanitaires visées par ce droit d'initiative comprennent à la fois les activités d'assistance et de protection, et doivent bénéficier à toutes les personnes dans le besoin suite à un conflit armé, y compris les personnes décédées.*

## **3. Le consentement requis des parties au conflit pour l'exercice d'activités humanitaires**

*Selon le CICR, le droit d'initiative n'implique pas un droit d'accès inconditionnel au bénéfice des acteurs humanitaires. Il est ainsi clairement établi que ces derniers sont dans l'obligation de rechercher et d'obtenir le consentement des parties concernées.*

*La réponse à la question de savoir auprès de quelle partie le consentement doit être recherché varie selon la nature du conflit en question :*

- *Dans le cadre des conflits armés internationaux, les dispositions pertinentes de DIH prévoient que seul est requis l'accord des Etats parties au conflit et concernés par le fait que les activités humanitaires proposées seraient entreprises sur leur territoire ou sur un territoire soumis à leur contrôle.*
- *Dans le cadre des conflits armés non internationaux, l'article 3 commun n'apporte aucune indication à cet égard. Le CICR estime cependant que la question doit être abordée à la lumière de l'article 18(2) du deuxième Protocole additionnel, lequel requiert expressément le consentement de la Haute Partie Contractante concernée. C'est ainsi que doit être recherché le consentement de l'Etat sur le territoire duquel les activités humanitaires prévues devraient avoir lieu – y compris dans le cas où l'Etat n'exerce plus de contrôle effectif sur celui-ci. Par ailleurs, dans ces cas de figure, le CICR requiert habituellement le consentement de toutes les parties au conflit, y compris des groupes armés non étatiques, avant d'intervenir sur le terrain.*

*Il est ainsi établi qu'une organisation humanitaire ne pourra exercer ses activités que dans le cas où elle y a légalement été autorisée. En cas de circonstances exceptionnelles toutefois, où obtenir le consentement requis serait problématique, mais les besoins humanitaires s'avèreraient extrêmement importants, les impératifs humanitaires commanderaient tout de même l'intervention d'une organisation humanitaire impartiale.*

*En matière de consentement, le CICR établit une distinction entre le consentement dit « général » et le consentement « opérationnel » : le premier désigne l'accord de principe de l'Etat mentionné ci-dessus après la soumission d'une offre de services valide ; le second recouvre l'exécution pratique de ce consentement général, et nécessite une série d'accords ad hoc sur des opérations spécifiques de secours d'urgence. L'intérêt de cette distinction réside dans la validité des raisons émises pour refuser l'offre de services humanitaires. En effet, dans le cas d'un consentement général, seuls deux motifs peuvent valablement justifier la réponse négative donnée à une offre de services : il s'agit du cas où l'offre émane d'une organisation qui n'est pas impartiale ou humanitaire dans sa nature, et celui où il n'y a pas de besoins humanitaires nécessitant une telle intervention. L'argument relatif aux nécessités militaires n'est lui accepté qu'en ce qui concerne le consentement opérationnel.*

*Il existe en outre des circonstances où il apparaît qu'une partie à un conflit est obligée d'accepter une offre de services en vertu du DIH. En effet, il s'agit de la situation où la partie concernée ne veut ou ne peut satisfaire à l'obligation de prendre en charge les besoins humanitaires des populations qui se trouvent sous son contrôle. Le consentement ne peut en outre être refusé ou retiré sur la base de motifs arbitraires, ou en contravention avec les règles applicables de DIH. Ce dernier ne règlemente toutefois pas les conséquences de ce refus illégal d'accès humanitaire : l'affirmation selon laquelle un tel refus pourrait légalement donner lieu à des opérations humanitaires transfrontalières ou traversant des lignes de front, ne reflète pas l'état actuel du DIH.*

#### **4. L'obligation de permettre et de faciliter les opérations de secours d'urgence**

*Le DIH établit une distinction entre l'obligation d'obtenir le consentement d'une partie au conflit suivant une offre de services, et l'obligation de permettre et de faciliter les opérations de secours, laquelle permet d'exécuter l'offre acceptée. Une fois l'autorisation donnée, l'Etat ou la partie au conflit est dans l'obligation de coopérer et de prendre des mesures positives aux fins de faciliter les opérations humanitaires.*

*Ces règles sont communément admises comme étant coutumières et s'appliquent dès lors aux conflits armés tant internationaux que non internationaux. Dans le cadre de conflits armés internationaux, cette obligation incombe non seulement aux parties au conflit mais également à d'éventuels Etats tiers concernés, tels les Etats dont l'accord est requis pour le transit de convois humanitaires sur leur territoire. Le consentement de ces derniers est en outre obligatoire mais doit être demandé par les organisations humanitaires candidates. S'agissant des conflits armés non internationaux, il n'existe pas d'obligation expresse similaire mais celle-ci peut être inférée de l'esprit général des règles de DIH.*

*Enfin, l'obligation des parties des permettre et de faciliter les opérations de secours ne préjudicie pas de leur droit de contrôler ces dernières. Ce droit ne peut cependant avoir pour conséquence de retarder ou d'empêcher la délivrance de l'assistance humanitaire prévue – ce qui pourrait s'apparenter à un abus de droit, et ainsi à un refus illégal de consentement aux opérations de secours.*

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## **Introduction**

Humanitarian access is a central challenge to the effective protection of civilians. Unfortunately, impartial humanitarian organisations such as the International Committee of the Red Cross (ICRC) are too often faced with denial of access. These denials may take various forms, such as long delays in receiving authorisations to conduct humanitarian activities in certain areas, refusal of access because of military necessity, multiplication of administrative obstacles, authorisation of access not communicated at the tactical level or lack of security for humanitarian personnel. These denials or delays come from all sides in situations of armed conflicts, States party to the armed conflict or non-State armed groups alike. This bleak picture shows that the reality of armed conflicts nowadays is that problems of access are the daily business of impartial humanitarian organisations with, of course, adverse effects on individuals in need. On this basis, the ICRC has often made public its concern regarding the multiplication of hurdles rendering humanitarian access increasingly difficult.

Paradoxically, the ICRC has been silent until recently on the International Humanitarian Law's (IHL) legal framework governing humanitarian access. This has two main causes. First, humanitarians do not generally negotiate access with the Geneva Conventions in their hands. Negotiating access is a political process driven first and foremost by humanitarian considerations and to a lesser extent by legal considerations. Second, IHL rules dealing with humanitarian activities are quite developed and this body of law is well equipped to deal with problems relating to humanitarian access in current situations of armed conflict.

However, one can observe a tendency to oversimplify IHL rules on humanitarian access by focusing only on the obligation of parties to allow and facilitate humanitarian assistance reflected in Rule 55 of the ICRC's Customary Law Study. This oversimplification does not do justice to the complexity and niceties of the IHL rules governing humanitarian access. In addition, it is also misleading as it gives the wrong impression that IHL provisions guarantee an unrestricted right of access to impartial humanitarian organisations, which unfortunately is not the case.

Therefore, a clarification of some aspects of these IHL rules governing humanitarian access in situations of armed conflict may be necessary.

In this regard, the ICRC in 2014 published a 'Q&A and Legal Lexicon on Humanitarian Access'.<sup>2</sup> The main arguments contained therein can also be found in the 2015 ICRC Report on 'IHL and Challenges of Contemporary Armed Conflicts', submitted at the 2015 International Conference of the Red Cross and Red Crescent.<sup>3</sup> The ICRC's position is also reflected in the new ICRC 'Commentaries to common Article 3<sup>4</sup> and Article 9 of the 1949 Geneva Convention I<sup>5</sup> and the 1949 Geneva Convention II'.

### **The ICRC's Perspective on the IHL Framework Governing Access**

Although the relevant rules vary slightly depending on the nature of the conflict – international armed conflict (IAC) other than occupation, occupation, non-international armed conflict (NIAC) –, the IHL framework governing humanitarian access and the delivery of humanitarian activities in armed conflicts may be said to be constituted of four interdependent 'layers':

- 1) each party to an armed conflict bears a primary obligation to meet the basic needs of the population under its control;
- 2) impartial humanitarian organisations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by an armed conflict are not fulfilled;
- 3) impartial humanitarian activities undertaken in situations of armed conflict are generally subject to the consent of the parties to the conflict concerned; and
- 4) once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as other States concerned, are expected to allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control.

These layers are interdependent as each of them has an impact and provides important elements for the implementation and interpretation of another layer, all forming part of the IHL framework governing humanitarian access and the delivery of humanitarian activities in armed conflicts.

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2 <<https://www.icrc.org/en/international-review/article/icrc-qa-and-lexicon-humanitarian-access>>, 2014, p. 20.

3 <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>>, pp. 26-33.

4 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC>>. See in particular paragraphs 779-840 on the offer of services.

5 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3074EE1C685CFDBDC1257F7D00360B7B>>. See in particular paragraphs 1120-1180 on the activities of the ICRC and other impartial humanitarian organisations.

## 1. The Primary Obligation to Meet the Basic Needs of the Population

This obligation of the parties to the armed conflict to ensure that the basic needs of the population under their control are met is a corollary of State sovereignty and can also be derived from human rights law.<sup>6</sup>

However, it is much more difficult to locate this obligation under IHL, as, with the exception relating to occupation law<sup>7</sup>, there is no specific IHL treaty rule in which such an obligation can be found. Does this mean that this obligation to ensure that the basic needs of the population are met does not exist outside occupation law? Not in the ICRC's view. This obligation can be inferred from the object and purpose of IHL. Moreover, it can be argued that this obligation also derives from the broader obligation to treat humanely persons who are in the power of a party to the armed conflict.<sup>8</sup> When it comes to the notion of 'basic needs', the Additional Protocols (AP) to the Geneva Conventions (GC) have been very important as they have broadened the notion of basic needs by extending the list of supplies to all those essential to the survival of the civilian population. They have also expanded the list of beneficiaries to the whole civilian population (Article 69 and 70 of AP I and Article 18 of AP II).<sup>9</sup>

It may be difficult at first sight to identify the link existing between humanitarian access and this primary obligation to ensure that the basic needs of the population under the parties' control are met. However, the link does exist and plays an important role. Indeed, the ability of a party to the conflict to fulfil its obligation to ensure the basic needs of the population under its control would condition the way in which the notion of consent for the purpose of humanitarian access must be interpreted under IHL.

## 2. The Right of Impartial Humanitarian Organisations to Offer Services

The right given by IHL to humanitarian organisations to offer their services to the parties to an armed conflict finds its legal basis in common Article 3 to the Geneva Conventions for non-

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6 For example, the ICESCR provides for the right to food and water, and the Committee on Economic, Cultural and Social Rights has noted, that whenever an individual or group are unable, for reasons beyond their control, for example in situations of natural or other disasters, to enjoy the rights to adequate food and water by the means at their disposal, States must provide those rights directly. Similar positive obligations form part of States' duty to protect the rights to life and to security of the persons. See E.C. Gillard & D. Akande, "Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict", commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, October 2016, p. 11.

7 Articles 55 of GC IV and 69 of AP I.

8 Articles 3 and 27 of the fourth Geneva Convention of 1949.

9 Article 69 and 70 of AP I and Article 18 of AP II.



international armed conflicts and in Articles 9/9/9/10 of the GCs. These articles spell out the so-called ‘right of initiative’.

This right of initiative – and the correlative ‘privilege’ given to its ‘owners’ – can be defined as the legal entitlement given to impartial humanitarian organisations to propose their humanitarian activities to a party to the armed conflict. The right of initiative as defined under IHL only belongs to organisations that qualify as ‘impartial humanitarian organisations’ under IHL. Therefore an offer of services will be valid only if it emanates from an organisation that qualifies as impartial and humanitarian in nature and in deeds.<sup>10</sup> That is why the quality and the *modus operandi* – both being intrinsically connected – of the humanitarian organisation concerned are keys for the latter in order to qualify as an impartial humanitarian organisation for the purposes of IHL. This qualification is an important element of the humanitarian access equation under IHL as it has direct consequences on the conditions under which the addressee of an offer of services may or may not consent to humanitarian operations on its territory or the territory it controls.

In this regard, an offer of services emanating from an organisation that does not qualify as an impartial humanitarian organisation under IHL could be lawfully turned down simply because of the lack of quality of that organisation. Offers of services placed by States or intergovernmental organisations that do not qualify as impartial humanitarian organisations are not regulated by IHL *per se* and the latter cannot claim that these are based on a corresponding IHL-grounded right of initiative.

From another perspective, it is important to recall that the IHL right of initiative gives impartial humanitarian organisations the right to offer their services and to perform humanitarian activities without States regarding this as unlawful interference in their domestic affairs or as unfriendly acts.<sup>11</sup> In this context, it is essential not to confuse offers of services under IHL, and the subsequent humanitarian relief operations undertaken, with the ‘right to humanitarian intervention’ or the ‘responsibility to protect’. The latter are notions that are distinct from the strictly humanitarian activities carried out by impartial humanitarian organisations within the parameters of IHL.

Still on this second layer, it is worth underlining that there is nothing in IHL that restrains the right of impartial humanitarian organisations to offer their services. It has been recently argued that the impartial humanitarian organisations’ right to propose humanitarian activities

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10 For more details on the notion of impartial humanitarian organisation, see *ICRC Commentary to the Geneva Convention I*, 2016, common Article 3, paragraphs 788-799.

11 See Article 70, paragraph 1 of AP I.

to the parties to an armed conflicts would be conditioned by the fact that the civilian population would actually not be provided with supplies essential for its survival.<sup>12</sup>

On this issue, the ICRC considers that there is no legal basis for such arguments under IHL, as common Article 3 and Articles 9/9/9/10 of the Geneva Conventions, which form the only provisions on which the right of initiative is grounded under IHL, do not include any condition for an impartial humanitarian organisation to offer its services in a situation of armed conflict. In addition, such a condition can generate adverse effects from an operational perspective as it gives the parties to the armed conflict another ground not laid down in the law to turn down a valid offer of services and could prevent impartial humanitarian organisations to pre-position, for instance, logistic assets and humanitarian personnel in the territory affected by the armed conflict before the humanitarian situation reaches a critical point.

This second layer raises also the question of which humanitarian activities are concerned.

IHL does not specifically define the notion of ‘humanitarian activities’ that impartial humanitarian organisations may offer to the parties to an armed conflict. Common Article 9/9/9/10 of the Geneva Conventions applicable to international armed conflict specifies that the ICRC and any other impartial humanitarian organisation can offer to undertake humanitarian activities for the ‘protection’ and the ‘relief’ of those affected by armed conflict. Common Article 3 to the Geneva Conventions only refers to ‘services’ but one should consider that the right of initiative applicable in non-international armed conflicts also includes all humanitarian activities.

Therefore, in terms of scope, offers of services made by impartial humanitarian organisations should be interpreted to encompass humanitarian activities in a broad sense. While IHL does not specifically define the notion of humanitarian activities, these should be interpreted as

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12 See E.C. Gillard & D. Akande, *op. cit.*, pp. 14-15.

13 As used in the Geneva Conventions, the term ‘relief’ is mostly aimed towards addressing emergency situations. It needs to be read jointly with the broader term ‘assistance’, used in Article 81(1) of AP I and which seeks to cover additionally the longer term as well as the recurrent and even chronic needs. Neither relief nor assistance have been defined in the aforementioned treaties. The absence of a generic definition, or of a list of specific activities which would be covered by the term ‘assistance’, is in line with the fact that what may be needed in terms of humanitarian assistance in one context will not necessarily be needed in another context and may evolve over time. Assistance activities refer to all activities, services, and delivery of goods, primarily in the fields of health, water, habitat and economic security and which seek to ensure that persons caught up in an armed conflict can survive and live in dignity. See also, “ICRC Assistance Policy”, adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004 and reproduced in *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 677–693.

including both an assistance<sup>13</sup> and a protection dimension.<sup>14</sup> This has been made clear notably by Article 81 of AP I requiring the parties to an armed conflict to grant all facilities to the ICRC to carry out its humanitarian functions in order to ensure *protection* and *assistance* to victims of armed conflicts.<sup>15</sup>

Humanitarian activities for the purposes of IHL rules governing humanitarian action are therefore all those aimed at preserving life and security or seeking to restore or maintain the mental and physical well-being of victims of armed conflicts.

Furthermore, it is worth recalling that under IHL, humanitarian activities must benefit all persons who may be in need of assistance and/or protection as a result of an armed conflict. This means that States cannot limit activities to civilians alone; activities may also benefit wounded and sick fighters, prisoners of war, persons otherwise deprived of their liberty in relation to the armed conflict, and other vulnerable individuals affected by an armed conflict.

Eventually, while not explicitly mentioned in common Article 3, the right to offer services can also relate to activities for the benefit of dead persons. Similarly, while not mentioned explicitly as such, it flows from the purpose of common Article 3 that the right to offer services can, depending on the circumstances, also be exercised to protect, or safeguard the functioning of, objects benefiting the wounded and sick, such as medical establishments.

### **3. Humanitarian Activities Carried out by Impartial Humanitarian Organisations Can only be Undertaken with the Consent of the Parties Concerned**

The third layer can be considered as constituting the cornerstone of the rules governing humanitarian access, addressing the issue of consent. In this regard, the ICRC has a clear stance:

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14 The ICRC's definition of 'protection' is the following: 'In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict (...), protection aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals. It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations. It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations'. The ICRC's 'protection' activities are implemented following four main guiding principles: neutral and independent approach; dialogue and confidentiality; holistic and multidisciplinary character of ICRC action; search for results and impact. See ICRC's "Protection policy", in: *International Review of the Red Cross*, Volume 90, Number 871, September 2008, at: <<http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>>.

15 Emphasis added.

the so-called right of initiative addressed above does not translate into an unrestricted right of access given to humanitarian organisations.<sup>16</sup>

It is clear from our perspective that humanitarian organisations, in order to carry out their humanitarian activities in situations of armed conflict, must seek and obtain the consent of the parties concerned.<sup>17</sup> This is a prerequisite. The key question in this respect is: who qualifies as the party concerned for the purposes of IHL?

The IHL rules governing consent vary in their wording and scope.<sup>18</sup>

In *international armed conflicts*, the relevant IHL provisions specify that consent only needs to be obtained from the States that are a party to the conflict and are ‘concerned’ by virtue of the fact that the proposed humanitarian activities are to be undertaken in their territory or in the areas under their effective control. It is understood that the opposing party does not need to be asked to consent to relief operations that take place in the adversary’s territory or in territory controlled by the adversary.

For *non-international armed conflicts*, common Article 3 is silent on who should consent to humanitarian relief operations in non-international armed conflicts. It has been argued – in relation to some recent NIACs – that humanitarian action undertaken in areas controlled by non-State armed groups requires only their consent, and not that of the government of the State in whose territory that action is to take place.

However, the ICRC considers that the question of whose consent is necessary in NIACs governed by common Article 3 should be answered based on the guidance provided in Article 18(2) of Additional Protocol II, which expressly requires the consent of the High Contracting Party concerned. The issue of consent in NIACs under IHL cannot be dissociated from the notion of State sovereignty. Thus, consent should be sought from the State (through its effective government) in whose territory a NIAC is taking place, including for relief activities to be undertaken in areas over which the State has lost control. In any case, for practical reasons, the ICRC would also seek the consent of all parties to the NIAC concerned (including non-State armed groups party to it) before carrying out its humanitarian activities.

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16 ICRC “Q&A and a legal Lexicon on humanitarian access”, 2014, p. 9. See also 2015 ICRC “Report on IHL and challenges of contemporary armed conflicts”, p. 29.

17 It goes without saying that when impartial humanitarian organisations are directly solicited by the parties to the armed conflict, their consent is presumed.

18 See common Article 9/9/9/10 of the GCs and Article 70(1) of AP I for IAC; Article 59 of the GC IV for occupation and Article 18 of AP II for NIAC.

Therefore, it is clear from the logic underpinning international law in general and IHL in particular that, in principle, an impartial humanitarian organisation will only be able to carry out the proposed humanitarian activities lawfully if it has consent to do so. In exceptional circumstances, however, seeking and obtaining the consent of the party concerned may be problematic. This may be the case, for example, when there is uncertainty with regard to the government in control, or when the State authorities have collapsed or ceased to function. These may be cases where the humanitarian needs are particularly important. Whenever such needs remain unaddressed, humanitarian imperatives would require that humanitarian activities be undertaken by impartial humanitarian organisations such as the ICRC.

On the practical implementation of the notion of consent, it is important to emphasise that the ICRC makes a dichotomy between what it calls in its jargon ‘general consent’ and ‘operational consent’. This dichotomy can be found in the division operated by Article 70 of Additional Protocol I. General consent would be the broad decision made by a party according to which impartial humanitarian organisations can be present and operate in its territory or territory under its control following a valid offer of services. In other words, general consent is the positive answer to the offer of services. General consent is however not a blank cheque for humanitarian organisations to crisscross the country unrestrained.

On the other hand, the ‘operational consent’ would be the implementation of the general consent. In other words, it constitutes the subsequent green light given by the party concerned to carry out specific and targeted relief operations within the framework of the general consent. From the ICRC’s perspective, it corresponds to the obligation to allow and facilitate relief schemes that can be found in Article 70, paragraph 2 of Additional Protocol I.

This distinction between general and operational consent is crucial in order to determine the grounds permitting turning down an offer of services submitted by impartial humanitarian organisations to the parties to an armed conflict.

In the ICRC’s view, in relation to the notion of general consent, there are only two grounds that can be used to turn down an offer of services. First, when the offer of services comes from an organisation that does not qualify as impartial and is not humanitarian in nature. Second, when there are simply no needs to meet in the area in question, because, for instance, the party to an armed conflict has the capacity and is willing to fulfil its primary obligation to meet the needs of the population under its control. Or because it has already consented to the action of another impartial humanitarian organisation capable of meeting those needs.

IHL does not provide other grounds justifying negatively answering an offer of services.

At this point, it is important to underline that, for the ICRC, the military necessity argument is not a valid ground to turn down definitively an offer of services and to deny in their entirety the humanitarian activities offered by impartial humanitarian organisations. The military necessity argument can only be invoked to regulate humanitarian access, not to prohibit definitely the possibility for an impartial humanitarian organisation to operate in a specific territory. Therefore, the ICRC considers that the military necessity argument is only valid in relation to what we defined as 'operational consent'. Consequently, this means that military necessity must be restricted geographically and temporally.<sup>19</sup>

While access in some territories and the implementation of humanitarian activities therein depend on the consent of the parties to an armed conflict, their decision to consent to relief operations is not discretionary. As always, IHL strikes a careful balance between parties' interests and humanitarian imperatives, and is not entirely deferential to State sovereignty when it comes to relief operations.

The question of whether a party to an armed conflict can lawfully turn down an offer of humanitarian services is intrinsically linked to its ability to fulfil its primary obligation to meet the basic needs of the population under its control. When the relevant party is unable or unwilling to fulfil this obligation and when an offer of services has been made by an impartial humanitarian organisation, there would appear to be no valid/lawful grounds for withholding or denying consent.

There may thus be circumstances under which, as a matter of IHL, a party to a conflict may be considered to be obliged to accept an offer of services.<sup>20</sup>

International law as informed by subsequent State practice in the implementation of the Geneva Conventions has now evolved to the point where consent may not be refused on arbitrary grounds. Thus, any impediment(s) to humanitarian activities must be based on valid and lawful reasons, and the party to the conflict whose consent is sought must assess any offer of services in good faith and in line with its international legal obligations in relation to the humanitarian needs of the persons affected by the non-international armed conflict.

Recently, the expression 'arbitrary denial/withholding of consent to relief operations' has been used to describe a situation in which a party to an armed conflict unlawfully rejects a valid offer of humanitarian services. The expression 'arbitrary denial/withholding of consent' is not

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19 ICRC Q&A and a legal Lexicon, op. cit., 5 and 10, and ICRC Report on IHL, op. cit., p. 28,

20 See for example Article 59 of the fourth Geneva Convention: '... the Occupying Power *shall* agree ...' (emphasis added).

found in any IHL treaty and international law does not provide authoritative clarification on how to interpret the criterion of arbitrariness. This assessment remains context-specific.

Taking into account the vagueness surrounding the notion of ‘arbitrary denial of consent’, one could wonder whether the expression ‘unlawful denial of consent’ should be used instead, insofar as the unlawfulness of such denial of consent would be intrinsically linked to the potential violations of IHL obligations incumbent upon the party concerned it entails. Therefore, a refusal to grant consent resulting in a violation of the party’s own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case, for instance, when a party’s refusal results in the starvation of civilians as prohibited by Article 54 of Additional Protocol I or when the party is incapable of providing humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL. A refusal to grant consent may also be considered unlawful when the refusal is based on adverse distinction, i.e. when it is designed to deprive persons of a certain nationality, race, religious beliefs, class or political opinion of the needed humanitarian relief or protection.

Lastly, it is also important to note that IHL does not regulate the consequences of a denial of consent and does not spell out a general right of access that can be derived from an ‘arbitrary denial/withholding of consent’. Thus, the argument according to which an arbitrary denial/withholding of consent could justify unconsented cross-line/border operations as a matter of IHL does not reflect current IHL.<sup>21</sup>

#### **4. The Obligation to Allow and Facilitate Relief Operations**

Concerning the fourth layer, it is important to underline the distinction made by IHL between the requirement to obtain consent from a party to a conflict following an offer of services on the one hand, and the obligation to allow and facilitate relief schemes, which serve to implement the acceptance of the offer, on the other.

Once relief actions are accepted in principle, the parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate humanitarian operations. The parties must facilitate the tasks of relief personnel. This may include simplifying administrative formalities as much as possible, to facilitate visas or other immigration issues, financial/taxation requirements, import/export regulations, field-trip approvals, and possibly privileges and immunities necessary for the organisation’s work. In short, the parties must enable ‘all facilities’ needed for an organisation to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time,

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21 This is without prejudice to arguments along those lines that may be derived from other bodies of international law.

cost, safety, appropriateness). This is an obligation of results whose content and realisation is largely left to the parties to the armed conflict concerned.

This obligation to ‘allow and facilitate’ is expressed in IHL rules regulating humanitarian activities in situations of international armed conflict (including occupation). Neither common Article 3(2) to the Geneva Conventions nor Article 18(2) of Additional Protocol II address this aspect of humanitarian activities, but the rules applicable in international armed conflict on this issue are considered customary and applicable in both international and non-international armed conflicts.<sup>22</sup>

From a personal scope of application, *under IHL governing international armed conflicts*, the obligation to allow and facilitate relief operations applies not only to the parties to an armed conflict but to all States concerned. This means that States not party to the conflict through whose territory impartial humanitarian organisations may need to pass in order to reach conflict zones must authorise such transit. However, IHL is silent on the consent of such third countries concerned. Does this mean that impartial humanitarian organisations are exempted from seeking and obtaining their consent? The answer should be negative. Consent of third States must be sought and obtained as a matter of public international law. But, as a matter of IHL, those States are obliged to give their consent as well as to allow and facilitate relief schemes.

From a personal scope of application, *IHL governing non-international armed conflicts* does not expressly contain a similar obligation for third States. There is, nevertheless, an expectation that States not party to the NIAC will not oppose transit through their territory of impartial humanitarian organisations seeking to reach the victims of a NIAC. The humanitarian spirit underpinning IHL should encourage non-belligerent States to facilitate humanitarian action that has already been accepted by the parties to a NIAC. It could also be argued that this obligation incumbent upon third States could be inferred from the obligation to ensure respect spelled out in IHL (third States’ refusal would lead to the impossibility of parties to the conflict to fulfil their primary obligation to meet the basic needs of the population).

Finally, under IHL, the obligation to allow and facilitate humanitarian activities is without prejudice to the entitlement of the parties concerned to control them. As such the ‘right of control’ is not an IHL treaty-based expression but is reflected in several IHL provisions.<sup>23</sup>

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22 See ICRC CIHL Study, *op. cit.*, Rules 55 and 56.

23 See Article 23 of the GC IV and Article 70 paragraph 3 of AP I.



These measures of control authorised by IHL may serve a number of purposes: they may allow parties to an armed conflict to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.<sup>24</sup>

Under IHL, the obligation to allow and facilitate – to which the right of control is a corollary – is an obligation of result, not an obligation of means. Thus, even if the holders of the obligation to allow and facilitate are entitled to a related right of control, the implementation of the latter must be made in good faith and should never result in unduly delaying or rendering impossible the delivery of the humanitarian relief. This may well amount to an abuse of law and may be tantamount to an unlawful denial of consent.

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<sup>24</sup> See E.C. Gillard & D. Akande, *op. cit.*, p. 28.

# HUMANITARIAN ACTION FROM AN ARMED GROUP'S PERSPECTIVE

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## **Résumé**

*Dans le cadre de cette dernière intervention sur la question de l'accès humanitaire, Annyssa Bellal se concentre sur la manière dont les groupes armés non étatiques perçoivent l'aide humanitaire et base ses réflexions sur une étude menée par Geneva Call.*

*Il n'existe guère de données disponibles sur l'importance des obstacles dressés à l'action humanitaire par les groupes armés. Toutefois, des refus d'accès humanitaires par divers groupes ont été régulièrement constatés, ainsi que des attaques visant des travailleurs humanitaires.*

*La perception de l'aide et des organisations humanitaires par les groupes armés (1) ainsi que la problématique de l'autorisation requise pour la fourniture d'aide humanitaire (2), sont les deux questions abordées dans le cadre de cette contribution.*

## **1. La perception de l'aide humanitaire par les groupes armés**

*Bien qu'il ait été démontré qu'un nombre significatif de groupes armés souscrivent au Droit international humanitaire (DIH) et à certains principes humanitaires, d'autres groupes considèrent toutefois les travailleurs et l'aide humanitaires comme des menaces potentielles à leur autorité.*

*Par ailleurs, l'interprétation des principes humanitaires que font certains groupes armés peut paraître problématique. C'est notamment le cas en ce qui concerne le type d'organisation habilitée à fournir l'assistance humanitaire, où l'on observe que certaines organisations – particulièrement les organisations nationales d'aide – ne sont pas perçues par les groupes armés comme respectant les principes de neutralité, impartialité et indépendance et se voient dès lors refuser l'accès aux zones que ces derniers contrôlent. La perception de l'absence de neutralité est dès lors cruciale pour garantir l'accès humanitaire, étant donné qu'elle est susceptible de justifier un refus d'accès de la part du groupe armé.*

## **2. La question de l'autorisation d'accès humanitaire dans le cadre des conflits armés non internationaux**

*La question du refus d'autorisation à fournir de l'aide humanitaire est au cœur d'un nombre important de crises humanitaires dans les conflits armés contemporains. Dans le cadre de conflits*

*armés non internationaux, l'article 3 commun ne contient aucune indication quant à l'acteur qui devrait répondre à une offre d'assistance humanitaire. Le Protocole additionnel II prévoit cependant explicitement que l'autorisation de la Haute Partie Contractante concernée est requise, alors que le Commentaire du Comité international de la Croix-Rouge (CICR) ne mentionne que les « parties » au conflit. L'enjeu de cette discussion réside dans le cas de figure où un groupe armé contrôlant un territoire accepte de fournir un accès alors que l'Etat sur le territoire duquel le groupe opère le refuse. En l'espèce, le consentement de l'Etat serait tout de même requis, bien que les raisons admissibles pour justifier un refus soient fort restreintes.*

*Il est important de souligner qu'en pratique, et ce pour des raisons opérationnelles, l'accord de toutes les parties au conflit armé sera recherché, et ce dans le but de mener les opérations de secours sans entraves et en toute sécurité.*

*Des positions contrastées existent toutefois sur la question : Marco Sassòli, par exemple, estime qu'une organisation humanitaire peut procéder à de l'assistance dans le cas où un groupe armé a émis son approbation, et ce même si l'Etat hôte a, quant à lui, émis un refus.*

*Les groupes armés estiment à leur tour de manière générale que le défaut de consentement peut constituer une raison valable d'expulser une organisation humanitaire du territoire qu'ils contrôlent.*

*A titre de conclusion, Annyssa Bellal met en lumière que les acteurs armés non étatiques peuvent également jouer un rôle positif en termes de protection, ne serait-ce qu'en raison de leur grande proximité des populations. Il convient dès lors d'encourager les Etats ainsi que les organisations humanitaires à les considérer comme des partenaires.*

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## **1. Introduction**

There should be 'a humanitarian law that will ensure that governments will not infringe humanitarian access'. With these words, reproduced in the study conducted by Geneva Call on the perceptions of armed non State-actors on humanitarian action, a representative of the Sudan's People Liberation Movement – North (SPLM-N) expressed his frustration over a State-centric system of norms that requires obtaining consent from host States to gain access to areas under the control of armed groups.<sup>1</sup> This comment is motivated by the context of the conflict in Sudan where humanitarian access is prevented to Southern Kordofan and Blue Nile

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1 Ashley Jackson, "In their Words : Perceptions of Armed Non-State Actors on Humanitarian Action", Geneva Call, 2016, at: <[https://genevacall.org/wp-content/uploads/dlm\\_uploads/2016//09/WHS\\_Report\\_2016\\_web.pdf](https://genevacall.org/wp-content/uploads/dlm_uploads/2016//09/WHS_Report_2016_web.pdf)>.

States, which remain cut off, and access to most of the Jebel Marra area in Darfur is heavily restricted, as reminded by the 13 May 2016 Report of the United Nations Secretary-General on the protection of civilians.<sup>2</sup>

While there is a lack of data on the extent to which armed groups are hampering humanitarian action, armed groups are reported to have denied access to aid organisations in Yemen, for example, or to impose stringent accreditation procedures in eastern Ukraine, among others.<sup>3</sup> In addition, the latest statistics gathered in the Aid Worker Security Report 2017 tell us that ‘between 2011 and 2016, the armed groups responsible for most major attacks on aid workers were the Taliban (51 attacks), Al Shabaab (21), Islamic State (IS) (12), and Al Qaeda in the Islamic Maghreb (AQIM) (5). Other significant perpetrator groups included the Anti-Balaka groups in the Central African Republic (four incidents) and Syria’s Jabhat Al Nusra, the Democratic Front for the Liberation of Rwanda and Movement for Oneness and Jihad in West Africa (MUJAO) (three incidents each).’<sup>4</sup>

Given these realities, it makes sense to include armed groups in discussions of the challenges faced by relief operations in contemporary armed conflicts.

## **2. Armed Groups’ Perception of Humanitarian Aid**

The Geneva Call study mentioned above highlights that the 19 armed groups they consulted generally expressed support for International Humanitarian Law and certain principles underlying humanitarian action, namely neutrality, impartiality and independence. The Aid Worker Security study shows a slightly more critical perception of humanitarian aid and workers, perhaps because of the types of groups interviewed for the study: Al Shabaab in Somalia and the Taliban and Haqqani Network, in Afghanistan. In addition, the Aid Worker Security research sought to include the Islamic State and Al Qaeda’s viewpoints through a review of their public statements and English language publication. The general conclusion the report draws with regard to the perception of humanitarian aid is that ‘armed groups view aid organisations as potential threats to their authority as well as useful proxy targets. When attempting to govern territory and provide some measure of public services, armed groups have incentives to grant

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2 “Report of the Secretary General on the protection of civilians in armed conflict”, 13 May 2016, S/2016/447, paragraph 30, available at: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2016/447](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/447)>

3 Ibid., paragraphs 31-32.

4 Humanitarian Outcomes, “Aid Worker Security Report 2017. Behind the attacks: A look at the perpetrators of violence against aid workers”, 2017, p. 7, available at: <<https://aidworkersecurity.org/sites/default/files/AWSR2017.pdf>>.

aid organisations secure access, but this often requires the aid groups to accept conditions that compromise humanitarian principles.<sup>5</sup>

That said, some armed groups have issued positive declarations in favour of humanitarian assistance, such as the ‘Declaration of Commitment on Compliance with IHL and the Facilitation of Humanitarian Assistance’ by the National Coalition of Syrian Revolution and Opposition Forces.<sup>6</sup> Others have adopted formal policies regulating humanitarian aid, as, for instance, the Karen National Union (KNU) in Burma, which established a ‘Policy for Humanitarian Assistance’ on 11 June 2014.<sup>7</sup>

While these texts and declarations usually comply with IHL, the interpretations that some armed groups have concerning humanitarian principles are problematic. This is the case with regard to the type of entity that can provide humanitarian assistance. Common Article 3 states that ‘(a)n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.’ While the International Committee of the Red Cross (ICRC) is especially mentioned, the words ‘such as’ suggest that other entities may do so.<sup>8</sup> Offers to conduct humanitarian relief operations may thus be made by States, international organisations or non-governmental organisations (NGOs). Some of these entities are perceived by armed groups as not meeting the criteria of neutrality, impartiality and independence. Unsurprisingly, ‘national aid organisations’ fall into that category. The SPLM-N even asserted that ‘no actors fulfil all three principles’.<sup>9</sup>

Apart from the fact that national aid organisations are said to be in some instances ‘infiltrated by the government’,<sup>10</sup> perhaps more worryingly, humanitarian assistance, even when provided by independent and neutral NGOs, can be perceived as partial, because, according to a specific mandate, they might target aid towards a certain population. For example, the Democratic Forces for the Liberation of Rwanda (FDLR), active in the northeast of the Democratic Republic of the Congo, criticised the partiality of organisations that distributed aid only to the

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5 Ibid., ‘Summary.’

6 The document is available at: <[http://www.etilaf.us/ihl\\_declaration](http://www.etilaf.us/ihl_declaration)>.

7 The document is available at: <[http://theirwords.org/media/transfer/doc/knu\\_s\\_policy\\_for\\_humanitarian\\_assistance\\_2014-be64212cf1a6b6dff134dee3e7e6a25.pdf](http://theirwords.org/media/transfer/doc/knu_s_policy_for_humanitarian_assistance_2014-be64212cf1a6b6dff134dee3e7e6a25.pdf)>.

8 See the 2016 “Commentary to Common Article 3”, in: ICRC (2016) *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949, paragraphs 803-806, available at: <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#\\_Toc465169934](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169934)>.

9 Geneva Call, “In their words...”, op. cit., p. 12.

10 Ibid.

Congolese population and excluded the Rwandan refugees.<sup>11</sup> The perception of the absence of neutrality is particularly problematic for humanitarian access, as it can justify, in the eye of an armed non-State actor, refusal of consent to access the zones under its control.

### **3. The Issue of Consent to Humanitarian Access in non-International Armed Conflicts**

The issue of consent, or rather the refusal to give consent to the provision of humanitarian aid, is at the heart of many humanitarian crises in contemporary armed conflicts. Different initiatives have sought to address, clarify and/or reiterate international law applicable to these situations. I will mention here the 'Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts'<sup>12</sup> and the 'Humanitarian Access Initiative' developed by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), the ICRC, the Swiss Department of Foreign Affairs (DFA) and Conflict Dynamics which produced a 'Practitioners' Manual' as well as a 'Legal Handbook on Humanitarian access in Armed Conflicts'.<sup>13</sup>

With regard to consent, as emphasised by the 2016 ICRC Commentary, common Article 3 does not give information about by whom, nor how, an offer of humanitarian assistance is to be responded to.<sup>14</sup> In contrast, Article 18, paragraph 2 of Additional Protocol II, explicitly addresses the requirement to obtain the consent 'of the High Contracting Party concerned'.

The 2016 ICRC Commentary of Common Article 3 notes that '[d]espite the silence of common Article 3, it is clear from the logic underpinning international law in general, and humanitarian law in particular, that, in principle, an impartial humanitarian organisation will only be able to carry out the proposed humanitarian activities if it has consent to do so'.<sup>15</sup> Interestingly, the Commentary adds: 'Consent may be manifested through a written reply to the organisation which has made the offer but can also be conveyed orally. In the absence of a clearly communicated approval, an impartial humanitarian organisation can make sure that the "Party to the conflict" concerned consents at least implicitly, by acquiescence, to the proposed humanitarian activities duly notified to that Party in advance.'<sup>16</sup> The ICRC commentary

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11 Ibid.

12 Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law relating to Humanitarian Relief Operations in Situations of Armed Conflicts*, University of Oxford and UN OCHA, 2016, available at: <<http://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>>.

13 Available at: <<http://www.cdint.org/our-work/humanitarian-action/humanitarian-access/>>.

14 2016 Commentary to Common Article 3, paragraph 827.

15 Ibid., paragraph 828.

16 Ibid., paragraph 829.

of common Article 3 thus only refers to the modalities of obtaining the consent of the 'party to the conflict' and not of the 'High Contracting Party' such as in AP II.

What is at stake here? This issue of who can give consent can indeed prove to be particularly problematic in situations where humanitarian relief needs to be provided to a territory under the control of an armed group. What if the armed group in control of the territory accepts humanitarian access, but the State in which the armed group operates refuses?

The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflicts stated in this regard that '[i]n situations of non-international armed conflict, where a humanitarian relief operation is intended for civilians in territory under the effective control of an organised armed group, and this territory can be reached without transiting through territory under the effective control of the State party to the conflict, the consent of the State is nonetheless required, but it has a narrower range of grounds for withholding consent.'<sup>17</sup> The Oxford document also underlines that: '[w]hatever the legal position, as a matter of operational practice, the agreement or acquiescence of all parties to an armed conflict to humanitarian relief operations intended for civilians in territory under their effective control or transiting through such territory will be required to conduct the operations in a safe and unimpeded manner'.<sup>18</sup>

There are different interpretations with regard to the issue of consent and access to the territory held by an armed group. Marco Sassòli, for instance, has argued that under common Article 3, a humanitarian body may proceed with humanitarian assistance if an armed group has accepted it, even if the host State withheld its consent.<sup>19</sup> Nishat Nishat has held a similar position.<sup>20</sup> Some authors even maintained that there might be a legal obligation requiring an armed group's consent for humanitarian relief operations in an area under their control.<sup>21</sup>

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17 Oxford Guidance, op. cit., Rule D(ii)

18 Ibid., paragraph 31.

19 Marco Sassòli, "When are states and armed groups obliged to accept humanitarian assistance?", 6 November 2013, at: <[https://phap.org/system/files/article\\_pdf/Sassoli-AcceptingHumanitarianAssistance\\_0.pdf](https://phap.org/system/files/article_pdf/Sassoli-AcceptingHumanitarianAssistance_0.pdf)>.

20 Nishat Nishat, "The Right of Initiative of the ICRC and Other Impartial Bodies", in: Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions, A Commentary*, Oxford, OUP, 2015, p. 502, paragraph 25.

21 See Françoise Bouchet-Saulnier, "Consent to humanitarian access: An obligation triggered by territorial control, not States' rights", in: *International Review of the Red Cross*, 2014, vol. 96, (893), pp. 207-217; see also Tom Gal, "Territorial control by armed groups and the regulation of access to humanitarian assistance", in: *Israel Law Review*, pp. 25-47.

Be that as it may, all the armed groups interviewed in the Geneva Call study were adamant in saying they have a right to consent and regulate humanitarian access, because 'they see themselves as governments in waiting, or as de facto governments of the area they control'.<sup>22</sup> In an armed group's view, failure to obtain consent can be a justified reason for expelling a humanitarian organisation.<sup>23</sup>

More generally, experts tend to agree that it is important to consider armed non-State entities not only as perpetrators of IHL violations, but also as players who can undertake a positive role in protection issues, if only because they are often very close to their constituencies.<sup>24</sup> Many armed groups also view themselves as being responsible for the fate of the civilian population under their control. Despite national counter-terrorism legislation, it is crucial to encourage States and humanitarian organisations to consider certain armed groups also as partners, and not only as duty bearers in the implementation of relief operations, and to take seriously statements such as the one expressed by a KNU representative who said: 'Although I don't know all the rules, I do think we should take part and fulfil our responsibilities'.<sup>25</sup>

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22 Geneva Call, "In their words...", op. cit., p. 16.

23 Ibid., p. 21.

24 See for instance, Ron Dudai and Karen McEvoy, "Thinking Critically About Armed Groups and Human Rights Praxis", in: *Journal of Human Rights Practice*, 2012, 4(1), p. 15.

25 Geneva Call, *In their words...*, op. cit., p. 22.



## Q&A SESSION

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At the end of this second session of the Colloquium, questions were raised by the audience on the following issues:

### **1. The Consequences of an Unlawful Refusal of Consent by a State to Allow Humanitarian Assistance to Proceed on its Territory**

A participant asked for some clarification on how the prohibition to enforce an unlawful decision of refusing consent to humanitarian aid works in practice.

A speaker explained that, in practice, the consequences of that situation will depend on where the question is raised. If humanitarians are brought before the courts in country X where the courts are not independent, the State's argument to refuse consent might be accepted. If, on the other hand, it is raised before the court of a third country, which is independent, the State's argument to refuse consent may then be contested. An indefinite list of possible scenarios can nevertheless be imagined, and the answer will systematically depend on the context.

Another speaker emphasised that International Humanitarian Law (IHL) does not regulate the consequences of an arbitrary denial of consent. IHL does therefore not clearly spell out a right of access that would derive from such a denial. Consequently, the legal basis needs to be found elsewhere.

### **2. The Obligation of Impartial Humanitarian Organisations under IHL**

The issue of the existence of international obligations based on IHL that would bind international humanitarian organisations was raised by a participant in the audience: when we read common Article 3, it refers to 'legal consequences' attached to the right to offer services. What does it mean?

According to a speaker, only States have obligations under international law. In this context, the direct consequences of States' obligations on humanitarian organisations are difficult to assess, and even to generalise.

For another speaker, a clear obligation binding humanitarian organisations is the one according to which all beneficiaries need to be treated impartially and without any discrimination. This would otherwise lead to the expulsion of the organisation.

Another speaker pointed out that such a moral obligation probably exists, but not legally speaking, as IHL sees the role of impartial humanitarian organisations as complementary: the primary responsibility lies with the parties to the armed conflict, i.e. States and/or armed groups. When it comes to occupation law however, Article 60 of Geneva Convention (GC) IV expressly states that impartial humanitarian organisations operating in an occupied territory do not relieve the occupying power of its responsibilities towards the occupied population. It is therefore up to the discretion of the humanitarian organisation to decide whether it is willing to place an offer of humanitarian services in these situations of armed conflicts.

### **3. The Issue of the Location of Humanitarian Organisations**

According to Additional Protocol (AP) II, Article 18 (1), the ‘relief societies’ have to be located on the territory of ‘the’ High Contracting Party, and not the on one of ‘a’ High Contracting Party. Does it mean that relief organisations located on the territory of another High Contracting Party are also included in the scope of this provision and can still offer their services to a State which is not a contracting party to AP II?

According to a speaker, this issue is very specifically linked to a drafting issue at the end of the 1977 Conference. It thus relates only to the territory of the State where the conflict takes place and does not exclude any other activities based on more general considerations.

Another speaker underlined that, in the ICRC’s view, the legal basis to offer humanitarian services to parties to an armed conflict does not lie in the above-mentioned Article 18, but rather in common Article 3, as the APs only supplement what had already been laid down in the Geneva Conventions. Article 18 is only a clarification on the fact that national aid societies are also entitled under IHL to place offers of services.

## Session 3

# The Relationship between the Additional Protocols and International Human Rights Law

Chairperson: **Alexander Breitegger**

ICRC Legal Division

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## FUNDAMENTAL GUARANTEES UNDER IHL AND HUMAN RIGHTS LAW<sup>1</sup>

**Françoise Hampson**

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### Résumé

*Françoise Hampson présente une analyse des garanties fondamentales prévues par le Droit international humanitaire (DIH) et leur articulation avec celles qui sont prévues par le Droit international des droits de l'homme (DIDH).*

#### **1. Pourquoi inclure des garanties fondamentales dans le DIH ?**

*Les garanties prévues par le DIH et plus particulièrement par les Protocoles additionnels (PA) y ont été introduites en 1977 étant donné que certaines questions clés relatives à des garanties fondamentales n'étaient en effet pas traitées par les conventions sur les droits de l'homme ni par les organes chargés du contrôle de ces garanties. C'est ainsi qu'elles furent introduites dans les Protocoles pour assurer leur protection en droit international.*

#### **2. La nature, le statut et le contenu des garanties fondamentales contenues dans les Protocoles additionnels**

*Les articles 75 du PA I et 4 du PA II sont intitulés « garanties fondamentales » et ont principalement pour objet des obligations liées au droit de Genève – et non à la conduite des hostilités, réglementée par le droit de La Haye. Les implications de leur incorporation dans le droit de Genève résident particulièrement dans le fait que le respect de ces garanties fondamentales ne préjudicie pas à la conduite des opérations militaires d'une part, et qu'elles s'appliquent de manière strictement résiduelle, d'autre part.*

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1 This contribution was drafted on the basis of an audio recording of the debates, and has not been reviewed by the speaker.

*Il est par ailleurs généralement admis que ces dispositions ont le statut de règles coutumières de droit international, comme il y est fait référence dans l'Étude sur le droit international humanitaire coutumier du Comité international de la Croix-Rouge. La Cour internationale de justice a en outre précisé à cet égard que les garanties fondamentales contenues dans les articles 75 du PA I et 4 du PA II étaient tellement similaires à l'article 3 commun aux Conventions de Genève, qu'il convenait également de les appliquer dans le cas de conflits armés non internationaux.*

*S'agissant du contenu de ces dispositions, Françoise Hampson en donne un aperçu détaillé en soulignant notamment que l'article 75 du PA I prévoit des garanties de procès équitable, contrairement à l'article 4 du PA II, et que cette dernière disposition est en substance extrêmement différente de l'article 75 en ce que, notamment, elle s'applique à toutes les personnes qui ne participent pas ou plus aux hostilités. De manière transversale, il est de plus intéressant de noter que certaines de ces garanties fondamentales ressemblent fortement à celles qui sont prévues par le DIDH, comme les dispositions relatives aux traitements inhumains par exemple, alors que d'autres en diffèrent fondamentalement.*

### **3. Le DIDH et les garanties fondamentales prévues par le DIH**

*La question principale qui se pose en ce qui concerne l'articulation des garanties fondamentales prévues par le DIH et le DIDH est celle de savoir quelle législation devrait être appliquée par un organe de protection des droits de l'homme lorsqu'il est confronté à une affaire dont les faits se sont déroulés dans le cadre d'un conflit armé, et où l'application du DIH peut se révéler pertinente. Ces organes seront par ailleurs, dans la plupart des cas, contraints par les termes de leur mandat à formuler leurs conclusions par référence au DIDH, et ce même si celles-ci ont été influencées de manière considérable par le DIH.*

*Certains éléments ont émané de cette pratique jurisprudentielle : c'est ainsi qu'il n'y aura de violation du DIDH que s'il y a violation du DIH et que le DIH fournit la structure du raisonnement juridique, et le DIDH la partie plus substantielle.*

*Enfin, dans la pratique des organes de protection des droits de l'homme, il est important de constater que le DIH sera privilégié en cas de conflit armé international alors que le DIDH sera davantage le point de départ de leur raisonnement dans le cas d'un conflit armé non international.*

#### 4. Conclusions

*Françoise Hampson insiste sur la nécessité d'abandonner l'idée d'une fusion du DIH et du DIDH : il s'agit simplement de deux corps de règles couvrant les mêmes problématiques, mais avec des formulations propres. Il est dès lors crucial de déterminer dans quels cas l'un ou l'autre doit être appliqué, et quand il est nécessaire de passer du DIH au DIDH et inversement.*

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It might seem surprising at first sight to talk about fundamental guarantees under International Humanitarian Law (IHL), and yet this is precisely the rationale of this contribution to the Bruges Colloquium.

### 1. Why were Fundamental Guarantees Included in the Additional Protocols?

The two international human rights covenants entered into force the year before the Additional Protocols (AP) but this does not mean that the key questions in terms of human rights had been addressed – and that is also true when it comes to the European Convention on Human Rights.

As of 1977, there was plenty of case-law, from human rights bodies, on the treatment of detainees, including for example the *Irish State* case, but the following important questions had not been identified nor even addressed by those bodies:

- the applicability of Human Rights Law (HRsL) in situations of an armed conflict;
- the application of HRsL in armed conflict, which inevitably would have involved the question of whether or not human rights bodies can take account of the Law of Armed Conflict (LOAC) in their own activities;
- the extra-territorial applicability of HRsL, which had begun to be taken into account at that time but not in the context of an armed conflict.

In 1977, fundamental guarantees needed to be included in the Protocols because it was not clear whether they would be covered by HRsL. They consequently had to be incorporated in IHL and not in HRsL.

### 2. Nature of Fundamental Guarantees – i.e. AP I Article 75 and AP II Article 4

Both Articles 75 of AP I and 4 of AP II are called 'fundamental guarantees', that is the reason why they are the main subject of this analysis.

It is important to remember that fundamental guarantees principally involve obligations towards people in the power and under the control of a party – i.e. Geneva Law and not Hague Law – and do not concern the conduct of hostilities. This precision matters as it is much easier to make a link between Geneva Law and HRsL than it is in the case of The Hague Law.

What are the implications of the fact that fundamental guarantees are part of Geneva Law?

- *Following the rules does not prejudice the conduct of military operations:* fundamental guarantees cannot be used as an excuse to avoid performing any action that is militarily necessary. It also means that violations by the other side of equivalent obligations do not give them an operational/military advantage. We have seen in that regard that if a State breaches the rules on conduct of hostilities, that poses challenges for the side fighting them – how can they fight lawfully when the other side is getting a military advantage by breaking the rules? That does not apply in the context of Geneva Law: even if the other party is breaking the rules, that does not compromise your ability to adhere to the principles.
- *Fundamental guarantees, and in particular Article 75 are residual:* they only apply if the individual is not protected by other provisions. For instance, a prisoner of war should not need Article 75; a civilian protected by GC IV should not need it either. In addition, there is an argument according to which the existence of Article 75 undermines the claim of the International Committee of the Red Cross (ICRC) that GC III and IV cover the entire world: if everyone is covered by the latter, why would one need Article 75?

### 3. The Status of Fundamental Guarantees

There is overwhelming evidence that the rules provided in AP I Article 75 & AP II Article 4 represent customary law, as stated in the ICRC Study on Customary International Humanitarian Law, Rules 87-105, the supportive evidence provided is particularly telling.

Furthermore, insofar as the provisions very closely resemble common Article 3, the International Court of Justice (ICJ) confirmed their fundamental character in the *Nicaragua* case. The Court said that the content of common Article 3 is fundamental, and so fundamental that it also applies in international armed conflicts (IACs).

The only slight *caveat* is the United States' (US) position on the matter: it originally stated that these provisions were international customary law, then said it was not, then said it was again. This inconsistent stance should not be followed, as a legal provision cannot cease to be customary – it should then be clearly stated that AP I Article 75 & AP II Article 4 are indeed customary.

#### 4. AP I Article 75 and AP II Article 4 – Substantive Content

Both provisions are very long, here is a short summary:

- AP I Article 75 concerns a general requirement of humane treatment. It has the same prohibitions as common Article 3, but also due process guarantees, for whether detained or interned, special rules on war crimes proceedings, and special rules on female detainees, who have to be held apart from male detainees.
- AP II Article 4 is in some respect strikingly different from Article 75 and is certainly not its equivalent. It applies to all persons who do not or have ceased to take part in hostilities, and therefore have to be treated humanely. It therefore applies to all soldiers *hors de combat* in non-international armed conflicts (NIAC), as they do not benefit from prisoner of war status. There are in addition the same prohibitions as in common Article 3 as well as others, and also special provisions on the treatment of children. There are however no due process guarantees in Article 4, as they are to be found in Articles 5 and 6, which are, interestingly, not labelled as ‘fundamental guarantees’.

The following emerges from the substantive content of these provisions:

- The provisions on humane treatment and especially the prohibition of inhumane treatment are like non-derogable HRSL but are expressed in a slightly different vocabulary.
- The due process provisions under HRSL are potentially derogable – depending on what is derogated from. This is a significant difference from IHL, which does not provide for derogations.
- Some aspects of the rules protecting children are potentially derogable, others were not part of HRSL in 1977, as the Convention on the Rights of the Child was adopted only on 20 November 1989. This is again an important difference from IHL.

As we can see from these examples, IHL fundamental guarantees are very much like those of HRSL with regard to humane treatment, but not with respect to many other obligations which bear some significant differences between the APs’ fundamental guarantees and HRSL.

In conclusion, some elements in IHL are the same as non-derogable HRSL; some elements contain the same idea but are expressed differently; some others are potentially derogable under HRSL. Since the fundamental guarantees are part of IHL, the rules of the IHL ‘system’ apply to treaty interpretation: there is for example no presumption in LOAC where the balance between humanitarian needs and military necessity is to be found in the treaties.

## 5. HRsL and the Fundamental Guarantees of IHL

With regards to HRsL, it is important to distinguish between two questions, which tend to be confused, particularly by military lawyers.

Can a human rights body handle an issue that involves both HRsL and IHL, an issue that arises out of armed conflicts and where IHL might be particularly relevant? The answer to this question is absolutely affirmative.

The issue therefore does not lie in the body that is dealing with the question, but rather in which body of rules, HRsL or IHL, will be used as the primary source of rules to determine whether there has been a violation, on the assumption that a human rights (HR) body can refer to IHL.

Human rights bodies – unlike the ICJ and commissions of inquiry – only have a mandate to enforce HRsL. Therefore, regardless of the body of law they use, they have to express their conclusions in terms of HRsL. The issue is then whether the interpretation of HRsL is affected by the applicability of LOAC.

There are broadly three permutations, which should be kept in mind:

- there will only be a violation of HRsL if there is indeed a violation of LOAC;
- IHL provides the essential skeleton but the muscles and tendons are provided by HRsL – the relevant example for that might be the case of *Hassan v. United Kingdom* before the European Court of Human Rights;
- finally, there might be facts that are primarily labelled HRsL but at the same time affected by the reality of an armed conflict and probably in some respect by LOAC.

Consequently, it is important to note that regarding fundamental guarantees and dealing with persons in the power of the other side, one does not only deal with a matter that is exclusively regulated by LOAC but also with HRsL, for which there is a greater role in this case than it would be when analysing the conduct of a military operation in active hostilities.

*In relation to AP I Article 75:* in the case of an IAC, HR bodies would probably take IHL more into account than in the case of a NIAC. They would use IHL for authority to detain, grounds of detention and form of review. But the other issues addressed by Article 75 will primarily be a question of HRsL unless IHL offers additional guarantees – which might be the case for due process for which a HR body would use Article 75 to oppose a derogation to this fundamental guarantee. A State's military should be aware of that when looking at derogations.



*Turning to AP II Article 4:* because it is a NIAC, the starting point of human rights bodies is not 'we cannot take account of LOAC' but they will rather give more attention to HRsL unless IHL offers additional guarantees. In addition, one should also take Articles 5 and 6 into account regarding due process, even if those provisions are not expressly referred to as fundamental guarantees. It would then be primarily a matter of HRsL but taking LOAC into account.

## **6. Conclusions**

To conclude, HRsL and IHL cannot be 'merged', as it would be detrimental both for HRsL and IHL. They are two different languages, with different constructions and rules of grammar that happen to address the same issues. Merging them would mean speaking *franglais*. It is necessary to be bilingual in HRsL and IHL and to know when it is necessary to speak which language. What matters is when you switch from one to the other, and that is where all the discussion should be focused.

# THE RELATIONSHIP BETWEEN THE ADDITIONAL PROTOCOLS AND SOCIO-ECONOMIC RIGHTS

**Amrei Müller**

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## **Résumé**

*Amrei Müller concentre son intervention sur les interactions entre les Protocoles additionnels et le droit international des droits de l'homme. Le point de départ de sa réflexion est le constat suivant : les Protocoles additionnels ont amélioré la protection octroyée aux populations affectées par un conflit armé, particulièrement leurs droits socio-économiques, et ce dans le cadre de conflits armés tant internationaux que non internationaux.*

### **1. Le renforcement du régime de protection de la mission médicale dans les Protocoles additionnels**

*Le régime de protection de la mission médicale prévu par les deux Protocoles additionnels contribue à atténuer les conséquences, directes et indirectes, des conflits armés sur la santé des populations affectées, et ce principalement à travers un meilleur accès aux soins de santé dans le cadre des conflits armés tant internationaux que non internationaux. L'application parallèle du droit de l'homme appelé le « droit à la santé » renforce ce constat, comme le démontrent les exemples suivants :*

- *La protection égale des malades et blessés, qu'ils soient civils ou militaires : la première avancée considérable pour un meilleur accès aux soins de santé en période de conflit armé réside dans l'application aux populations civiles des règles des Conventions de Genève relatives aux blessés, malades et naufragés.*
- *Le champ d'application des soins médicaux fournis : les Protocoles additionnels ont en outre rendu plus explicite l'obligation des parties au conflit de fournir une assistance médicale aux malades et blessés.*
- *Enfin, la protection des systèmes de santé est renforcée par le Protocole additionnel I en ce que celui-ci définit de manière très large les notions de « personnel médical », « unités médicales » et « transports médicaux ». Ces définitions couvrent ainsi un nombre important d'éléments clés nécessaires pour faire face aux besoins médicaux découlant d'un conflit armé.*

### **2. La protection des civils contre les conséquences des hostilités**

*Les Protocoles additionnels ont par ailleurs introduit un certain nombre de règles nouvelles relatives à la conduite des hostilités, en lien avec les droits socio-économiques et particulièrement*

quand il s'agit de limiter les dégâts causés aux infrastructures civiles essentielles pour la jouissance par les individus de leurs droits socio-économiques.

*Il en va ainsi de l'interdiction d'utiliser la famine comme méthode de combat, ce qui constitue une avancée significative des Protocoles par rapport aux Conventions de Genève. En outre, les obligations des Etats découlant des droits socio-économiques peuvent influencer sur l'interprétation donnée au Protocole additionnel I en situation de combat active, et particulièrement sur le concept d'objectif militaire et sur le principe de proportionnalité.*

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## 1. Introduction

This contribution offers some remarks on the multifaceted relationship between the two 1977 Additional Protocols (AP) to the four Geneva Conventions and socio-economic rights. If we take the state of International Humanitarian Law (IHL) before the two Additional Protocols were finalised as a point of departure, the protection of life-saving conditions that are needed for conflict-affected populations to enjoy minimum socio-economic rights has improved with the adoption of the Protocols in both international and non-international armed conflicts. This is due to important developments in two main areas. First, the improved protective regime for medical care and relief operations in the two Protocols ensures that direct and more indirect interferences with people's abilities to enjoy their socio-economic rights caused by armed conflicts are mitigated to a greater extent. Second, the new rules on the protection of civilians from the dangers arising from active hostilities limit the damage to civilian infrastructure, objects and institutions that are needed to secure socio-economic rights. Both these effects are reinforced when the parallel application of socio-economic human rights is taken into account. Such parallel application – and that of human rights law more generally – brings a systemic and more long-term perspective into the law applicable in times of armed conflict.<sup>1</sup>

These general observations are substantiated in the following by discussing some of these new rules, and how their interpretation and application can be influenced by States' obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). By way of example, some aspects of the strengthened regime for the protection of medical care in the Additional Protocols are examined (2), before we turn to a brief discussion of some of the new rules on the protection of civilians from the effects of hostilities (3), followed by concluding remarks (4).

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1 Many of the arguments sketched out here are made in full detail in Amrei Müller, *The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law – An Analysis of Health-Related Issues in Non-International Armed Conflicts* (Leiden, Brill, 2013); and in Amrei Müller, "States' Obligations to Mitigate the Direct and Indirect Health Consequences of Non-International Armed Conflicts: Complementarity between IHL and the Right to Health" (2013) 95 (889), in: *International Review of the Red Cross* 129-165.

## 2. The Strengthened Regime for the Protection of Medical Care in the Additional Protocols

The strengthened regime for the protection of medical care in the two Additional Protocols contributes to alleviating the direct and indirect health consequences of armed conflict, primarily through improved protection of access to health care in international and non-international armed conflicts. The parallel application of the human right to the highest attainable standard of physical and mental health (the right to health)<sup>2</sup> reinforces this, in particular when it comes to alleviating the indirect effects. Three examples follow.

### 2.1. Equal protection for the wounded and sick, whether military or civilian

The first step to better protection of access to health care in armed conflicts is the fact that Additional Protocol I fully extended to *civilians* the rules on the wounded, sick and shipwrecked persons of the Geneva Conventions. Traditionally, IHL applicable to international armed conflicts offered such protection primarily to wounded, sick and shipwrecked combatants.<sup>3</sup> This development is in itself remarkable. It moves IHL, which had hitherto reflected the historical realities of the 1859 Battle of Solferino where few, if any, civilians had been directly wounded in hostilities, to match the reality of contemporary conflicts. Drafters of the Protocols realised that in order to mitigate the health consequences of armed conflict, one had to go far beyond the protection of wounded and sick members of the armed forces. This is also reflected in the inclusive definition of the wounded and sick in Article 8(a) AP I. The definition covers not only military or civilian persons ‘in need of immediate [emergency] medical care’ because they have been wounded in ongoing hostilities, but also those who need immediate care for other reasons; and even those who need curative or rehabilitative treatment because of ‘physical and mental disorder or disability’. This definition inclusive of civilians and military personnel is endorsed by the parallel application of the human right to health. The right to health is held by ‘everyone’<sup>4</sup>, and will be particularly relevant for rights holders who are ‘in need of medical care’ for reasons related or unrelated to the armed conflict.

### 2.2. Scope of medical care to be provided

The second example relates to the scope of medical care that parties to a conflict should provide to the wounded and sick. In this area, the Additional Protocols and the right to health

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2 Article 12 ICESCR.

3 Due to the absence of a combatant status in IHL applicable to non-international armed conflicts, the protection offered to the ‘wounded and sick’ in common Article 3 of the four Geneva Conventions was more inclusive than in international armed conflicts already in 1949.

4 Article 12(1) ICESCR.

complement each other in preserving conditions that allow people to have access to basic health care in times of armed conflict.

In general, the Additional Protocols obligate parties to the conflict to provide medical care to the wounded and sick more explicitly than the Geneva Conventions. They require that the wounded and sick 'receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition'.<sup>5</sup> In commentaries to these provisions we read most of the time that those injured in hostilities should be provided with first aid and emergency medical treatment.<sup>6</sup> IHL thereby primarily obliges parties to the conflict to provide care that addresses the direct health consequences of armed conflicts, reflecting its traditional focus of protecting medical services attached to governmental armed forces whose primary task is to care for those who have been wounded in battles.

It is, of course, not excluded under the relevant provisions in the Additional Protocols that parties to the conflict provide care to address the more indirect health consequences of armed conflicts. Among these indirect health consequences are increasing rates of epidemic and endemic diseases, rising numbers of maternal and neonatal deaths, increasing prevalence of mental illness, complications from chronic diseases, and, more generally, rising levels of malnutrition. The broad definitions of the 'wounded and sick' and of medical 'units', 'transports' and 'personnel'<sup>7</sup>, which include persons suffering from indirect health consequences, as well as the medical units, transports and personnel caring for them, indicate that this is not ruled out.

However, States' obligations flowing from the right to health are more explicit in this regard. Under the right to health, in times of conflict, States will need to prioritise the implementation of the minimum core right to health which can neither be limited nor derogated from. In the United Nations Committee on Economic, Social and Cultural Rights' (CESCR) interpretation of the minimum core right to health, States are to concentrate on building a basic health system that ensures access to 'essential primary health care'.<sup>8</sup> In regard to the care and health services that should be prioritised within a State's jurisdiction as a matter of obligation, the CESCR expressly indicates that these shall include:

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5 Article 10(2) AP I; Article 7(2) AP II.

6 See e.g. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC: 1987), paragraph 4655.

7 Medical 'personnel', 'units' and 'transports' are defined in Article 8(c), (e) and (g) AP I respectively.

8 CESCR, "General Comment 3 – The Nature of States Parties' Obligations", contained in UN Doc E/1991/23, 14 December 1991, paragraph 10; and CESCR, "General Comment 14 – The Right to the Highest Attainable Standard of Physical and Mental Health", UN Doc E/C.12/2000/4, 11 August 2000, paragraph 43.

- ‘immunisation against major infectious diseases occurring in the community’;
- ‘measures to prevent, treat and control epidemic and endemic diseases’;
- ‘reproductive, maternal (pre-natal as well as post-natal) and child healthcare’;
- ‘education and access to information concerning the main health problems in the community, including methods of preventing and controlling them’;<sup>9</sup> as well as
- ‘essential drugs, as from time to time defined under the World Health Organisation Action Programme on Essential Drugs’.<sup>10</sup>

Moreover, in its definition of the minimum core right to health, the Committee emphasises the importance of protecting the so-called ‘underlying determinants of health’, i.e. ensuring access

- ‘to a minimum essential food which is nutritionally adequate and safe’; as well as
- ‘to basic shelter (. . .) and sanitation, and an adequate supply of safe and potable water’.<sup>11</sup>

This focus is particularly helpful for providing care that is needed to avert some of the most dreadful indirect health consequences of armed conflicts. If we can believe statistics on the health consequences of armed conflicts, civilian deaths and suffering resulting from indirect health effects tend to be far greater than those from violent injuries, and some of them may occur only in the long term.<sup>12</sup> This is in particular the case in conflict-affected low-income countries.

The parallel application of the minimum core right to health thus clearly calls on States involved in armed conflicts to not unduly prioritise emergency care, surgery and trauma care at the expense of keeping health facilities running that focus on the provision of primary health care services in line with the minimum core of the right to health. Sometimes at least, emergency care requires considerable resources to provide sophisticated technology and specialised training.

### 2.3. Protection of health systems

The third example concerns the protection of health systems. Overall, the extensive definitions of ‘medical personnel’, ‘medical units’ and ‘medical transports’ given in Additional Protocol

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9 Ibid., General Comment 14, paragraph 44(a)–(d).

10 Ibid., paragraph 43(d).

11 Ibid., paragraph 43(b) and (c).

12 See e.g. PRIO dataset on battle deaths at: <<https://www.prio.org/Data/Armed-Conflict/Battle-Deaths/>>; and Geneva Declaration, *Global Burden of Armed Violence*, Report, 2008, Chapter 2: “The Many Victims of War – Indirect Conflict Deaths”, at: <<http://www.genevadeclaration.org/fileadmin/docs/GBAV/GBAV08-CH2.pdf>>.

I are a step forward to securing better protection of an existing health system in a country affected by armed conflict. In some cases, a meaning was given to these terms in Additional Protocol I that goes beyond that in the four Geneva Conventions. Taken together, these definitions cover many key features of a well-developed and accessible health system that is required to address the diverse health needs of conflict-affected populations. They can be seen as a specification of some of the core elements of a basic health system that States have to set up under their overarching obligation to fulfil the right to health.<sup>13</sup> In fact, the definitions given by IHL of medical ‘personnel’, ‘units’ and ‘transports’ can even be useful for States to rely on in times of peace, when they engage in planning to progressively build an effective and integrated health system accessible to all. Such an approach would arguably also give effect to States’ IHL peace-time obligations ‘to respect and to ensure respect’ for IHL ‘in all circumstances’,<sup>14</sup> and to take, ‘without delay (...) all necessary measures for the execution of (...) obligations under the Conventions and this Protocol [AP I].’<sup>15</sup> In other words, this is an example of how IHL can complement States’ obligations under the ICESCR in times of peace.

In other areas, a State’s planning obligations under the right to health can complement a State’s obligations under IHL and help to preserve a basic health system in times of armed conflict.<sup>16</sup> This is in particular true for non-international armed conflicts when States act on their own official territory over which their (human rights) jurisdiction is presumed. For example, decisions on the prioritisation of health interventions or the adaptations of existing health plans can be made in situations where resources are limited by domestic authorities in line with the particular situation on the ground, ideally through participatory (democratic) processes. Such prioritisation or adaptation should, depending on the situation, focus on the community-based public health and primary care as encouraged by the minimum core right to health as indicated above. Furthermore, planning obligations under the right to health can offer helpful guidance when it comes to coordinating and integrating the contributions of humanitarian organisations in the area of health care into the procedures of an existing health system; and when it comes to taking priority measures to specifically tackle the massive exodus of health-care personnel that frequently occurs in armed conflicts.

Then there is a restricting aspect of the definitions of medical ‘personnel’, ‘units’ and ‘transports’ in the Additional Protocols that the parallel application of the right to health could ad-

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13 See e.g. Paul Hunt, “Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, UN Doc A/HRC/7/11, 31 January 2008.

14 Common Article 1 of the four Geneva Conventions; Article 1(1) AP I.

15 Article 80(1) AP I.

16 Article 2(1) ICESCR. Planning obligations flow even from the minimum core right to health, see: CESCR, General Comment 14, *op. cit.*, note 8, paragraph 43(f).

dress to some extent. Under the provisions of the Additional Protocols, medical personnel, units and transports have to be 'exclusively assigned to medical purposes by a party to the conflict' and they have to be 'recognised' and 'authorised' by a party to the conflict.<sup>17</sup> Such medical personnel, units and transports benefit from the special protection that IHL grants them, including the obligation on parties to the conflict to pro-actively facilitate their work.<sup>18</sup> Other persons who might engage in medical tasks or improvised medical transports and units will not benefit from such special protection under IHL. This can be problematic in low-income countries, in some of which States might not have taken sufficient steps to build an 'official' health system with the 'recognised and authorised' medical units, transports and personnel envisaged in IHL for whatever reason, including because the State has been unable to assert full control over its territory. In such countries, there might nonetheless be national or international private entities that provide some sort of health care to the population, as case studies from Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Haiti, Palestine and Somalia show.<sup>19</sup> While such 'unofficial' health care providers are of course also protected as civilians and civilian objects under IHL, States' obligations under the right to health would demand of States – in addition to, for example, facilitate their work in whatever way is appropriate in the specific context to guarantee physical accessibility of conflict-affected populations – to offer at least the essential health services contained in the minimum core right to health.

### **3. New Rules on the Protection of Civilians From the Effects of Hostilities**

Even though limited time does not allow me to go into any great detail, a brief discussion follows regarding some of the rules that were new in the Additional Protocols on the conduct of hostilities and their relation to socio-economic rights. The emphasis is on the rules that contribute to limit the destruction of civilian infrastructure, institutions and objects that are essential for individuals to enjoy their socio-economic rights. These limits can be reinforced and, to some extent, clarified by taking the parallel application of socio-economic rights seriously in times of conflict.

First of all, the prohibition of starvation of civilians as a method of warfare is to be named.<sup>20</sup> The International Committee of the Red Cross Commentaries rightly describe this prohibition

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17 Article 8(c) AP I and rule 25 of the ICRC Study on Customary IHL, including commentary (p.83) concerning medical personnel; Articles 9(2) and 12(2) AP I concerning medical units and transports. Concerning non-international armed conflicts, Article 11 AP II does not explicitly include the requirement of authorisation and recognition by a party to the conflict. However, it flows from Article 12 AP II that only authorised and recognised medical units and transports can display the distinctive emblem.

18 Article 15 AP I; Article 9(1) AP II.

19 Enrico Pavignani et al., "Making Sense of Apparent Chaos: Health-Care Provision in Six Country Case Studies", (2013) 95 (889), in: *International Review of the Red Cross*, pp. 41-60.

20 Article 54(1) AP I; Article 14 AP II.



of a 'method of total warfare' as a 'significant step forward'.<sup>21</sup> The protection of 'objects indispensable for the protection of the civilian population' in Articles 54(2) AP I and 14 AP II also contributes to ensuring civilian access to food and water, at the very least to an extent that the *survival* of the civilian population is secured. The same is true for the protection of 'installations containing dangerous forces', including dams, dykes and nuclear electrical generating stations in Articles 56 AP I and 15 AP II.

States' obligations under the human rights to food and water go of course further than these *survival*-focused obligations under IHL for situations where active hostilities are ongoing. Under the right to food and water, States, in their jurisdiction, must ensure that individuals not only have access to the amount of food and water that is needed for them to survive, but that they have *sustainable physical and economic* access to *adequate and nutritious* food and *sufficient clean* drinking water. It can be argued, however, that such more far-reaching obligations are to some extent pushed to the background in situations of active hostilities through the application of the *lex specialis maxim*.<sup>22</sup>

However, the obligations flowing from socio-economic rights are still relevant even in situations of active combat and should influence, for example, the interpretation of provisions in Additional Protocol I defining military objectives<sup>23</sup>, and also the principle of proportionality.<sup>24</sup> It can be argued that far-reaching interpretations of the phrases 'purpose or use' and 'effective contribution to military action' that are part of the IHL definition of a military objective should be rejected when account is taken of the parallel application of socio-economic rights even in situations of active combat. For example, the destruction of a wide range of economic or revenue-generating objects based on equating the phrase 'effective contribution to military action' in Article 52(2) AP I with an effective contribution to the opposing forces' war-fighting or war-sustaining capability<sup>25</sup> would significantly interfere with people's rights to food, water, health, housing, education and work.<sup>26</sup> Even if IHL obligations will be given preference in situations of active combat over obligations flowing from socio-economic rights, it is difficult to accept that such far-reaching 'derogations' from obligations under socio-economic rights can be justified.

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21 ICRC Commentary (op. cit. n.6) to Article 54(1) AP I, paragraphs 2087-88.

22 For the full argument on the function of the *lex specialis maxim* see Müller, op. cit., chapters 2 and 6.

23 Article 52(2) AP I.

24 Articles 51(5)(b) and 57(2)(a)(iii) AP I.

25 US Department of Defense, *US Law of War Manual*, June 2015, paragraphs 5.7.6.2, 5.7.8, 5.7.8.5 and 5.17.2.3, at <<http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf>>.

26 See also the contribution by Laurent Gisel and Marten Zwanenburg in these *Proceedings*.

It can moreover be argued that reasonably foreseeable interferences with socio-economic rights from attacks on certain military objectives – even if their effects materialise only in the medium- or long-term – should be factored into the IHL proportionality analysis when military target decisions are made. This is particularly relevant when so-called dual-use objects are identified as military objectives. Attacks on certain dual-use objects, for instance roads, bridges, industrial complexes and energy generating facilities, often have immense medium- and long-term effects on the ability of individuals to enjoy their rights to health, adequate food, water, work, education, etc. In other words, one could think about taking the various components of minimum core obligations flowing from socio-economic rights, and analyse how an attack on a certain dual-use object would potentially interfere with them. This alone would probably make the medium- and long-term socio-economic effects – often also called reverberating effects – of these attacks more foreseeable, enabling those making targeting decisions to integrate them into the proportionality analysis.<sup>27</sup> Recent analyses show that this is becoming increasingly important for mitigating the devastating effects of urban warfare on the civilian population at a time when many armed conflicts take place in urban settings.<sup>28</sup>

#### **4. Concluding Remarks**

To sum up and conclude: the 1977 Additional Protocols enhanced the protection of life-saving conditions in times of armed conflicts that are essential for conflict-affected populations to enjoy minimum core socio-economic rights. At the same time, taking into account the parallel application of socio-economic rights as set out in the ICESCR and other international and regional human rights treaties brings an additional long-term and systemic perspective into the law applicable in times of armed conflict. By way of the examples given above, it was shown that socio-economic rights can reinforce and complement the Additional Protocols' protective regime of medical care, and that their parallel application to situations of active combat can highlight potential medium- and long-term socio-economic effects of attacks on military objects that should be taken into account in processes of making military targeting decisions.

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27 For more details, see Müller, *op.cit.*, chapter 6.

28 See the contributions to 98 (901) *International Review of the Red Cross* on 'War in Cities' (April 2016).

# THE RELATIONSHIP BETWEEN THE ADDITIONAL PROTOCOLS AND IHRL FROM A STATE'S MILITARY PERSPECTIVE

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## **Summary**

*Léa Bass focused her contribution on the multi-faceted relationship of the European Convention on Human Rights (ECHR or 'the Convention') with the Additional Protocols (AP). The issue of applying the Convention in situations of armed conflicts had already been considered during the negotiations prior to its adoption. As a result, its Article 15 provides for the member States the possibility to derogate to the Convention 'in time of war or other public emergency threatening the life of the nation'.*

*States have however made very little use of this derogation when they have faced armed conflicts on their territory. In addition, few of them had anticipated that the European Court of Human Rights ('the Court') would consider that the Convention would be applicable in times of armed conflicts, in addition to relevant rules of International Humanitarian Law (IHL).*

*The simultaneous application of the APs and of the ECHR has shown positive results when it comes to translating them into operational rules of engagement (1), although the solutions brought by the case law still require maturation (2).*

## **1. A Possible Conciliation through a Flexible Interpretation of the Convention**

### *Conciliation in the case law with regards to administrative detention in the context of international armed conflicts*

*Through a flexible interpretation of the Convention, the Court manages to conciliate fundamental freedoms with IHL when the latter deviates from human rights obligations.*

*This can be demonstrated by the Court's consistent case law regarding the exclusion of detention during an international armed conflict from the list of acceptable justifications to the deprivation of liberty under the Convention (cf. *Al Jeddah v. United Kingdom*). In another instance however, the Court accepted to interpret the Convention in light of the relevant provisions of IHL. That is how new grounds for detention have been added to those exhaustively provided by the ECHR (cf. *Hassan v. United Kingdom*).*

Possible conciliation between the right to life (ECHR, Article 2) and rules governing the conduct of hostilities in the APs

*In addition, the Court may, in some circumstances, take into account IHL rules, including those provided by the APs. It is for example the case when the Court exceptionally has allowed its control to be softened when it comes to the use of lethal force in the framework of Article 2 of the Convention.*

*It is also worth underlining that human rights bodies are usually keener to apply rules related to the conduct of hostilities when the facts that are being assessed happened in the context of 'active hostilities', i.e. when fighting has been intense or when the State does not have full control over its territory.*

*It is nevertheless difficult to derive at this stage clear rules from the Court's case law with regards to the interactions between the Convention and IHL, which are based on different logics.*

**2. Persistent Differences and Uncertainties Brought by the APs' Silence on Certain Issues**

Uncertainties with regards to the application of the right to life and the right to liberty and security

*When it comes to verifying whether the required conditions were met when a State made use of lethal force, the Court has sometimes taken distance from its traditional jurisprudence by applying the IHL principles of distinction and precaution. A limit to the Court's reasoning appeared nonetheless when it stated a condition that was not required by IHL, i.e. that the assessed military operation must respond to a certain danger – which is contrary to IHL logic.*

*The Court subsequently implied that if the respondent State expressly invokes IHL in its defence, it could be taken fully into account in the assessment leading to the judgment. Uncertainty is however even more present for States when it comes to non-international armed conflicts, given the lack of case law in that context.*

*Finally, litigation risks are even higher for States when IHL does not provide for any possible justification for an interference in a human right protected by the Convention.*

### A formalistic approach to the right to privacy

*Turning to the right to privacy, the APs do not provide any legal ground to justify identity controls and other forms of privacy violations in the framework of an armed conflict, whereas the Court requires such violations to be legally justified. As a result, the Court has already condemned States several times for violating Article 8 of the Convention (Khamzayev v. Russia, Esmukhambetov v. Russia). This represents a formalistic approach pertaining to European Human Rights Law, and not to IHL.*

### **3. Conclusions**

*The level of conciliation operated by the Court will highly depend on the arguments put forward by the respondent State during the proceedings leading to the Court's judgment. It appears however that without timely clarifications provided, it is unlikely that States will be able to comply with the Court's requirements in order to take IHL into account while trying to follow the court's jurisprudence.*

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La relation entre les Protocoles additionnels et le Droit international des droits de l'homme suscitent un intérêt particulier au sein des services juridiques du Ministère français des Armées. Elle tend même à devenir un véritable sujet de préoccupation, dans la mesure où nos forces armées opérant à l'étranger expriment le besoin de disposer d'un cadre juridique clair et adapté à la nature des missions qui leur sont confiées.

Je vais me concentrer ici sur les relations entre les Protocoles additionnels et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après CESDH ou « la Convention ») du 4 novembre 1950. En fait, les autres instruments relatifs aux droits de l'homme auxquels la France est partie n'ont pas d'organes de contrôle juridictionnel véritablement comparables à la Cour européenne des droits de l'homme (ci-après CEDH ou « la Cour »). Elle rend des arrêts obligatoires pour les 47 Etats membres du Conseil de l'Europe, qui conduisent leurs gouvernements à modifier leur législation et leur pratique administrative.

La question de l'application de la Convention en période de conflit armé avait été abordée dès les négociations ayant permis son adoption. Les Etats étaient alors convenus que les droits civils et politiques que la Convention énonce continueraient à s'appliquer en période de conflit armé, mais qu'il serait possible, sous conditions, de déroger à certains d'entre eux, particulièrement difficiles à mettre en œuvre dans ce type de situations. L'article 15 de la Convention

permet ainsi aux Etats de déroger à leurs obligations en cas de « *guerre ou en cas d'autre danger public menaçant la vie de la nation* »<sup>1</sup>.

Pourtant, les Etats n'ont que très peu exercé leur droit de dérogation lorsqu'ils ont été confrontés à des conflits armés sur leur territoire. Ils n'avaient, du reste, pas anticipé que la Convention serait considérée par la Cour comme s'appliquant également lorsqu'ils intervenaient militairement à l'extérieur de leur territoire.

Bien souvent, lorsque la Cour a à connaître de faits s'inscrivant dans le contexte d'un conflit armé, les règles du Droit international humanitaire (DIH) et la Convention dans son intégralité sont donc simultanément applicables. Cependant, la jurisprudence récente montre que même en l'absence de dérogation, la Cour est désormais prête à « accommoder » la Convention avec les règles régissant notamment la conduite des hostilités et la détention administrative, propres au DIH.

Il nous est d'ailleurs apparu que dans bien des cas, les résultats de l'application simultanée des Protocoles et de la Convention pouvaient être déclinés sans difficulté dans les directives opérationnelles et les règles opérationnelles d'engagement (1). Toutefois, les logiques de ces deux instruments demeurent différentes. De fait, les solutions dégagées en jurisprudence sont encore assez incertaines et certains aménagements apparaissent encore nécessaires (2).

## **1. Une conciliation possible au moyen d'une interprétation souple de la Convention**

### **A. Une conciliation déjà opérée en matière de détention administrative dans un contexte de conflit armé international**

Dans son arrêt *Al-Jedda c. Royaume-Uni* de 2011, la Cour avait jugé que la détention administrative, ordonnée pour des raisons impérieuses de sécurité en lien avec une situation de

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1 L'article 15 de la CESDH dispose : « 1. *En cas de guerre ou en cas d'autre danger public menaçant la vie de la nation, toute Haute Partie contractante peut prendre des mesures dérogeant aux obligations prévues par la présente Convention, dans la stricte mesure où la situation l'exige et à la condition que ces mesures ne soient pas en contradiction avec les autres obligations découlant du droit international* ». 2. *La disposition précédente n'autorise aucune dérogation à l'article 2, sauf pour le cas de décès résultant d'actes licites de guerre, et aux articles 3, 4 (paragraphe 1) et 7*. 3. *Toute Haute Partie contractante qui exerce ce droit de dérogation tient le Secrétaire général du Conseil de l'Europe pleinement informé des mesures prises et des motifs qui les ont inspirées. Elle doit également informer le Secrétaire général du Conseil de l'Europe de la date à laquelle ces mesures ont cessé d'être en vigueur et les dispositions de la Convention reçoivent de nouveau pleine application* ».

conflit armé, était contraire à la Convention<sup>2</sup>. Cette conclusion est conforme à sa jurisprudence constante, selon laquelle l'article 5 paragraphe 1 de la Convention<sup>3</sup> dresse une liste exhaustive et limitative des motifs autorisant une privation de liberté, au nombre desquels ne figure pas cette forme de détention propre aux situations de conflit armé.

Par la suite, la Grande Chambre de la Cour a toutefois considérablement assoupli cette position dans l'arrêt *Hassan c. Royaume-Uni* du 16 septembre 2014<sup>4</sup>. Elle a ainsi accepté d'interpréter l'article 5 de la Convention à la lumière des règles pertinentes du DIH, comme demandé par l'Etat défendeur. Ce faisant, elle a véritablement ajouté un cas de détention, certes non prévu par la Convention, mais bien établi par les textes de DIH applicables aux situations de conflit armé international (CAI)<sup>5</sup>.

En interprétant la Convention avec une grande souplesse, la Cour peut ainsi réussir à concilier les droits et libertés garantis avec les règles de DIH lorsque celles-ci s'en écartent. De la même manière, la Cour a su parfois concilier l'article 2 de la Convention, qui consacre le droit de toute personne à la vie, avec les principes de distinction et de précaution dans l'attaque au sens des Protocoles additionnels.

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2 CEDH, 7 juillet 2011, *Al-Jedda c. Royaume-Uni*, req. n° 27021/08, paragraphe 110.

3 L'article 5 paragraphe 1 de la CESDH dispose : « 1. Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales :

a) s'il est détenu régulièrement après condamnation par un tribunal compétent ;

b) s'il a fait l'objet d'une arrestation ou d'une détention régulières pour insoumission à une ordonnance rendue, conformément à la loi, par un tribunal ou en vue de garantir l'exécution d'une obligation prescrite par la loi ;

c) s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci ;

d) s'il s'agit de la détention régulière d'un mineur, décidée pour son éducation surveillée ou de sa détention régulière, afin de le traduire devant l'autorité compétente ;

e) s'il s'agit de la détention régulière d'une personne susceptible de propager une maladie contagieuse, d'un aliéné, d'un alcoolique, d'un toxicomane ou d'un vagabond ;

f) s'il s'agit de l'arrestation ou de la détention régulières d'une personne pour l'empêcher de pénétrer irrégulièrement dans le territoire, ou contre laquelle une procédure d'expulsion ou d'extradition est en cours ».

4 CEDH, 16 septembre 2014, *Hassan c. Royaume-Uni*, req. n° 29750/09.

5 Ibid., paragraphe 104.

## **B. Perspectives de conciliation entre le droit à la vie garanti par l'article 2 de la CESDH et les règles régissant la conduite des hostilités établies par les Protocoles additionnels**

Pour mémoire, l'article 2 de la Convention n'autorise l'emploi de la force létale qu'en tout dernier recours et dans des cas limitativement énumérés<sup>6</sup>. Pour invoquer des « actes licites de guerre », il faut en principe que l'Etat exerce son droit de dérogation prévu à l'article 15 paragraphe 2 de la Convention.

Cependant, même en l'absence d'une telle dérogation, la Cour a parfois accepté de faire une entorse à sa jurisprudence classique, particulièrement restrictive, sur l'emploi de la force meurtrière. Habituellement, y compris pour des opérations s'inscrivant dans le cadre d'un conflit armé, elle vérifie si les autorités de l'Etat ont tout fait pour éviter d'utiliser la force létale et pour épargner la vie de toutes les personnes pouvant être affectées par l'attaque en cause, y compris la vie des personnes prises pour cible<sup>7</sup>. Or, dans certaines situations, la Cour a parfois seulement vérifié si toutes les précautions avaient été prises en vue d'éviter et, en tout cas, de réduire au minimum les pertes en vies civiles qui pourraient être causées incidemment, selon la logique propre à l'obligation de prendre des précautions dans l'attaque, posée notamment par l'article 57 alinéa 2 a) ii) du Protocole additionnel I<sup>8</sup>.

Dans son « Guide sur les droits de l'homme en période de conflit armé à l'usage des praticiens » publié en 2016 chez *Oxford University Press*, le Professeur Daragh Murray montre que les organes de protection des droits de l'homme, et la CEDH en particulier, sont plus enclins à appliquer les règles régissant la conduite des hostilités au sens des Protocoles lorsque les faits se sont déroulés dans un contexte d'« hostilités actives », c'est-à-dire, selon lui, lorsqu'il y a

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6 L'article 2 de la CESDH dispose :

« 1. Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi.

2. La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument nécessaire :

a) pour assurer la défense de toute personne contre la violence illégale ;

b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue ;

c) pour réprimer, conformément à la loi, une émeute ou une insurrection ».

7 Voir, notamment CEDH, 27 septembre 1995, *McCann et autres c. Royaume-Uni*, req. n° 18984/91, paragraphe 194.

8 CEDH, 28 juillet 1998, *Ergi c. Turquie*, req. n° 66/1997/850/1057, paragraphe 79 ; CEDH, 6 avril 2004, *Ahmet Özkan et autres c. Turquie*, req. n° 21689/93, paragraphe 297 ; CEDH, 24 février 2005, *Issayeva, Youssoupova et Bazaïeva c. Russie*, req. n° 57947/00, 57948/00 et 57949/00, paragraphe 175 ; CEDH, 15 septembre 2011, *Khamzayev et autres c. Russie*, req. n° 1503/02, paragraphe 178 ; voir également Cordula Droège, « Droits de l'homme et droit humanitaire : des affinités électives ? », in : *Revue internationale de la Croix-Rouge*, vol. 90, n° 871, *Sélection française* 2008, pp. 215-268.



des affrontements intenses, ou bien lorsque l'Etat n'exerce pas un contrôle effectif sur la zone en question. Il relève qu'ils appliquent en revanche les règles classiques sur l'usage de la force en Droit international des droits de l'homme, à mesure que les opérations en cause s'éloignent du lieu même où se déroulent les combats et lorsque les autorités étatiques retrouvent un certain degré de contrôle<sup>9</sup>.

Or, dans une certaine mesure, les règles opérationnelles d'engagement données à nos forces armées reflètent déjà cette logique. Même en période de conflit armé, certaines de nos opérations sont régies par les règles tirées de la jurisprudence classique de la Cour sur l'usage de la force. Ce fut notamment le cas en République Centrafricaine (RCA), dans le cadre de l'opération française Sangaris. Des règles d'engagement très restrictives étaient appliquées par les soldats lorsqu'ils étaient chargés d'opérations relevant davantage du maintien de l'ordre, alors que leur marge de manœuvre pouvait être plus importante dès lors qu'ils se trouvaient dans des zones de confrontation entre les groupes armés organisés.

La Cour peut ainsi parvenir à prendre en compte les règles de DIH, notamment certaines règles des Protocoles additionnels. Il serait cependant prématuré, à notre sens, d'affirmer qu'il est d'ores et déjà possible de dégager des règles claires de la jurisprudence de la Cour concernant les interactions entre ces instruments, qui procèdent tout de même de logiques différentes.

## **2. Des différences et des incertitudes persistantes dans le silence des Protocoles additionnels**

### **A. Incertitudes persistantes quant aux modalités d'application des articles 2 (droit à la vie) et 5 (droit à la liberté et à la sûreté) de la Convention en période de conflit armé non international**

Dans la majorité des affaires soumises à la Cour s'inscrivant dans le contexte de conflits armés et plus particulièrement d'hostilités actives, les Etats ont tenté de justifier le recours à la force militaire par l'un des motifs énumérés à l'article 2 et, bien souvent, par celui visant à « *assurer la défense de toute personne contre la violence illégale* » ou celui visant à « *réprimer une émeute ou une insurrection* ». La Cour s'est certes parfois écartée de sa jurisprudence classique en appliquant les principes de distinction et de précaution au sens du DIH et en ne vérifiant pas si l'usage de la force létale répondait à une menace immédiate. Cependant, elle a quand même, à notre connaissance, toujours vérifié si, comme l'invoquait l'Etat défendeur, l'opération militaire visait à répondre à un certain danger ou à une attaque au moment considéré.

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9 Darragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2016, pp. 88-108.

Or, le DIH ne suit pas la même logique. Le principe de nécessité militaire implique certes que le degré et le type de force employé soient limités à ce qui est nécessaire pour obtenir la soumission de l'ennemi, mais l'usage de la force au sens du DIH ne vise pas nécessairement à répondre à un danger. Il peut aussi viser à affaiblir les forces militaires de l'ennemi.

Il existe ainsi une incertitude sur le point de savoir si la Cour pourrait admettre ce but non prévu par l'article 2 de la Convention en l'absence de dérogation, à la manière de ce qu'elle a fait pour l'article 5 dans l'affaire *Hassan* en ce qui concerne les questions de détention. La question se pose particulièrement dans les situations de conflits armés non internationaux (CANI), pour lesquelles les règles régissant la conduite des hostilités sont en partie de nature coutumière.

Dans l'arrêt *Benzer et autres* du 24 mars 2014, la Cour a évoqué en creux le fait que l'article 2 aurait pu être « concilié » avec les règles du Droit international humanitaire conventionnel et coutumier régissant l'usage de la force dans les CANI, dans d'autres circonstances et si cela avait été plaidé par l'Etat défendeur<sup>10</sup>. Rien n'est moins sûr, mais il semble donc qu'il faille que l'Etat défendeur invoque explicitement l'applicabilité des règles de DIH dans son mémoire en défense pour que la Cour les prenne pleinement en compte. C'est la solution qu'elle a en tout cas adopté quelques mois après dans son arrêt *Hassan* précité, au sujet de la détention administrative, en jugeant qu'elle n'avait « pas à présumer qu'un Etat entend modifier les engagements qu'il a pris en ratifiant la Convention s'il ne l'indique pas clairement<sup>11</sup>».

Cette solution peut être perçue par les Etats défendeurs engagés dans des conflits armés extraterritoriaux comme quelque peu provocatrice, dans la mesure où ils n'ont pas donné compétence à la Cour pour connaître de ces situations extraterritoriales, ni d'ailleurs pour contrôler l'application du DIH. Ceci traduit néanmoins le souhait de la Cour d'être guidée dans ses conclusions et son souci de ne pas qualifier certains faits à l'aune de sa seule Convention.

L'incertitude est cependant encore plus marquée pour les Etats défendeurs en ce qui concerne la détention administrative en période de CANI. La Cour accepterait-elle d'interpréter sa

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10 CEDH, 24 mars 2014, *Benzer et autres c. Turquie*, req. n° 23502/06, paragraphe 184 : « *The Court observes that the Government have limited their submissions to denying that the applicants' villages were bombed by aircraft, and have not sought to argue that the killings were justified under Article 2 § 2 of the Convention. In any event the Court considers that an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society (see Isayeva v. Russia, no. 57950/00, § 191, 24 February 2005), and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts* ».

11 CEDH, 16 septembre 2014, *Hassan c. Royaume-Uni*, op. cit., note 4, paragraphe 107.

Convention à la lumière des dispositions assez succinctes de l'article 3 commun et du Protocole additionnel II, voire de règles coutumières, si cela lui était demandé par l'Etat défendeur ? Dans l'arrêt *Hassan* précité, la Cour n'a pas apporté de réponse à cette question. Elle n'a en effet pas opposé CAI et CANI dans son raisonnement, mais seulement temps de paix et CAI, comme l'illustre ce considérant : « *L'internement en temps de paix ne cadre pas avec le régime des privations de liberté fixé par l'article 5 de la Convention (...) Ce ne peut être qu'en cas de conflit armé international (...) que l'article 5 peut être interprété comme permettant l'exercice de pouvoir aussi étendus*<sup>12</sup>».

Les risques contentieux sont en tout cas sans doute encore plus grands pour l'Etat lorsque les Protocoles ne prévoient aucune procédure à même de justifier une ingérence constatée dans un droit garanti par la Convention. Le Protocole additionnel II ne contient certes que peu d'indications quant aux garanties devant être accordées aux personnes détenues en CANI, mais il a quand même le mérite de contenir des règles applicables à la détention.

## **B. Une approche formaliste du droit au respect de la vie privée et du droit de propriété**

Aucune règle des Protocoles additionnels ne prévoit ni n'encadre en revanche les éventuels contrôles d'identité, les fouilles ou les perquisitions qui peuvent être effectués par les forces armées.

Or, l'article 8 de la Convention, qui garantit le droit au respect de la vie privée, exige aussi que les ingérences dans l'exercice de ce droit reposent sur une base légale. De la même manière, les Protocoles ou les autres textes de DIH n'encadrent pas véritablement, sauf dans des cas bien spécifiques, les ingérences dans l'exercice du droit de propriété garanti par l'article 1 du premier Protocole additionnel à la CESDH, qui doivent elles aussi être prévues par « la loi » au sens de celle-ci. Or, ces deux dispositions ont déjà été invoquées par des requérants dans des affaires s'inscrivant dans le cadre de conflits armés, et la Cour a alors dressé des constats de violation de ces droits, en raison de l'absence de base légale encadrant les ingérences constatées<sup>13</sup>.

Ce fut par exemple le cas dans les affaires *Khamzayev et autres* du 3 mai 2011 et *Esmukhambetov* du 15 septembre 2009, dans lesquelles les domiciles des requérants avaient été détruits au cours d'un bombardement aérien de l'armée russe contre un village tchéchène<sup>14</sup>. L'applicabi-

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12 Ibid., paragraphe 104.

13 CEDH, 29 mars 2011, *Esmukhambetov et autres c. Russie*, req. n° 23445/03, 15 septembre 2011, paragraphe 178 ; CEDH, 19 juillet 2011, *Gubiyev c. Russie*, req. n° 29309/03, paragraphes 79-81 ; CEDH, 3 mai 2011, *Khamzayev et autres c. Russie*, 1503/02, paragraphe 219.

14 Ibid.

lité du DIH n'était pas invoquée par l'Etat défendeur, mais plusieurs dispositions du Protocole additionnel II étaient citées par la Cour au titre du droit applicable dans l'affaire *Esmukhambetov*<sup>15</sup>. Après avoir constaté que les bombardements étaient contraires à l'article 2, la Cour a jugé que les dommages incidents causés aux biens des requérants du fait de l'attaque aérienne étaient constitutifs d'une violation de leur droit au respect de la vie privée et de leur droit de propriété, car il n'y avait pas eu de décision individualisée ou d'ordre indiquant clairement les raisons et les conditions dans lesquelles des dommages pouvaient être infligés à leurs biens et à leurs domiciles<sup>16</sup>.

Il s'agit là d'une logique légaliste ou formaliste, propre au Droit européen des droits de l'homme et non pas au DIH. Faudrait-il que l'Etat défendeur invoque l'applicabilité du DIH, et notamment le principe de proportionnalité dans l'attaque, pour que cette logique soit abandonnée, ou du moins assouplie ? Est-il indispensable au contraire que l'Etat défendeur ait au préalable exercé son droit de dérogation prévu à l'article 15 dans de tels cas, alors même que la Cour a parfois interprété la Convention avec une grande flexibilité, en l'absence de dérogation ? Dans l'affirmative, ce droit de dérogation peut-il être exercé uniquement pour des opérations conduites par un Etat à l'extérieur de son territoire, à l'égard d'une situation de « guerre » qui ne menacerait pas directement la vie de la nation ?

Ce sont autant de questions auxquelles nous n'avons pour le moment pas de réponses certaines. Une chose paraît à peu près sûre en revanche : le degré de conciliation opéré par la

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15 CEDH, 29 mars 2011, *Esmukhambetov et autres c. Russie*, op. cit. note 13, paragraphe 76, citant les articles 13, 14 et 17 du Protocole additionnel II aux Conventions de Genève.

16 Ibid. On peut citer notamment cet extrait surprenant de l'arrêt *Khamzayev et autres* du 3 mai 2011 : « 218. [i]n the present case, the Court considers that the legal instrument in question, formulated in vague and general terms, cannot serve as a sufficient legal basis for such drastic interference as the destruction of an individual's housing and property. For the same reasons, the Court is also unable to regard General Major Sh.'s order no. 04 (...) as a sufficient legal basis for the interference with the relevant applicants' rights secured by Article 8 and Article 1 of Protocol No. 1. While directing the federal forces to destroy military targets, such as illegal fighters' bases, ammunition depots, etc, this order does not appear to have specifically authorized the federal servicemen to inflict damage on the first two applicants' property and the third applicant's home, and, in any event, it clearly contained no guarantees against an arbitrary use of force that might result in damage to, or destruction of, an individual's private property and home. 219. The Court thus concludes, in view of the above considerations and in the absence of an individualized decision or order which clearly indicated the grounds and conditions for inflicting damage on the first two applicants' property and the third applicant's home, and which could have been appealed against in a court, that the interference with the first two applicants' rights under Article 1 of Protocol No. 1 and the third applicant's rights under Article 8 of the Convention was not "lawful" within the meaning of the Convention. In view of this finding the Court does not consider it necessary to examine whether the interference in question pursued a legitimate aim and was proportionate to that aim ».

Cour entre les Protocoles additionnels et la Convention dépendra en grande partie des arguments juridiques invoqués par l'Etat défendeur, comme de ses explications factuelles.

Or sur ce dernier point, la Cour semble particulièrement exigeante. L'article 38 de la Convention met à la charge des Etats une obligation de fournir les éléments de preuve qu'elle sollicite<sup>17</sup>. Dans plusieurs affaires relatives à des situations de conflit armé, la Cour a ainsi cherché à se voir communiquer des plans de vol, des copies des ordres donnés et a jugé que les Etats défendeurs ne pouvaient se contenter de seulement invoquer les renseignements dont ils disposaient au moment considéré.

A l'occasion de l'affaire *Janowiec c. Russie* du 21 octobre 2013, la Grande chambre de la Cour a notamment rappelé que lorsqu'un Etat invoquait la confidentialité ou des considérations de sécurité nationale pour justifier son refus de produire les pièces sollicitées, la Cour devait vérifier s'il existait des raisons légitimes et solides de traiter les documents en question comme étant secrets ou confidentiels. Dans le cas contraire, la Cour juge qu'elle peut alors tirer du refus des autorités des « *conclusions quant au bien-fondé des allégations des requérants* ». <sup>18</sup>

Un nouveau champ contentieux s'est ainsi développé et il apparaît clairement que sans certains assouplissements et certaines précisions, les Etats défendeurs seront rarement en mesure de se conformer aux exigences de la Cour. Ceci, quand bien même ils s'attacheraient à respecter les règles de DIH tout en prenant en compte, autant que faire se peut, sa jurisprudence.

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17 L'article 38 de la CESDH dispose : « *La Cour examine l'affaire de façon contradictoire avec les représentants des parties et, s'il y a lieu, procède à une enquête pour la conduite efficace de laquelle les Hautes Parties contractantes intéressées fourniront toutes facilités nécessaires* ».

18 CEDH, 21 octobre 2013, *Janowiec et autres c. Russie*, req. n° 55508/07 et 29520/09, paragraphe 202.

## Q&A SESSION

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At the end of this second session of the Colloquium, questions were raised by the audience on the following issues:

### **1. The Obligation for States to Invoke IHL before IHRL Bodies**

A speaker commented on the issue of the application of the law of armed conflict by human rights bodies and insisted on the obligation of States to invoke International Humanitarian Law (IHL) if they want to rely on its rules. This is not an unreasonable requirement coming from a court which has on some occasions relied on third party interventions to build its reasoning on the combined application of IHL and International Human Rights Law (IHRL). Where there will be a problem is when it comes to non-international armed conflicts (NIAC), where the issue is not human rights law but rather the absence of rules you can point to in a treaty and in particular in Additional Protocol (AP) II. There is nothing there, for example, on targeting members of armed groups nor on internment in the case of a NIAC.

A participant in the audience then asked whether the Court requiring States to invoke IHL to justify their violations of IHRL could be reconciled with the principle of systemic integration, which requires that any rule of international law relevant to the relations between parties has to be taken into account.

A speaker replied by emphasising how that principle of systemic integration is by itself already confusing, as many different understandings of this notion exist. One possibility is that it would mean that obligations in one sphere should not conflict with obligations in another sphere. That is a universal feature that exists in all legal systems, including national ones. The issue is that it is perfectly possible for two bodies of law to come up with totally different conclusions. The only court that ought to ensure some systematic integration is the International Court of Justice (ICJ), unlike human rights bodies, which can only make a finding of a violation of human rights law. Thus the ICJ does not have the ability to determine whether there has been a violation of the law of armed conflicts (LOAC). It may however, when reaching a conclusion on whether there has been a violation of human rights law, inform itself from the law of armed conflicts. Two different aspects need to be distinguished:

- According to the speaker, it would be wrong, for a human rights court, to modify its interpretation of human rights law where the State has not sought to obtain it. A State is always free to choose to be judged by higher standards – insofar as human rights law is a higher standard.

- What human rights bodies should do is indicate either that there is an armed conflict but the State did not choose to rely on IHL, or say – without reaching a conclusion – that they do not take any position on whether the State could have invoked the law of armed conflict or not, and note, if that is the case, that it has not. The danger in saying that it depends whether the State relies on it, is to give the impression that the applicability of LOAC depends on whether the State is willing to concede it.

## **2. Human Rights Violations by Armed Groups on the Territory of a State Party to the Conflict**

A participant inquired on whether there can be shared responsibility between a State and an armed group if the latter commits a human rights violation on the territory of that State.

A speaker replied that when an organised armed group is in effective control of a territory, and is exercising effective governmental functions, it is appropriate to speak of human rights obligations of armed groups even though no court could judge it, as a court can only judge States. If it is not the case, then there is no human rights obligations borne by the group, and the State has the obligation to protect individuals from violations. If, however, the armed group is under the effective control of an external player, the European Court of Human Rights found that that State should be blamed. Beyond these specific circumstances, we are looking at domestic criminal law and civil proceedings, as well as international criminal law.

## **3. The Best Legal Regime to Apply to Detention in Armed Conflict**

A participant asked which regime to apply when somebody is detained, as IHL cannot be derogated to, contrary to IHRL.

According to a speaker, it is clear that on condition that the State pleads LOAC, for IAC they will use Geneva Convention (GC) III and GC IV for the architecture of the detention regime even if they use human rights law on specific questions. When it comes to NIAC, it would be much more difficult, as there is nothing a State can point to, enabling it to intern: it will then have to argue that it has to be implied by AP II – which is rather difficult – or it has to claim it is customary. It is easy when you are dealing with a treaty provision to see which State is bound, but in the case of customary law, the State has to demonstrate first that it is customary law, secondly what the formulation of the custom is.

For the speaker, something else worth emphasising is that in the Hassan case, the European Court of Human Rights said that in order to rely on LOAC in a NIAC, States had to have derogated from their HRSL obligations. States are very lucky that the Court did not say that for

IAC, and it is possible that the Human Rights Committee and other international human rights bodies may decide differently from Strasbourg in the case of an IAC.

Selon un autre orateur, il conviendrait dans cette situation de choisir le cadre juridique du Droit international humanitaire (DIH). A titre d'exemple, elle donne le cas de la France qui est un Etat engagé dans des conflits armés extraterritoriaux et n'a pas d'autre fondement pour pratiquer la détention. De plus, quand bien même il existerait une base juridique en droit interne pour recourir à la détention administrative, il n'est pas du tout certain que la Cour accepterait d'ajouter un cas de détention non prévu, étant donné que la détention administrative n'existe pas dans l'article 5 de la Convention et qu'elle le ferait sur la base d'une loi interne, ce qui a moins de chance d'arriver qu'en vertu du DIH, dont elle pourrait s'accommoder à la lumière du reste. Si on appliquait exclusivement le régime des droits de l'homme, il faudrait présenter le plus tôt possible la personne à un juge, lui octroyer l'accès à un avocat et à d'autres garanties, ce que l'on ne pourrait matériellement pas faire dans le cas d'un conflit armé extraterritorial.

#### **4. The Direct Participation in Hostilities and Law Enforcement Paradigms**

A participant enquired on how the European Court of Human Rights would accommodate the targeting of people directly participating in hostilities (DPH) under law enforcement paradigms in NIAC. Would that cover all DPH acts?

According to a speaker, the issue with the Strasbourg Court is that its jurisprudence on the protection of right to life outside of armed conflicts is not very clear. When it comes to the death penalty, it should be made an exception in using the term 'civilians' in peace time: a human rights body should not use the term 'civilian' unless it has said it uses LOAC – it is then just 'people'. The issue with the Court is that it fudges parts of the reasoning for its own convenience: see the Isayeva case, which is about air strikes in peace time against a convoy. The Court does not want to assess whether the operation is lawful and therefore holds the State responsible for the subsequent deaths, requiring them to act far beyond their normal obligations.

There are therefore judgments where the decisions to open fire are not challenged when the person that opens fire is taking a direct part in hostilities. They may challenge the application of proportionality and precautions but that is based on case law from south eastern Turkey and Chechen cases, which is very unsatisfactory case law as there are fudging questions. It would be better for the Court to express why it does not want to address the issue of whether it was lawful to open fire as it would make a finding on proportionality. At the moment, it gives the



impression that the decisions to open fire are fine, but that is why actual DPH would be very hard to be completely dealt with by Strasburg.

## **5. Socio-Economic Rights and the Cholera Epidemics in Yemen**

A participant enquired on how the legal framework governing socio-economic rights would affect what is currently occurring with regards to the cholera epidemics in Yemen.

The speaker emphasised that the epidemics show that indirect and long-term effects on health are very serious. It is a collective failure: it is not only the responsibility of the State and the armed groups who violate IHL and human rights law very obviously, but also of the international community to put sufficient pressure – which would flow from IHL but also from IHRL when it comes to the obligations of international cooperation and assistance. However, obligations stipulated by international law are very broad and it would be very difficult to disentangle everyone's responsibility in a particular case.



## Panel Discussion

# Accountability for Serious Violations of IHL under the Additional Protocols

Chairperson: **Paul Berman**  
*Council of the EU*

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### CIVILIANS AS THE OBJECT OF DIRECT ATTACK – A MATTER OF PRINCIPLE AND EVIDENCE

**Geoffrey Henderson**

International Criminal Court

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#### **Résumé**

*Dans le cadre de cette table ronde relative aux violations du Droit international humanitaires (DIH), Geoffrey Henderson présente, dans une perspective centrée sur la justice pénale internationale, quelques éléments d'interaction entre le Statut de Rome fondant la compétence de la Cour pénale internationale (CPI), et certaines interdictions découlant des Protocoles additionnels, et ce particulièrement en ce qui concerne les crimes de guerre.*

*L'exposé se concentre ainsi sur la manière dont le principe de distinction a été incorporé dans le Statut de Rome, et la condition selon laquelle les actes dirigés contre une population civile doivent être commis intentionnellement afin de pouvoir être qualifiés de crime de guerre.*

*Selon le Statut et l'interprétation donnée par la jurisprudence à l'élément intentionnel de cette infraction, le crime doit avoir été commis délibérément – c'est-à-dire qu'il ne peut avoir été commis par imprudence ou négligence. Il n'est cependant pas clair s'il est pertinent de savoir dans quelle mesure il y avait connaissance du fait que les civils auraient été dans tous les cas objets de l'attaque, qu'il y ait eu ou non négligence.*

*Par ailleurs, il est important de garder à l'esprit que les faits qui sont traduits en justice sont peu susceptibles d'une interprétation tranchée : il est rare que l'intention criminelle soit aussi évidente étant donné qu'en réalité, la plupart des cibles sont légitimes, c'est-à-dire soit militaires, soit mixtes (militaires et civiles à la fois). Dans ce dernier cas, et dans l'éventualité où la majorité des victimes seraient civiles, il est possible d'invoquer l'existence d'un crime distinct – qui n'est toutefois prévu par le Statut de Rome que dans le cas de conflits armés internationaux : celui de diriger intentionnellement une attaque vers une cible tout en sachant qu'elle causera*

*des dommages collatéraux excessifs. S'agissant de conflits armés non internationaux, l'unique éventualité en termes de poursuites réside dans la qualification des faits comme attaque intentionnelle contre des civils. Il n'est ainsi pas aisé de déterminer la réelle intention de l'auteur des faits, en raison du manque de preuves, lesquelles sont limitées à des éléments circonstanciels peu susceptibles d'établir les faits au-delà de tout doute raisonnable.*

*Afin de résoudre cette question épineuse, certaines juridictions ont tenté d'interpréter largement le crime d' « attaque contre des populations civiles », en décidant de le faire équivaloir à celui d'attaques dites « indiscriminées ». C'est notamment le cas du Tribunal pénal international pour l'ex-Yougoslavie, qui a exprimé pour la première fois cette idée, ainsi que de la CPI, qui a toutefois nuancé ce constat en indiquant qu'il existe une distinction juridique claire entre les attaques contre des populations civiles, et celles que l'on qualifie d' « indiscriminées ». En effet, l'élément moral requis dans le cadre de ces deux infractions est fondamentalement différent : l'intention dans le cadre de la première, et la négligence dans le cadre de la seconde. Il est en conséquence quelque peu difficile de concevoir dans quelle mesure la preuve d'une attaque indiscriminée puisse avoir de valeur probatoire également dans le cadre d'une intention délibérée de viser des populations civiles.*

*Il apparaît en outre que, comparé au contenu du Protocole additionnel I, un crime est absent du Statut de Rome : celui de lancer des attaques indiscriminées, un crime de guerre qui se situerait à mi-chemin entre l'attaque dirigée intentionnellement contre des civils et le fait de causer délibérément et de manière disproportionnée un dommage collatéral. En raison de l'absence de cette incrimination dans le Statut, reste ouverte la question de savoir si une attaque indiscriminée devrait être assimilée à l'un des deux crimes mentionnés ci-dessus. L'interdiction par le Protocole I tant des attaques indiscriminées que des attaques disproportionnées est également sujette à discussions.*

*Pour conclure, Geoffrey Henderson insiste sur l'incertitude existant autour de l'utilisation des preuves relatives aux attaques indiscriminées pour poursuivre un second crime qui est celui d'attaquer délibérément des populations civiles. Les circonstances des affaires dans lesquelles ces deux crimes ont été assimilés, ainsi que les éléments de preuves y afférents, sont extrêmement spécifiques et ne justifient aucunement l'établissement d'une règle générale à cet égard.*

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Earlier today the lack of universal ratification of the Additional Protocols, as compared to the Geneva Conventions, and challenges related to the scope of application, were highlighted. Although many of the State parties of the International Criminal Court (ICC) have not ratified one or both of the Protocols, the question of whether Additional Protocol II, for example, was applicable to a particular non-international armed conflict – either because it was not ratified

by the relevant State, or the government forces were not involved (as required by Article 1 of Additional Protocol II) – does not affect the Court’s ability to prosecute and adjudicate alleged violations of the prohibition to make civilians the object of attack, as laid down in Article 13(2) of this Protocol. By incorporating in the Rome Statute as war crimes certain conducts when committed during non-international armed conflicts, the State parties gave the ICC jurisdiction over them irrespective of the application of the Additional Protocols, as they are part of customary International Humanitarian Law.

The relevance of the Additional Protocols is nonetheless evident when looking at Article 8, the war crimes provision of the Rome Statute. The fact that certain conduct is included as a war crime for international armed conflicts but not for non-international armed conflicts directly follows from the fact that an explicit prohibition was included in Additional Protocol I but not in II. The war crime of attacking civilian objects (Article 8(2)(b)(ii)) and of causing disproportionate collateral, or incidental, damage (Article 8(2)(b)(iv)), both included only for international armed conflicts, are cases in point here. That does not mean that Article 8 is entirely consistent in this regard, as the prohibition to starve the civilian population is found in both Protocols,<sup>1</sup> yet it only made its way into the Rome Statute as a crime when committed during international armed conflicts: in Article 8(2)(b)(xxv).<sup>2</sup>

Today, however, I want to focus on the way the principle of distinction is incorporated in the Rome Statute. This is one of the cornerstones of humanitarian law: belligerents shall not attack civilians. It also holds pride of place in both Additional Protocol I (article 51(2)) and II (article 13(2)), which contain the identical, simple, provision: *The civilian population as such, as well as individual civilians, shall not be the object of attack.*

This same cardinal rule is also reflected in the Rome Statute. In particular, Article 8(2)(b)(i) and Article 8(2)(e)(i) make it a war crime to *‘[i]ntentionally direct attacks against the civilian population as such or against individual civilians not taking part in hostilities.’*

It all seems very straightforward and uncontroversial, the only difference with the underlying prohibition being the mention that the attack has to be intentionally directed. This clarification is, of course, required because someone can only be held individually responsible under criminal law if he or she had the relevant intent to enter into a certain conduct or bring about a certain result. However, the specification that the attack has to be ‘intentionally directed’

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1 Article 54(1) of Additional Protocol I and Article 14 of Additional Protocol II.

2 See further Rogier Bartels, “Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future” 48(2015), in: *Israel Law Review*, pp. 281-307.

also serves to distinguish such attacks from those directed against military objectives which accidentally, because of a missile going astray for example, cause civilian harm; or attacks that cause incidental civilian harm. Causing disproportionate, or excessive, incidental harm to civilians is included in the Rome Statute as a separate crime, under Article 8(2)(b)(iv). What I would like to focus on today, though, is the required mental element that needs to be proven under the Rome Statute for the crime of attacking civilians, and briefly discuss some of the evidentiary challenges this poses in practice.

The Elements of Crimes, which, according to Article 9 of the Statute shall assist us in the interpretation and application of Article 8, state that, not only must the civilians have been the actual object of the attack, but the perpetrator must also have '*intended*' the civilian population as such or individual civilians not taking direct part in the hostilities to be the object of the attack. Article 30 of the Statute, and the case law so far, clarify that a crime must have been deliberately committed, meaning that the perpetrator's action must have been deliberate and, in case of a consequence, that he or she meant to cause the consequence or was aware that it would occur in the ordinary course of events. In other words, it is clear that the crime of attacking civilians cannot be committed recklessly or through negligence. Less clear is what to do with the awareness that civilians would be the object of an attack in the ordinary course of events.

It is easy to think of examples of attacks against a civilian population or individual civilians that are obviously criminal. In practice, however, the cases that actually come to trial are usually less clear-cut. This is because in most real-life cases the nature of the target is mixed, or legitimate targets and protected persons and/or objects are located side by side, and in the course of a trial the accused are likely to argue that the attackers were actually aiming for the enemy combatants, even though the bulk of the eventual casualties turned out to be civilian.

The latter may still qualify as a separate crime. In particular, the Rome Statute criminalises intentionally directing attacks in the knowledge that they will cause excessive incidental loss of life or injury to civilians (Article 8(2)(b)(iv)). However, besides it still being problematic to determine the *ex-ante* knowledge of the attacker, this crime only exists in the context of an international armed conflict. So in cases taking place in a non-international armed conflict – and most conflicts nowadays are non-international and indeed most situations before the Court have been determined to be non-international armed conflict – the charge of an intentional attack against civilians may be the only available option for the prosecution.

As one can imagine, it is not easy to determine, in such mixed situations, who the attacker was targeting. Both the information available to the attacker at the time of ordering the strike, as well as his or her intent, are hard to come by. More often than not, the commander in charge

of the operation in the field will not be available for questioning and even if they are, they are likely to deny having deliberately aimed kinetic force at civilians. In most cases, the available evidence will be limited to circumstantial evidence. Usually we will be invited to draw inferences from the way in which the attack was carried out and the effects it had on civilians. In many cases, however, such circumstantial evidence will be fairly imprecise and indeterminate. It may thus be difficult to make the sort of conclusive findings that are necessary to satisfy the exacting standard of proof beyond reasonable doubt on this basis.

In an attempt to overcome this evidentiary problem, some chambers have ventured to widen the definition of the crime of attacking civilians by essentially equating it with indiscriminate attacks. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber in *Galic* held that ‘indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, *may qualify as* direct attacks against civilians.’<sup>3</sup> Unhappy with what seemed like a legal shortcut, the defendant appealed. The Appeals Chamber upheld the decision, but only after clarifying that ‘[t]he Trial Chamber’s finding that disproportionate attacks *may* give rise to *the inference* of direct attacks on civilians is therefore a justified pronouncement on the *evidentiary effects* of certain findings, *not a conflation* of different crimes.’<sup>4</sup> It also approved the proposition that ‘a direct attack can be inferred from the indiscriminate nature of the weapon used.’<sup>5</sup>

Similar reasoning can be found in the ICC case of the *Prosecutor v. Germain Katanga*. In this case, the trial chamber held that ‘indiscriminate attacks (...) may qualify as intentional attacks against the civilian population’.<sup>6</sup> However, the Chamber did not intend to instate legal equivalence between the two concepts, as it recognised that ‘an indiscriminate attack does not (...) automatically constitute an attack against the civilian population (...) as the subjective element is decisive (...)’.<sup>7</sup> Legally speaking, then, the two forms of conduct (attacking civilians and indiscriminate attacks) are distinct.<sup>8</sup> Although both enforce the principle of

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3 ICTY, Trial Chamber I, *Prosecutor v. Galic*, “Judgement”, 5 December 2003, IT-98-29-T, paragraph 57.

4 *Ibid.*, 30 November 2006, IT-98-29-A, paragraph 133.

5 *Ibid.*, 30 November 2006, IT-98-29-A, paragraph 132.

6 *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute”, 7 March 2014, ICC-01/04-01/07-3436, paragraph 802.

7 *Ibid.*

8 Perhaps some of the confusion stems from the advisory opinion of the International Court of Justice, where the Court rightly said that ‘[S]tates must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets’, in: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, paragraph 78. However, it is important to bear in mind that this is an opinion dealing with State responsibility and that one cannot simply transfer this finding lock, stock, and barrel into the realm of individual criminal responsibility, where there are specific *mens rea* requirements.

distinction between combatants and civilians, utilising indiscriminate methods of warfare in a situation where civilians are, or may be expected to be, present, and a strike would thus impact on civilians, is also a violation of the precautionary principle and the principle of proportionality. Neither of these principles comes into play when dealing with an attack that is intentionally directed against civilians. More important, for our current purposes, is that the mental element that is required for attacking a civilian population (i.e. direct intent) is very different from the one that must be proved in the context of an indiscriminate attack (i.e. recklessness, negligence, wilful blindness or even omission).<sup>9</sup>

One may thus wonder whether evidence that an attack on a military target is indiscriminate can ever prove, by itself, a specific intent to target civilians. Even if we imagine a situation where the number of civilian casualties far outweighs the military advantage of destroying a military objective, this in itself does not prove that the officer launching the attack *intended* to harm the civilians. It is, of course, conceivable that the officer intended to target both military and civilians objectives with one and the same attack. In such a scenario the attack would have two parallel but independent 'primary objectives'. However, this kind of scenario is probably rather exceptional. It is far more likely that evidence of an indiscriminate attack shows that the commanding officer did not do the required due diligence before ordering the attack or that he or she overlooked important intelligence about the target. We may wonder then whether failing to take the relevant precautions can lead to a finding that someone deliberately meant to make civilians the object of an attack. Another plausible inference might be that the officer did reasonably foresee the civilian casualties but did not apply the proportionality principle appropriately. The difficulty in practice is to identify the correct inference and to determine whether or not it is the only reasonable one.

If we compare the structure of Article 51 of Additional Protocol I, it seems as if a crime is missing in the Rome Statute. One that should be situated between intentionally directing an attack against civilians and knowingly causing disproportionate incidental damage, namely the war crime of launching indiscriminate attacks. Naturally, Article 8 includes a war crime for the use of certain weapons which are deemed to be inherently indiscriminate (Articles 8(2)(b)(xx)), which has been partially incorporated for non-international armed conflicts (Article 8(2)(e)(xiii) and (xiv) for poisonous weapons and gas), but the actual launching of an indiscriminate attack is not mentioned as such. In the absence of such a provision, and in light of the issues related to the mental element required for Article 8(2)(b)(i), it can be considered open to debate whether an indiscriminate attack should fall under the crime of intentionally directing an attack against civilians or of knowingly causing excessive incidental damage.

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9 See, for a thoughtful discussion of this issue, Jens David Ohlin, "Targeting and the Concept of Intent", in: *Michigan Journal of International Law*, Vol. 35, (2013), pp. 79-130.



Irrespective of the answer to this question for international armed conflict, it is further open to debate whether both indiscriminate attacks and disproportionate attacks may fall under Article 8(2)(e)(i) when committed during a non-international armed conflict. While this was possible at the ICTY, the fact that separate crimes have been included in Article 8(2)(b) seems to indicate that this ought not to be done.<sup>10</sup>

In conclusion, unless it is accepted that there is legal equivalence between direct attacks against civilians and indiscriminate attacks – which, as I briefly discussed, is problematic from a legal and methodological point of view –, it is far from certain whether there is much to be gained by charging the former when there is only evidence for the latter. This is not to say that it will never be possible to infer the intent to attack civilians from the way in which the attack was carried out, as some of the existing case law demonstrates. But it is important to be aware that the circumstances of these cases were very specific and that there was usually other evidence to support the conclusion. And it is important to resist the tendency, which we sometimes observe in international criminal law, to jump on a few exceptional cases to formulate a general rule that attacks directed against civilians and indiscriminate attacks are so similar that the specific intent that is required for the former can be inferred from the *actus reus* of the latter.

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<sup>10</sup> For a discussion, see Rogier Bartels, “Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials” 46(2013), in: *Israel Law Review*, pp. 295-296.

# ROLE AND CHALLENGES FOR THE APS IN ENSURING PROPER ACCOUNTABILITY

**Yasmin Naqvi**

UN Mechanism for International Criminal Tribunals

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## **Résumé**

*Dans le cadre de cette table ronde relative aux violations graves du Droit international humanitaire (DIH), Yasmin Naqvi met en évidence les innovations apportées par les Protocoles additionnels en ce qui concerne l'obligation de rendre des comptes à la suite de telles violations (1), ainsi que les problèmes identifiés à la suite de ces nouvelles règles introduites par les protocoles (2).*

### **1. Les innovations apportées par les Protocoles additionnels et leur efficacité**

*Les dispositions nouvellement introduites par le Protocole additionnel I (PA I) en son article 85 ont étendu la liste des violations graves donnant lieu à une responsabilité pénale individuelle:*

- *Cette disposition prévoit désormais que toutes les violations graves contenues dans les Conventions de Genève constituent également des violations du PA I si elles sont commises contre certaines catégories de personnes protégées.*
- *Un acte intentionnel ou une omission qui met sérieusement en danger la santé mentale ou physique ou l'intégrité de toute personne qui se trouve entre les mains d'une partie autre que celle dont elle dépend a également été érigé en violation grave du Protocole.*
- *En troisième lieu, un certain nombre de violations du « droit de La Haye » ont été érigées en violations graves dans le cas où elles sont commises intentionnellement et qu'elles causent la mort ou un dommage sérieux corporel ou à la santé. C'est notamment le cas d'attaques indiscriminées conduites en connaissance du fait qu'elles causeraient de manière excessive des pertes humaines, des blessures ou des dommages à des biens civils.*
- *Enfin, d'autres violations du DIH ont été transposées en violations graves lorsqu'elles sont commises intentionnellement, tel le transfert par une puissance occupante de parties de sa propre population civile vers le territoire occupé.*

*La liste de crimes additionnels est ainsi longue, mais il est important de noter que les juridictions internationales ne basent pas leur raisonnement pour déterminer si un comportement constitue un crime de guerre sur la liste des violations graves contenues dans les Conventions de Genève ou dans le Protocole I. Ceci peut cependant avoir des répercussions positives sur le développement du droit pénal international, comme le montrent les affaires Galić et Dragomir Milosević où les*

*actes de violence dont le but premier est de semer la terreur au sein de la population civile ont été considérés comme un crime de guerre relevant du droit international coutumier.*

*Le Protocole additionnel II, malgré l'absence de disposition équivalente à l'article 85 du PA I, a permis un développement significatif du droit international pénal étant donné que la responsabilité pénale individuelle découlant de la violation des obligations prévues par le Protocole a été jugée comme implicitement prévue, d'abord par le Conseil de Sécurité des Nations unies dans le cadre du Tribunal pénal international pour le Rwanda, ensuite par le Tribunal pénal international pour l'ex-Yougoslavie dans le cadre de son arrêt Tadić, où il a été reconnu que le droit coutumier international imposait une responsabilité pénale pour les violations graves de l'article 3 commun.*

*Pour le surplus, un nombre important d'Etats ont également mis en œuvre dans leur juridiction nationale un cadre normatif criminalisant les violations des Protocoles additionnels, et en outre créé des mécanismes juridiques pour prévenir les violations graves du DIH, et ce en matière de conflit armé tant international que non international.*

## **2. Les questions liées aux nouvelles règles introduites**

*L'un des problèmes majeurs quand il s'agit d'assurer la responsabilité pour violation des dispositions nouvellement introduites par les Protocoles, est le manque de précision de celles-ci. Elles ne sont ainsi pas directement transposables en incriminations pénales. La question se pose particulièrement dans le « droit de La Haye ».*

*Un autre défi crucial réside dans les difficultés rencontrées afin de rendre plus opérationnelles les dispositions relatives à l'établissement d'une Commission internationale humanitaire d'établissement des faits, dotée d'un mandat spécifique pour investiguer les violations du DIH. Cet organe existe toutefois bel et bien, et il ne revient qu'à la bonne volonté des Etats d'en faire usage – au lieu de créer de nouvelles institutions ad hoc aux mêmes fins.*

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## **1. What Were the Innovations in Accountability Introduced by the Protocols and how Effective Have they Been?**

One of the important innovations introduced by the Protocols was the extension of the list of grave breaches giving rise to individual criminal responsibility in Article 85 of Additional Protocol (AP) I. To be absolutely clear, AP I stated that these grave breaches *shall* be regarded as war crimes. There were four different components to this extension.

First, Article 85 provided that all the grave breaches in the Geneva Conventions are also breaches of the Protocol if committed against certain protected categories of people. This was important since the scope of the application of AP I extended the concept of international armed conflict to wars of national liberation movements fighting against colonial rule, alien occupation or racist regimes in the exercise of self-determination.

Second, Article 11 made a wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a party other than the one on which they depend, a grave breach of this Protocol.

Third, AP I made a number of violations of the so-called 'Hague Law' grave breaches when committed wilfully, and causing death or serious injury to body or health:

- making civilians the object of attack;
- indiscriminate attacks knowing they will cause excessive loss of life, injury or damage to civilian objects;
- attacking works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- making non-defended localities and demilitarised zones the object of attack;
- making a person the object of attack in the knowledge that he/she is *hors de combat* ; and
- perfidious use, in violation of Article 37, of the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun or of other protective signs recognised by the Conventions or this Protocol.

Fourth, AP I defined certain other International Humanitarian Law (IHL) violations as grave breaches if committed wilfully:

- 'the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (...);
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- making the clearly-recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organisation, the object of attack, causing as a result extensive destruction thereof (...); and

- depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

So this is a rather long impressive list of additional crimes. But how useful has this exercise really been? As we know, international courts have not based their determination of which violations of IHL are war crimes on the list of grave breaches in the Geneva Conventions or AP I. Rather, courts have looked at whether a violation of IHL is serious, whether it is prohibited in customary international law, and whether it entails individual criminal responsibility. While being on the Article 85 list would certainly help prove these elements of a specific IHL rule, it is by no means determinative. That courts have not felt themselves constrained by what the APs determined were war crimes has been positive from the view of the development of international criminal law. For instance, in the *Galić* and *Dragomir Milošević* cases, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that Article 51(2) of AP I (acts of violence the primary purpose of which is to spread terror among the civilian population) was customary in nature and a war crime.

Moreover, if a customary international law approach were not taken, there would not be any recognised war crimes in non-international armed conflicts, since Additional Protocol II contains no list of war crimes equivalent to AP I. During the negotiations on war crimes at Rome for the Statute of the International Criminal Court (ICC), there was no disagreement that the norms laid down in the Hague Conventions and Regulations of 1907 gave rise to individual criminal responsibility under customary international law. This was not, however, the case for the extended list of grave breaches laid down in AP I. Ultimately, the ICC Statute provides for jurisdiction over 26 separate serious violations of IHL committed in an international armed conflict (Article 8(2)(b) ICC Statute). So while Article 85 was a step forward in 1977, and it no doubt helped to inform the content of Article 8 (war crimes) of the Rome Statute, it has only worked because courts have not taken it too literally.

As for AP II, one might be tempted to say there were no innovations in terms of accountability since there is no equivalent to Article 85 of AP I setting down war crimes. But this ignores the enormous service AP II did for international criminal law. In 1994, the United Nations Security Council considered that criminal responsibility for violations of this Protocol was implicit in the obligations it established, and gave the International Criminal Tribunal for Rwanda jurisdiction over such violations. Although the ICTY was not given the same specific competence, the Tribunal decided in the *Tadić* case that customary international law imposes criminal liability for serious violations of common Article 3 and that it had jurisdiction over such violations. The ICTY in the *Tadić* case found a way around the lack of an accountability mechanism in the Geneva Conventions and AP II by focusing on international customary law.

Article 3 ICTY Statute is a 'residual clause' which establishes jurisdiction over any serious violation of IHL not covered by Articles 2 (grave breaches), 4 (genocide), or 5 (crimes against humanity) of the Statute. The jurisprudence of the Tribunal has consistently held that for an offence to fall under the scope of Article 3 ICTY Statute, four conditions must be met: (i) the violation must constitute an infringement of a rule of IHL; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

AP II played a role there, since the 'fundamental guarantees' in Article 4 were interpreted as 'serious', thereby fulfilling criterion 1 of the *Tadić* test. Secondly, since the rules were laid down in AP II, national military manuals made such rules part of the rule book, the violation of which were prosecutable. This laid down the basis for a finding on customary international law. For war crimes committed in non-international armed conflicts, the Rome Statute of the International Criminal Court has jurisdiction over 12 separate serious violations of IHL 'other' than serious violations of common Article 3 (over which it also exercises jurisdiction). Most of the provisions in Article 8(2)(e) ICC Statute also find support in AP II. Finally, many States have adopted normative frameworks (over 50 States criminalise violations of AP I) and created strong juridical mechanisms and effective measures to prevent serious violations of IHL committed in both types of conflicts and to prosecute those responsible for committing them.

## **2. What Have Been the Particular Challenges in Ensuring Accountability for Violations of the Rules Introduced, or Codified, in the Protocols? (e.g. on Conduct of Hostilities, NIAC generally, etc.)**

One of the particular challenges in ensuring accountability for violations of the rules introduced, or codified, in the Protocols, is the lack of precision in the rules, which means that they do not translate automatically to criminal statutes. This is particularly true for the 'Hague rules'. Writing in 1977, just before the Protocols were adopted, Professor Bassiouni noted that the simple incorporation of the Hague rules into AP I, 'without explanation, creates interpretive difficulties'. This has certainly been true for the ICTY. For instance, there have been virtually no guilty verdicts for launching disproportionate attacks at the ICTY, the *Gotovina* Trial Chamber Judgment being one of the few. And that verdict was overturned. The *Gotovina* Trial Judgment and Appeal Judgment show the difficulty of applying the concepts of distinction and proportionality to specific facts and evidence. The Trial Chamber's attempt to come up

with a precise formula to apply – the ‘200 metre rule’<sup>1</sup> – was promptly overturned by the Appeals Chamber, which, however, failed to articulate a different legal standard to make a finding on the evidence, leading to the acquittal of the accused.

Another challenge has been the difficulty of operationalising Article 90 of AP I which provides for the establishment of a permanent International Fact-Finding Commission with a specific mandate to investigate violations of IHL. The Commission was established in 1991. It is a permanent body of 15 independent experts, acting in their personal capacity, elected by the States having made a declaration of recognition under Article 90 of AP I. The Commission’s essential purpose is to contribute to implementing and ensuring respect for IHL in armed conflict situations. Today, 76 States have made a comprehensive declaration under Article 90. The Commission may investigate matters to determine what has happened, but does not pass judgment on issues it raises. However, the Commission may conduct an investigation only with the consent of the parties involved. Up until this year, it had never been used, leading Professor Kalshoven to describe it as the ‘Sleeping Beauty’. The reason for this lack of use has been suggested to be the independence of the Commission and the general reluctance of parties to armed conflicts to have the truth about certain facts exposed. This year, however, the Commission was asked by the Organisation for Security and Co-operation in Europe (OSCE) to lead an independent forensic investigation in relation to the incident of 23 April 2017 that occurred in Pryshyb (Luhansk Province) of Ukraine and caused the death of a paramedic and the injury of two monitors of its Special Monitoring Mission to Ukraine (SMM). On 18 May 2017 the Secretary General of the OSCE Lamberto Zannier and the President of the Commission Thilo Marauhn signed a memorandum of understanding between the two organisations, followed by a distinct agreement relating to the incident. The team will conduct its investigation confidentially and will report to the OSCE Secretary General only. There is no valid reason for creating costly new institutions on an *ad hoc* basis as long as a permanent body exists for the same purpose. It is up to the international community as a whole and to individual States to realise the importance and usefulness of the Commission and to take advantage of its availability.

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1 Under the ‘200 metre’ rule, the Trial Chamber determined that artillery shells falling more than 200 meters from a legitimate military target constituted evidence of indiscriminate shelling of a residential area.

# COMMAND RESPONSIBILITY

**Guénaël Mettraux**

Kosovo Specialist Chambers

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## **Résumé**

*Dans son intervention, Guénaël Mettraux traite de la responsabilité du commandement dans le contexte des Protocoles additionnels (PA). Il analyse notamment le dialogue intervenu entre les tribunaux pénaux internationaux et les PA ces quinze dernières années. Il expose, pour ce faire, trois illustrations de ce dialogue :*

### **1. L'affaire Hadzihasanovic et le statut juridique de la responsabilité du commandement**

*Dans l'affaire Hadzihasanovic, le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a jugé que la responsabilité du commandant revêtait un statut de droit international coutumier et ce, avant même l'adoption des PA en 1977 – qui ne constituent dès lors que le miroir d'une réalité juridique préexistante.*

*En conséquence, la Cour a de ce fait permis l'application de la responsabilité du commandement aux conflits armés non internationaux bien que celle-ci ne fût pas prévue par le PA II.*

### **2. L'affaire Celebici et l'élément moral requis pour établir la responsabilité du commandement**

*Dans l'affaire Celebici devant le TPIY, s'est posée la question de savoir quel standard devait être appliqué en matière d'élément moral pour déterminer la responsabilité du commandant. A ce sujet la juridiction a établi que le critère pertinent en matière d'élément moral pour déterminer une telle responsabilité était celui selon lequel le commandant devait avoir suffisamment d'informations en sa possession pour l'alerter d'un crime en passe d'être commis par ses subordonnés.*

*Le Comité international de la Croix-Rouge (CICR) a adopté la même approche dans son Etude de droit coutumier, règle n°153. La Cour pénale internationale a également fait de même.*

### **3. Le critère des mesures « nécessaires et raisonnables »**

*Enfin, il est intéressant de relever l'adaptation ingénieuse faite par les tribunaux internationaux aux réalités des circonstances opérationnelles auxquelles peut faire face le commandement, en*



ce qui concerne le critère à appliquer pour déterminer sa responsabilité. C'est ainsi que le concept de « mesures nécessaires et raisonnables » a été développé : le commandement doit ainsi adopter toutes les mesures nécessaires et raisonnables pour prévenir ou punir les infractions au Droit international humanitaire lorsque celles-ci sont portées à sa connaissance. Plus précisément, les mesures adoptées doivent être légales, proportionnées, réalisables et adoptées à un moment approprié.

Le CICR a également intégré ce critère dans son Etude de droit coutumier.

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I will use my short presentation time to discuss the doctrine of command responsibility specifically in the context of the Additional Protocols (AP). I would like to do that through the prism of a dialogue that has taken place between the international criminal tribunals (ICT) and the APs in the past fifteen years. I would like to do so through three points of contact that have occurred between the ICTs and the APs:

## **1. Command Responsibility as Customary International Law**

The first of these points of contact was the *Hadzihasanovic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY). During these proceedings, named after a Bosniak commander, the question was raised of whether the doctrine of command responsibility existed as a matter of customary international law in 1993-94, and whether this particular doctrine was indeed applicable to a situation of non-international armed conflict (NIAC).

The interesting part of that litigation was that, in responding to that question, the Appeals Chamber of the ICTY made a couple of valuable remarks: it held that the doctrine of command responsibility existed as a matter of international customary law *before* the APs, which therefore constitute a reflection of pre-existing customary international law. What this means in practice is that, in case of doubt, Articles 86 and 87 of AP I, with their customary law status, denied the APs the paternity of command responsibility. What is the reason behind this? Maybe because the Appeals Chamber went on to say that the doctrine of command responsibility was also applicable in NIAC, and this despite the fact that AP II does not contain any provision similar to Articles 86 and 87 of AP I.

## **2. The Standard of *Mens Rea* Required for the Command Responsibility**

The second point of contact between the ICTs and the APs was illustrated in the *Celebici* case, again before the ICTY. In this case, the Court questioned the standard of *mens rea* that should apply to military commanders and civilian commanders, and in particular whether the standard

advanced by the Prosecution – the so-called ‘should have known’ standard – formed part of customary international law.

To put it simply, the position of the Prosecution was that a military commander could be held criminally responsible for a crime even if they did not know about it, but where they should have known about it. The interesting part of the argument of the Prosecution was that, with a view to supporting that suggestion, they sought to rely on Article 86(2) of AP I, which says that if the commander knew or had information that should have enabled them to conclude at the circumstances at the time that a crime was going to be committed, they could be held responsible. In addition, to advance its argument, the Prosecution relied on the object and purpose of AP I to say that the latter intended to provide as much protection as possible, therefore the broad *mens rea* standard propounded by the Prosecution should apply.

Interestingly, the Trial Chamber and then the Appeal Chambers also relied on AP I to solve this issue. Unlike the Prosecution, it focused on the text of the treaty, and pointed out that it does not provide for a ‘should have known’ standard and instead provides for a ‘had reasons to know’ standard. In other words, for a commander to be held criminally responsible for a crime committed by subordinates, they must have sufficient information in their possession to alert them to the fact that a crime had been committed by subordinates. The ‘should have known’ standard was thus rejected and said not to form part of the (then) existing customary law.

Now a development of great interest in this dialogue between the international tribunals and the International Committee of the Red Cross (ICRC) is that the *Celebici* standard is the one that the ICRC had adopted, correctly in my view, in its Customary Law Study, under Rule 153, where it said that the standard of *mens rea* was the ‘had reasons to know’. Interestingly, the Statute of the International Criminal Court (Article 28(a)(i)) developed a different standard and has adopted the ‘should have known’ standards in relation to military and military-like commanders for the purpose of proceedings before the Court.

#### **4. The Criteria of ‘Necessary and Reasonable Measures’**

The last point in the way these ICTs have pushed the agenda of the ICRC is that in the Commentary of Article 7 of the AP I, the ICRC underlines the importance of military commanders in ensuring compliance with International Humanitarian Law (IHL) by their subordinates.

The international tribunals have adopted this same philosophy but have balanced it with the reality of operational circumstances in which military commanders may find themselves at the time of making decisions. What they have developed is a standard of so-called ‘necessary and reasonable measures’, i.e. in the circumstances where a commander learns of crimes or the

risks of commission of by subordinates, they must adopt all necessary and reasonable measures in those circumstances to prevent or punish these crimes. This view pursues the overall purpose, outlined by the ICRC, of command being exercised responsibly whilst also accounting for the realities of warfare.

What is also useful from the point of view of IHL and the military particularly, is that these tribunals have defined further what was meant by 'necessary and reasonable measures', namely legal, proportionate, timely and feasible. In other words, they have integrated operational reality into an otherwise abstract legal standard. What is also interesting in that context is that they have rejected a standard of perfection that would have placed an overly onerous burden on commanders and created the possibility of criminal conviction for mere negligence or incompetence. In setting the threshold of relevance to evaluating command responsibility, international criminal tribunals have adopted again the view of the ICRC in its Commentary that only gross or blatant derelictions of duty should result in responsibility for the commander.

To finish, on the dialogue between these tribunals and the APs, again if you look at Rule 153 of the Customary Law Study you will find this 'necessary and reasonable' standard being accepted by the ICRC as the valid standard for customary international law.

# THE DUTY OF COMMAND<sup>1</sup>

**Darren Stewart**

British Ministry of Defence

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## **Résumé**

*Dans cette dernière intervention dans la table ronde relative à la responsabilité pour violations graves du Droit international humanitaire (DIH), Darren Stewart expose une perspective opérationnelle sur les innovations introduites par les Protocoles additionnels (PA). Il se concentre plus particulièrement sur l'article 87 du PA I qu'il considère comme une nouveauté en ce qui concerne le devoir des commandants, et en analyse tant les apports positifs (1) que les défis restant à relever dans ce domaine (2).*

### **1. Les apports positifs de l'article 87 du PA I**

*Le premier élément positif apporté par l'article 87 est la prise de conscience par les commandants de leurs obligations en DIH. Un exemple en est le nombre croissant d'Etats qui se dotent de conseillers juridiques civils ou militaires afin de conseiller leurs forces armées sur le terrain. Le nombre croissant de formations et de manuels dans le but de former les troupes au respect de leurs obligations découlant du DIH constitue une autre illustration importante.*

*Les commandants recherchent par ailleurs de manière beaucoup plus systématique et proactive les conseils de leurs conseillers juridiques lors de la phase préparatoire d'une opération militaire. Ils soumettent ainsi plus souvent leur prise de décision à la compatibilité de l'opération envisagée avec les règles de droit.*

### **2. Les questions restant à résoudre**

*Il reste toutefois des défis de taille à relever, notamment au regard de l'interprétation qu'il convient de donner à certains passages de l'article 87 :*

- *S'agissant de déterminer qui est soumis à l'autorité du commandant, la question se pose particulièrement aux forces des coalitions multinationales, en ce qu'une controverse existe sur l'étendue de l'autorité du commandant sur du personnel militaire relevant d'un Etat autre que le sien. Une question identique se pose lorsque les forces armées d'une partie coopèrent (« partnered forces ») ou sont soutenues (« sponsored forces ») par d'autres Etats.*

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1 This contribution was drafted on the basis of an audio recording of the debates, and has not been reviewed by the speaker.

- *Ensuite, malgré l'apport des nouvelles technologies à la collecte de preuves dans des cas de violations, ces preuves mettent le plus souvent du temps à être établies et à pouvoir être utilisées au service de l'enquête en cours.*
  - *Enfin, les Etats font encore face à des obstacles importants lorsqu'il s'agit de diligenter des enquêtes efficaces, tant disciplinaires que judiciaires, notamment en raison du manque de collaboration des acteurs concernés.*
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In this panel, I will focus my remarks on an operational perspective on the influence of the Protocols in the area of the accountability for serious violations of International Humanitarian Law (IHL). I will deal especially with Article 87 of Additional Protocol (AP) I, which I regard as an innovation to the duty of commanders.

Article 87 of AP I was a ground-breaking innovation at its time in terms of capturing what was expected from commanders, and articulating very clearly what their obligations were: that was revolutionary. And it has had a positive and profound effect. From the perspective of an officer serving in the armed forces of a State which takes its responsibilities under IHL seriously, specifically in relation to how it regulates its armed forces, the Protocols in general and Article 87 in particular are good news.

I would like to identify a couple of areas that can illustrate a positive effect (1) as well as other areas where there still remain some challenges (2). I will remain in the context of Nation States and their armed forces as opposed to organised armed groups. However, one could argue that there is a degree of extension in relation to those organisations, although my comments will be primarily addressing State armed forces.

## **1. The Positive Achievements**

The following references to positive achievements brought by the Protocols are mainly taken from the Sandoz Commentary.

The first positive aspect of Article 87, and of the APs more widely, is the current awareness of obligations for commanders. One illustration may be the number of nations that have embraced the role and requirements of having military or civilian legal advisors who provide support to the armed forces. In all those cases, the level of awareness of the commanders of their legal obligations under IHL has blossomed significantly.

In addition, the Commentary talks about different phases where commanders engage in the preparation of their forces through training but also in the use and development of manuals.

From a practitioner's perspective, what has been the most striking to me is the willingness of commanders to seek advice and to be interested in their obligations and satisfy those obligations through their decision-making on operations. I can refer to countless occasions where I have sat through targeting decision-making processes as the legal advisor where the commander would turn to me and seek advice with respect to the question of proportionality, the actions by which he articulates the concept of military necessity, etc. This constitutes an incredibly positive development.

During my career I have seen an increasing appetite for commanders to seek advice and act upon it. I look towards the future and I can see that it will be much rosier than it was certainly twenty years ago or longer when I first started practicing law within the military.

## **2. The Remaining Challenges**

However, there still remain challenges, which relate to the following.

First, what is the meaning of 'forces under command and persons under their control'? This nowadays raises a number of issues as we become more sophisticated in the way we conduct our operations and especially when it comes to multinational operations where a constant friction point is the extent to which command can be exercised by a multinational commander over those that are part of the force which are not from his own country.

In addition to that, although the Commentary speaks in the context of occupation with respect to those persons under their control, we now start to move towards an area where serious thought is being given to 'partnered forces' or 'sponsored forces'. In those circumstances, what are the ramifications or the extent of the control a commander can exercise over those with which there may be very little connection at all?

On the awareness of breaches, there is a greater willingness to recognise a breach and then do something about it than we have seen for many years. The modern technology available to soldiers to record data is such that there is a living record of what is going on in and around the battlefield. A challenge, however, remains in the amount of time that these technologies sometimes take to provide evidence for a given breach.

Finally, on the sanction of breaches, there still remains a lot to be done when it comes to collaborating in an investigation: this used to be a very challenging area and many nations still need to find accommodations and often compromises to make sure that proper investigation is conducted and can produce evidence which can be of assistance in cases of violations of IHL – be it in the framework of disciplinary or judicial proceedings.

## Q&A SESSION

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At the end of the panel discussion, a Q&A session allowed the audience to raise five questions:

### **1 The Breach of a Legal Obligation and its Consequences in terms of International Criminal Law**

A person in the audience made the point that any breach of the law of armed conflicts (LOAC) obviously entailed the breach of an international legal obligation, but in very many cases it does not entail the commission of an international crime. Examples would include the United States (US) strikes against the *Médecins sans frontières* (MSF) hospital in Kunduz where it looks as if flawed national processes for target identification had led to a violation of LOAC, but there was no criminal intent. In addition, it is easier to bring civil proceedings where all you need to do is to identify the State whose agent was involved in the act – you do not need to identify precisely the person who performed it. For these reasons, not enough attention is currently paid to civil liability on the part of States for the violation of LOAC.

The participant then asked the panellists to comment on the possibilities of national and international civil proceedings for violations of LOAC, given that most of the interventions in the panel were dedicated to criminal liability.

The panellists emphasised the relevance of the issue of addressing accountability through civil proceedings rather than criminal ones as this has probably not been given sufficient attention so far. One of the issues that might arise is that if a violation of IHL is serious enough to bring a court action, the fact that there are civil proceedings might be considered as the basis of a criminal prosecution and then trigger an obligation to prosecute anyone who can be identified in relation to those civil proceedings. One interesting example of this happening was in regard to the use of nuclear weapons and the *Shimoda* proceedings and civilian action; in that case IHL was looked at, in particular when it comes to the principle of the prohibition of use of weapons that cause unnecessary suffering, which was used to make specific findings in that particular judgment. This opens up a whole new range of accountability measures. However it is not certain that it would lessen the need for criminal prosecutions for those violations.

A panellist referred particularly to the situation in the United Kingdom (UK) where the civilian courts are currently dealing with similar cases. One senses that the only area that might be available for plaintiffs in terms of domestic remedies would be in the context of human rights. Tort actions are, as a result, going to fall away to only leave human rights cases. It will

be interesting to see how that development unfolds within the UK as the courts are currently moving towards a judgment in several cases.

## **2. The International Humanitarian Fact-Finding Commission**

Another participant raised an important issue, the so-called failure of the APs, as the International Humanitarian Fact-Finding Commission (IHFFC) had never been activated. There is some good news on this topic, as for the first time this year, the Commission performed its mission and the report was published on its website in September 2017. It is probably not groundbreaking but this new piece of information is relevant in the comparison between what had happened since 1991 when the Commission was formally established on the basis of PA I and the end of 2017 where it performed its first official fact-finding mission.

The panellists welcomed this announcement. One of them highlighted the public's interest in MSF's question to the US a few years ago on its consent to an investigation by the Commission with regard to the aerial attack on a hospital in Afghanistan. This investigation of course did not happen. A lot of related issues were raised, including the limitations faced by the Commission, and precisely the fact that it is consent-based. In that case, the US had not ratified the first Additional Protocol (AP) and subsequently not made the necessary declaration to consent to the Commission's activities. Another limitation that may be seen is that, as the Commission is provided by AP I, it may be implied that it could not be used in the framework of a NIAC. Having said that, the IHFFC is a hugely unused resource and hopefully the fact that it has been triggered for the first time may mean that this would lead to further use of the Commission.

Another panellist questioned the relevance of these investigations as it is one thing is to investigate violations of IHL, but a step forward would be to do something about them, which might not happen for a wide range of reasons.

## **3. How Courts Take Account of the APs**

A representative of the International Committee of the Red Cross (ICRC) asked the panellists about which provisions of the APs they used the most in their everyday assignments.

A panellist chose to expand on the provisions that judges *do not* apply in their everyday judicial assignments: those related to grave breaches. There are a number of reasons explaining this, some of which are to be found in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY): there are very few cases dealing with grave breaches and they tend to be the early cases, as prosecutors progressively became aware of the evidential challenges that accompanied the proof of grave breaches as opposed to other categories of international crimes. The same applies to the protected person status that is perhaps more



evidentially challenging through other routes. A second factor, according to the panellist, stems from the *Tadic* jurisprudence and to what happened subsequently: following the development of a whole body of war crimes applicable in the context of a NIAC, we have reached a conflict-neutral situation where many of the most serious war crimes would be applicable in both IAC and NIAC. And we have reached a point in this jurisdiction where sometimes the chambers do not even bother saying which of the two sorts of conflicts are at stake. If you look at the *Karadzic* judgement of the ICTY for instance, and look at the nature of the conflict in Bosnia at the relevant time, you will not find it because the chambers did not cover it. The defendant was nevertheless convicted for war crimes, and the matter was appealed neither by the Prosecutor, nor by the defence.

Lastly, a speaker asked the ICRC whether it should concern itself, when developing legal standards and drafting international conventions and other instruments, with the prosecutorial challenges that particular categories of crimes or laws of liability pose. It is a pity that something as important as the grave breaches end up not being applied by domestic systems nor at the international level, because of prosecutorial constraints.

#### **4. The APs in an Operational Context**

A speaker was asked whether the incorporation of the Hague Law in the Protocols is something that is specifically relied upon in the context of military operations, and pointed out that there is some correlation with the provisions that judges regularly use in their practice, especially when it comes to the grave breaches. From a military perspective, it would have to be, without a shadow of a doubt, precautions in attack and attacks on civilians and civilian populations that are the provisions getting the most attention.

#### **5. The Incorporation of the Hague Rules in the APs**

A panellist mentioned an additional challenge, with regards to the APs, to those already emphasised by Judge Henderson in his comments. It has to do with the incorporation of the Hague rules in AP I: one of the major challenges that has come forward when applying these rules in criminal cases has been their lack of precision. Certainly, when we look at the ICTY, there have been hardly any convictions for this type of offence: the Court did not manage to articulate any clear standard in order to apply these rules to concrete cases. This issue has not been solved yet and will certainly come to the attention of the International Criminal Court, which has a similar language.



## Session 4

# The Development of the Notion of Military Objective and its Impact on the Conduct of Hostilities

Chairperson: **Andres Muñoz Mosquera**

*SHAPE Legal Office*

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## THE RELEVANCE OF REVENUE-GENERATING OBJECTS IN RELATION TO THE NOTION OF MILITARY OBJECTIVE\*

**Laurent Gisel**

ICRC

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### **Résumé**

*Dans sa présentation Laurent Gisel analyse la pertinence de la notion de biens générant des revenus en lien avec celle d'objectif militaire qui a été codifiée à l'article 52(2) du Premier Protocole Additionnel (PA I). La définition de cette dernière notion reflète le droit international coutumier applicable dans le cadre de conflits armés internationaux et non internationaux.*

### **1. La définition de l'objectif militaire**

*La définition de l'objectif militaire consiste en un double test : il s'agit de s'interroger d'une part sur la contribution effective de l'attaque menée à l'action militaire, et d'autre part sur l'avantage militaire procuré en tenant compte des circonstances en vigueur au moment de l'attaque.*

*La notion d'action militaire joue un rôle clé dans la première partie de ce test, ainsi que dans le cadre du débat relatif à la possibilité de cibler des biens permettant de maintenir la conduite des hostilités (« war-sustaining objects »). La contribution à l'action militaire doit en outre être effective et donc concrète et discernable – et donc non hypothétique. Enfin, la destruction du bien visé par l'attaque doit procurer un avantage militaire certain.*

*Une définition aussi restrictive de la notion d'objectif militaire répond à l'objet et à l'esprit des dispositions du DIH régissant la conduite des hostilités. C'est pourquoi Laurent Gisel affirme*

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\* The views expressed in this presentation are those of the author alone and do not necessarily reflect the views of the ICRC. The author would like to deeply thank Maria Giovanna Pietropaolo for her invaluable support in researching the issues addressed in this presentation.

*dans son argumentation que les biens permettant de maintenir la conduite des hostilités ne présentent pas le lien étroit requis entre leur utilité même et les hostilités, pour constituer un objectif militaire et ainsi pouvoir être ciblés. Ce point de vue est notamment soutenu par le droit coutumier.*

## **2. La pratique des Etats lors de conflits armés récents**

*La pratique des Etats est pertinente lorsqu'il s'agit de la question de savoir si les « war-sustaining objects » peuvent être intégrés dans la définition de l'objectif militaire. Dans la plupart des exemples récents, comme le ciblage des complexes liés au trafic de drogue en Afghanistan ou encore celui des infrastructures pétrolières de Daesh en Syrie, la justification avancée par les Etats s'appuie sur un lien « suffisant » entre les biens ciblés et l'action militaire.*

## **3. L'inclusion des biens générant des revenus dans la notion d'objectif militaire**

*Les inquiétudes relatives à l'inclusion des « war-sustaining objects » dans la notion d'objectif militaire sont principalement liées au risque que les conflits armés ne connaissent plus aucune limite. Pour remédier à cette situation, Goodman a mis en avant des « principes limitatifs » dont le critère requérant que la destruction du bien offre un avantage militaire certain, ou encore celui selon lequel uniquement les biens satisfaisant au test « indispensable et principal » puissent être ciblés.*

*En conclusion, Laurent Gisel estime qu'il n'existe aucun doute sur l'exclusion des biens générant des revenus de la notion d'objectif militaire telle qu'adoptée par le PA I. Le contraire permettrait une approche trop permissive du ciblage dans les conflits armés contemporains, ce qui risquerait d'influer de manière importante sur l'ampleur de ceux-ci.*

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This presentation will discuss the relevance of revenue-generating objects in relation to the notion of military objective.

The notion of military objective has been codified in Article 52(2) of the first Additional Protocol of 1977 (AP I): 'Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.'

This definition is widely recognised to reflect customary law applicable in international and non-international armed conflicts.<sup>1</sup> It is also well known that the United States (US) has interpreted the notion of military objective as encompassing war-sustaining objects, and the discussion on revenue-generating objects is part of this debate.

This discussion has been brought again to the forefront recently in relation to the targeting of oil and oil-related infrastructure in the conflicts against the Islamic State group (ISIS/ISIL). However, the purpose of this presentation is not to discuss particular strikes or targeting policies of specific States in these conflicts. It will rather address the issue from a broader perspective by looking at the evolution of the notion of military objective over the last few decades.

The presentation will first recollect the adoption of the definition of military objective during the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (the Diplomatic Conference). It will then give a short overview of relevant practices during recent armed conflicts. It will conclude with some concerns raised by the inclusion of revenue-generating objects in the notion of military objective.

So let me first turn to the adoption of the definition of military objective in Article 52 AP I. The definition consists of a two-prong test, namely *making an effective contribution to military action* and *offering a definite military advantage in the circumstances ruling at the time*. The two prongs are cumulative.<sup>2</sup>

The words 'military action' play a pivotal role for the first prong and for the debate on the targetability of war-sustaining objects. The draft article submitted by the International Committee of the Red Cross to the Diplomatic Conference was about objectives 'recognised to be of

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1 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *ICRC Customary International Humanitarian Law, Vol. I: Rules*, Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary IHL Study), Rule 8.

2 Y. Sandoz, Ch. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (hereinafter ICRC Commentary), on Article 52, paragraph 2018; M. Bothe, K. J. Partsch, W. A. Solf, *New Rules for Victims of Armed Conflicts*, 2<sup>nd</sup> edition, Martinus Nijhoff Publishers, Leiden and Boston, 2013, paragraph 2.4.2 to 2.4.4 on Article 52, p. 365f; France, *Manuel du droit des conflits armés*, 2012, p. 67; UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 (UK 2004 military manual), paragraph 5.4.4(a); US Department of Defence, *Law of War Manual* (US DoD Law of War Manual), June 2015 (updated December 2016), paragraph 5.6.5. See also the discussion in Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2016 (3<sup>rd</sup> Ed.), Cambridge, Cambridge University Press, paragraph 288, p. 107.

military interest'.<sup>3</sup> This phrase was criticised during the Diplomatic Conference because it was considered too general, vague and subjective.<sup>4</sup> During the negotiations the phrases 'military effort' and 'military potential of the adverse Party' were proposed, but not adopted. Eventually, the Working Group opted for 'military action'. The notion of 'effective contribution to military action' seems to find its origin in the preparatory work of the Institute of International Law introduced in 1967. It referred specifically to the contribution offered by military objectives by nature,<sup>5</sup> namely those objects most directly used in combat. Therefore, both the ordinary meaning of the terms and the origin of the notion of 'effective contribution to military action' support the conclusion that 'military action' is a concept more restrictive than 'military interest', 'military potential' or 'military effort', which were also suggested and rejected during the Diplomatic Conference.

The adoption of Article 52 AP I is also telling. France requested a vote, at which it abstained.<sup>6</sup> France explained its abstention because of the definition of military objective, which at the time it found too restrictive.<sup>7</sup> This can be compared with the amendment that France had submitted earlier in the Conference: '[a]n objective shall be considered a military objective if by its nature or use it contributes directly or indirectly to the maintenance or development of the military potential of the adverse Party'.<sup>8</sup> This would have arguably included war-sustaining objects. Had France not considered the definition adopted in Article 52 AP I as more restrictive than the amendment it had proposed, it would not have asked for a vote, not abstained and not explained that it found the definition too restrictive.

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3 Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Article 47(1):

*Article 47. -General protection of civilian objects*

1. *Attacks shall be strictly limited to military objectives, namely, to those objectives which are, by their nature, purpose or use, recognised to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.*

4 Diplomatic Conference, Official Records (O.R.), Vol. XIV, CDDH/III/SR.14, p. 111, paragraph 16 (Australia); p. 112, paragraph 17 (Netherlands); pp. 119-120, paragraph 13 (UK); p. 129, paragraph 15 (Poland); p. 130, paragraph 16 (Republic of Vietnam).

5 See "Le problème que pose l'existence des armes de destruction massive et la distinction entre les objectifs militaires et non militaires en général, Cinquième Commission, Rapport définitif présenté par le baron von der Heydte", pp. 155ff at 178-9, and "Observations de M. Erik Castrén", pp. 220ff, at 222-3, in: *Annuaire de l'Institut de Droit International*, 1967.

6 CDDH/SR.41, O.R. VI, p. 168, paragraph 149 and 150. The vote count was 79 in favour, none against, with 9 abstentions.

7 CDDH/SR.41, O.R. VI, p. 169 paragraph 150. The only other delegation that explained its abstention (Australia) referred to the prohibition on reprisals, see CDDH/SR.41, O.R. VI, p. 176.

8 CDDH/III/41, O.R. Vol. III, p. 209.

Turning back to the definition, the contribution to military action must be *effective* and therefore concrete and discernible as opposed to merely hypothetical.<sup>9</sup>

Finally, even if an object provides an effective contribution to military action, it cannot be lawfully targeted unless its destruction, capture or neutralisation offers a definite military advantage in the circumstances ruling at the time. The advantage must be military in nature, that is not solely economic or financial.<sup>10</sup> It must be *definite*, namely concrete and perceptible and not hypothetical or merely speculative.<sup>11</sup> There must therefore be a proximate nexus between the object and the fighting to conclude that the object is a military objective under the AP I definition.<sup>12</sup>

Such a restrictive understanding of the notion of military objective is supported by the object and purpose of the IHL rules governing the conduct of hostilities. These rules are often said to aim at finding a balance between military necessity and humanitarian considerations. In my view, it is more accurate to characterise their object and purpose as protecting civilians by finding such a balance. Indeed, these rules are in the section of the Protocol regarding the protection of the civilian population against the effects of hostilities, and the *Basic Rule* referring to the principle of distinction at the outset of this section emphasises this protec-

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9 Bothe, Partsch and Solf, *op. cit.*, note 2, paragraph 2.4.6 on Article 52, p. 367; A. Boivin, “The Legal Regime Applicable to Targeting Military Objective in the Context of Contemporary Warfare”, Research Paper series, University Centre for International Humanitarian Law, 2006, p. 21.

10 M. N. Schmitt (Ed.), *Tallinn Manual 2.0 on International law applicable to cyber operations*, 2<sup>nd</sup> edition, Cambridge, Cambridge University Press, 2017 (Tallinn Manual 2.0) paragraph 21 on Rule 100, p. 441.

11 France, *Manuel du droit des conflits armés*, 2012, p. 67; UK 2004 Military Manual, paragraph 5. 4.4 (i); ICRC Commentary on Article 52(2), paragraph 2024; Bothe, Partsch and Solf, *op. cit.*, note 2, p. 367, paragraph 2.4.6 on Article 52; A.P.V. Rogers, *Law on the battlefield*, 3<sup>rd</sup> edition, Manchester University Press, Manchester and New York, 2012, p. 104; M. Sassoli, “Legitimate Targets of Attack Under International Humanitarian Law”, Program on Humanitarian Policy and Conflict Research at Harvard University, 2003, p. 3.

12 Y. Dinstein, “For an object to qualify as a military objective, there must exist a proximate nexus to “war-fighting””, in: *The Conduct of Hostilities under the Law of International Armed Conflict*, 3<sup>rd</sup> edition, Cambridge University Press, Cambridge, 2016, paragraph 293 p. 109; see also M. Schmitt, “the key criteria is that a ‘military advantage is that which exhibits a direct nexus to military operations’ (“Targeting in operational law”, in: T.D. Gill and D. Fleck, *The Handbook of the international law of military operations*, Oxford University Press, Oxford, 2015, p. 279, paragraph 4. Contra : US DoD Law of War Manual (updated December 2016), paragraph 5.6.6.2: “this contribution need not be “direct” or “proximate””; the Manual refers in footnote to Bothe, Partsch, Solf, *op. cit.*, note 2, paragraph 2.4.3 on Article 52, p. 365f “Military objectives must make an “effective contribution to military action”. This does not require a direct connection with combat operation such as is implied in Article 51, paragraph 3, with respect to civilian persons who lose their immunity from direct attack only while they “take a direct part in hostilities”. Thus a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party’s overall war effort.”

tive aim.<sup>13</sup> Some might say that it is a distinction without a difference. I believe on the contrary that it puts the rules in a different light and context when interpreting them.<sup>14</sup> The aim of protecting civilians was pursued in the Diplomatic Conference through the adoption of rules governing the conduct of hostilities that were more restrictive than past practices.<sup>15</sup> They shifted the balance between military necessity and humanity towards more protective or restrictive standards. The definition of military objective is reflective of such an approach.

It is submitted here that war-sustaining objects do not exhibit the proximate nexus between the object and the fighting required to conclude that an object is a military objective. The weight of opinions in the literature supports this view, including under customary law.<sup>16</sup> Kalshoven, who was present at the meeting of the Third Committee where the discussion on military objective took place, addressed in 1992 the question of whether exports could be military objectives. He concluded: '[i]t may be evident, in short, that a construction of the definition in Article 52(2) that would extend the requirement of effective contribution beyond the limit of direct contribution to strictly military action is bound to result in an unacceptable dilution of the distinction between combatants and civilians and between military objectives and civilian objects, and must therefore be rejected'.<sup>17</sup>

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13 Article 48 AP I: *'In order to ensure respect for and protection of the civilian population and civilian objects (...):* See also the preamble of AP I, which notably states: *'Believing it necessary (...) to reaffirm and develop the provisions protecting the victims of armed conflict and to supplement measures intended to reinforce their application.'*

14 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Arts 31 and 32.

15 ICRC Commentary on Article 51(4) AP I, paragraph 1946 and on Article 52, paragraph 2000; ICTY, Final Report on the NATO Bombing Campaign, paragraph 43; University Centre for International Humanitarian Law, Report of the Expert Meeting 'Targeting Military Objectives', Geneva, 2005, p. 5; S. Oeter, "Methods and means of Combat" in: D. Fleck (ed.) *The Handbook of International Humanitarian Law, 2013* (3<sup>rd</sup> ed.), Oxford University Press, p. 169f paragraph 5; E.R. Bohm, "Targeting Objects of Economic Interest in Contemporary Warfare", in: *Crieghton International and Comparative Law Journal*, 2015, Vol. 6, p. 78.

16 M.N. Schmitt, "Targeting in operational law" in: T.D. Gill and D. Fleck, *The Handbook of the international law of military operations*, Oxford, OUP, 2015, p. 279; paragraph 4 concludes that *'the weight of opinion on this is that the advantage resulting from an attack on war sustaining objects is too remote to qualify as military advantage'*. See also: Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, International Institute of Humanitarian Law*, Cambridge University Press, Cambridge, 1995, Paragraph 40 and Explanations, paragraph 60.27; Tallinn Manual 2.0 paragraphs 18 and 19 on Rule 100; International Law Association, Study Group, "The Conduct of Hostilities and International Humanitarian Law, Challenges of 21st Century Warfare, Final Report", pp. 15-16, at: <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=3763&StorageFileGuid=11a3fc7e-d69e-4e5a-b9dd-1761da33c8ab>>.

17 'Remarks by Fritz Kalshoven, in The American Society of International Law, *Proceedings of the 86<sup>th</sup> Annual Meeting*, Washington D.C, April 1-4, 1992, p. 43; see also F. Kalshoven, "Noncombatant Persons. A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations", in: *International Law Studies* 64, p. 310.



Some US authors, however, support a different view under customary law. Publications in the 1990s expressed the position that the definition of Article 52 AP I would be more restrictive than the US view. In his 1990 major article in the *Air Force Law Review*, Parks criticised the restrictive character of the definition adopted in Article 52 AP I.<sup>18</sup> In 1997, Robertson concluded that probably the only difference between the Article 52 AP I definition and that expressed then in the US Naval Commanders' Handbook<sup>19</sup> was attacks on exports as a financial resource for the belligerent's war effort. Such attacks would in his view be prohibited by the definition of military objective under Article 52 AP I but not under the US understanding of the notion.<sup>20</sup>

The US has not ratified the Additional Protocol but nowadays accepts the textual definition of Article 52 AP I.<sup>21</sup> However, it does so without accepting all the restrictions that – in my view – this definition entails. The relevant paragraph of the 2015 US Department of Defence Law of War Manual states:

'Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as "war-fighting," "war-supporting," and "war-sustaining" are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts'.<sup>22</sup>

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18 W. H. Parks, "Air War and the Law of War", in: 32 *The Air Force Law Review* 1 (1990), pp. 138-144.

19 The most recent version of the Naval Commander Handbook at the time of Robertson's article was the 1995 edition. It read '[m]ilitary objectives are (...) those objects which, by their nature, location, purpose, or use, an effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralisation, would constitute a definite military advantage to the attacker under in the circumstances at the time of the attack' (paragraph 8.1.1).

20 Robertson concludes that '[p]robably the only point of difference between the San Remo formulation (which adopt the Article 52(2) phrasing) and that in the Commander's Handbook is in respect to attacks on exports that may be the sole or principal source of financial resources of a belligerent's continuation of its war effort'. H. B. Robertson, "The Principle of the Military Objective in the Law of Armed Conflict", in: 8 *United States Air Force Academy Journal of Legal Studies* (1997), pp. 35ff, p. 51.

21 See US DoD Law of War Manual (updated December 2016), paragraph 5.6.3 and "International Law, Legal Diplomacy, and the Counter-ISIL Campaign", speech by US State Department Legal Advisor Brian Egan at the American Society of International Law annual meeting, 1 April 2016.

22 US DoD Law of War Manual (updated December 2016), paragraph 5.6.6.2.

Goodman argued in a recent article that encompassing war-sustaining objects within the definition of military objective was supported by State practice.<sup>23</sup> So let us have a closer look at such practice.

The precedent most often mentioned in US literature and official documents is the destruction of cotton during the civil war. However, this appears to relate to the *destruction* of objects under the control of the belligerent, so it is factually irrelevant for the protection of objects against attacks. Furthermore, it occurred a century and a half ago, at a time where there was no definition of military objective, so even if it was factually relevant, it could hardly be legally conclusive today.

Until the targeting of oil infrastructure in Syria, the most relevant recent example had been the targeting of narco-traffic in Afghanistan. According to publicly available sources, the International Security Assistance Force (ISAF) Commander issued in 2008 a Guidance on targeting drug lords and drug labs. This Guidance was opposed by other ISAF States and withdrawn after a few months. Even States supporting this Guidance emphasised that they were targeting insurgency with links to the drug trade, not drug traffickers with links to terrorism.<sup>24</sup> Interestingly, the US Department of Defence Law of War Manual mentions the destruction of narcotics in Afghanistan in the section on destruction of property (paragraph 5.17.2.1), together with destruction of cotton during the US civil war, and not in the section on military objective.

Certainly, oil and oil-related objects have been targeted during past conflicts. However, the justification given by States with regard to such targeting was mostly based on the relevance of oil for a mechanised military force.

For example, strikes on oil infrastructure carried out during the first Gulf War were described in the US Department of Defence Conduct of the Persian Gulf War, Final Report to the Congress as attacks on 'Iraq's ability to produce refined oil products (such as gasoline) that had immedi-

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23 R. Goodman, "The Obama Administration and Targeting 'War-Sustaining' Objects in Non-International Armed Conflict", in: *American Journal of International Law*, Volume 110(4), pp. 663ff.

24 Lt. Col. Patrick Ryder, Pentagon spokesman: '*[W]e are targeting terrorists with links to the drug trade, rather than targeting drug traffickers with links to terrorism*', quoted in: Risen, "US to Hunt Down Afghan Drug Lords Tied to Taliban", *The New York Times*, 9 August 2009 (<<https://www.nytimes.com/2009/08/10/world/asia/10afghan.html>>). Similarly the UK House of Commons, Foreign Affairs Committee, "Eighth Report Global Security: Afghanistan and Pakistan" stated: '*The FCO has supported this move [conduct interdiction operations against drugs facilities and facilitators], arguing that ISAF involvement will enable "the UK to support the Afghan security forces in targeting those elements of the insurgency where there is a clear link to the illegal drugs trade"*', at: <<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/302/30206.htm>>.

ate military use, instead of its long-term crude oil production capability'.<sup>25</sup> Conversely, trucks carrying oil from Iraq to Jordan during this conflict were not considered to constitute military objectives.<sup>26</sup> With regard to the 1999 North Atlantic Treaty Organisation (NATO) operations in the former Yugoslavia, the US Chairman of the Joint Chiefs of Staff explained that NATO chose targets to constrain the movement of Yugoslav forces, and it included petroleum, oil and lubricants 'since this was a predominantly mechanised armoured force'.<sup>27</sup> Similar declaration can be found from Israel with regard to 2006 strikes against Hezbollah<sup>28</sup> and NATO with regard to 2011 strikes in Libya.<sup>29</sup> Finally, various views were expressed regarding the recent conflicts against the Islamic State group in Syria and Iraq. The US 'have attacked ISIL's ability to fund their operations through stolen oil' since at least the beginning of Tidal Wave II.<sup>30</sup> Conversely, the Netherlands clarified that

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25 Conduct of the Persian Gulf War, Report to the Congress, section on Planning, p. 129, at: <<https://archive.org/details/ConductofthePersianGulfWarFinalReporttoCongress>>. See also the statement by British Wing Commander Andy Suddards, referring to the joint UK-US targeting of Iraqi fuel storage depots near Baghdad, that '*one goal was to cut the fuel supply chain for republic guard tanks*', in: The Guardian, 30 March 2003, at: <<http://www.theguardian.com/world/2003/mar/30/iraq.simonparker>>.

26 Goodman, op. cit. note 23, p. 14.

27 Statement by Gen. Shelton, Chairman, Joint Chiefs of Staff, in "The Lessons Learned From The Military Operations Conducted As Part Of Operation Allied Force, And Associated Relief Operations, With Respect To Kosovo", Thursday, October 14, 1999, "U.S. Policy and NATO Military Operations in Kosovo, Hearings before the Committee on Armed Services", U.S. Senate, One hundred sixth Congress, first session, p. 323. More specifically with regard to the targeting of the oil refinery in Pancevo during this conflict, a NATO spokeswoman explained that this refinery was believed to be '*a key installation that provided petrol and other elements to support the Yugoslav Army. By cutting off these supplies we denied crucial material to the Serbian forces fighting in Kosovo*', quoted in: C. Hedges, "Serbian Town Bombed by NATO Fears Effects of Toxic Chemicals", The New York Times, 14 July 1999, at: <<http://www.nytimes.com/1999/07/14/world/serbian-town-bombed-by-nato-fears-effects-of-toxic-chemicals.html?pagewanted=all>>.

28 "Responding to Hezbollah attacks from Lebanon: Issues of proportionality", 25 July 2006, at: <<http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/responding%20to%20hizbullah%20attacks%20from%20lebanon-%20issues%20of%20proportionality%20july%202006.aspx>>.

29 K. Sengupta, "Nato strikes at Libya's oil in bid to oust Gaddafi", in: The Independent, 8 July 2011, at: <<http://www.independent.co.uk/news/world/africa/nato-strikes-at-libyas-oil-in-bid-to-oust-gaddafi-2308962.html>>, where Rear Admiral Harding, the most senior British commander involved in the Libya operation, explained that the attack on the petrochemical complex at Brega was undertaken because fuel was being used by the Libyan military forces (e.g.: '*By depriving Gaddafi of fuel we are depriving him of mobility*').

30 Department of Defence Press Briefing by Col. Warren via DVIDS from Baghdad, Iraq, November 13, 2015 at: <<http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/628932/department-of-defensepress-briefing-by-col-warren-via-dvids-from-baghdad-iraq>>. Operation Tidal Wave II had been launched in October 2015 and described by Col. Warren as '*the coalition's targeting of illicit oil revenues*'.

‘objects that merely have an economic advantage for the opposing party, but that do not make an effective contribution to military action, are not legitimate military objectives under international humanitarian law applicable to the Netherlands. Hence, Dutch F-16’s cannot attack lines of financing and the oil infrastructure, except for, for example, fuel storages next to ISIS camps destined for ISIS vehicles’.<sup>31</sup>

Similarly, Durhin, then Head of the Operational Law Section of the French Joint Staff, wrote that ‘[i]n the case of an oil refinery, for example, it would be necessary to establish the amount of fuel being directly supplied to enemy troops and the precise impact the destruction of the plant would have on the conduct of the enemy’s operations’.<sup>32</sup>

It appears therefore that in most cases, a proximate nexus between oil or oil-related objects and military action is given as the justification for strikes on such objects carried out in armed conflicts of the last decades.

So let me finish by highlighting some concerns raised by the inclusion of revenue-generating objects in the notion of military objective.

Revenue-generating objects may be seen as the ‘far end’ of the notion of war-sustaining. To include revenue-generating objects in the notion of military objective risks expanding the class of targetable objects beyond the raw material that may be used by the military, such as oil or steel. Indeed, the entire economy may be seen as generating revenues for the government of a party to the conflict, through taxes. So, where and how could a limit be established? The risk exists that such precedents create a dangerous slippery slope. Could it be possible that, in another country with different economic realities, another belligerent considers on that same basis that the entire industrial and financial sectors of a developed economy are lawful targets? For example, what would amount to war-sustaining or revenue-generating targets here in Belgium? Once the door is open to targeting revenue-generating objects, it seems difficult to avoid opening it completely from a legal perspective. This risks bringing us back to limitless wars.

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31 Yearbook of International Humanitarian Law — Volume 18, 2015, Correspondents’ Reports (Marten Zwanenburg and Nelleke Van Amstel), The Netherlands, 2016 T.M.C. Asser Press, at <<http://www.asser.nl/media/3011/netherlands-yihl-18-2015.pdf>>, p. 3 (original at <<https://zoek.officielebekendmakingen.nl/kst-27925-571.html>>, answers to questions 33, 34, 179, 180, 190 and 210).

32 N. Durhin, “Protecting civilians in urban areas: A military perspective on the application of international humanitarian law”, in: *International Review of the Red Cross* (2016), volume 98(1), pp. 177ff, p. 179.

In his article, Goodman identifies four limiting principles. Let us take a close look at the two that are relevant for the notion of military objective.<sup>33</sup>

First, Goodman underlines the requirement that the destruction offers a definite military advantage. In his view, this ‘helps eliminate (...) activity from the category of legitimate military targets due to the remote and speculative causal connection to obtain a military advantage’. In a similar line, Dunlap rejects World War II-style bombing of the entire economic infrastructure of an adversary, but supports striking those ‘war-sustaining’ objects where the linkage to actual battlefield effects is not speculative or remote, but real and demonstrable.<sup>34</sup>

Indeed, but this is precisely why war-sustaining objects do not fall under the definition of Article 52 AP I. A June 2016 press conference by the spokesman of Operation Inherent Resolve illustrates this. Col. Garver said:

‘Sometimes it’s tough (...) in attacking their revenue stream (...) to know the exact (...) results. I mean, if I go and bomb a fighting position, if there’s no more machine gun fire coming from the fighting position, I think I got the position. The oil business and how much revenue they’re generating, that’s ... that’s a more difficult thing. (...) it is tougher to understand the exact impact. We can tell whether we hit the building or not, but what that does to the ... to the overall management of its oil operations, we’re still going to take some time to develop that.’<sup>35</sup>

Other declarations by US officials express however more confidence that in specific circumstances, petroleum facilities may make an effective contribution to military action through the revenue they provide.<sup>36</sup>

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33 The other two limiting principles suggested by Goodman relate to persons involved in revenue-generating activities and to the principle of proportionality.

34 C. Dunlap, “War-sustaining targets: Scholars can better help develop norms if they focus more on understanding the military perspective of evolving state practice”, 6 July 2016, at: <<https://sites.duke.edu/lawfire/2016/07/06/war-sustaining-targets-scholars-can-better-help-develop-norms-if-they-focus-more-on-understanding-the-military-perspective-of-evolving-state-practice/>>.

35 Department of Defence Press Briefing by Col. Garver via teleconference, 29 June 2016, at: <<http://www.defense.gov/News/Transcripts/Transcript-View/Article/820641/department-of-defense-press-briefing-by-colonel-garver-via-teleconference/source/GovDelivery>>.

36 J. O’Connor, General Counsel of the Department of Defence, “Applying the Law of Targeting to the Modern Battlefield”, speech, New York University School of Law, New York, 28 November 2016, p. 9: *The money it [ISIL] receives from sales of petroleum is used to purchase weapons and pay fighters. ISIL funnels petroleum revenues directly to the group’s fighting forces (...) Given this analysis, certain petroleum facilities such as pumping stations or the transportation assets that take the oil either to its depots or to market to be sold make an effective contribution to ISIL’s military action*, at: <<http://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>>.

The other limiting principle suggested by Goodman is that only objects which would meet an 'indispensable and principal' test could be targeted, namely those which would not be easily replaceable with regard to the revenue they generate. Along similar lines, O'Connor noted that 'petroleum is the principal source of support for ISIL's armed action (...) ISIL cannot easily substitute petroleum for other sources of ready fiscal income. So the military effects of damaging or destroying ISIL-controlled petroleum facilities will be more certain than they might otherwise be if ISIL could easily replace that revenue from other sources'.<sup>37</sup> However, to meet the test, does it not simply require one to 'go big' in the relevant category of object considered?

If objects belonging to one specific economic sector can become lawful targets on this basis, what would prevent a party considering a more generic economic sector, or aggregating several sectors, to meet a 'principle and indispensable' test? Depending on how this test is understood, what would prevent the industrial sector of a diversified economy from meeting it, in the same way that one specific sector may do so in a less diversified economy or in a territory under the control of a non-State armed group? Instead of a limitative factor, this test may actually constitute an incentive to broaden the economic sector(s) considered to make sure that the test is met.

Let me conclude. The principle of distinction as expressed in AP I, including the definition of military objective, crystallises an evolution towards an increased protection for civilians and civilian objects compared to the Second World War or other past practices. The definition of military objective adopted in Article 52(2) AP I was precisely criticised for its restrictive character by military authors advocating for the permissive approach of the past. There is indeed no doubt in my view that the definition adopted in Article 52 AP I excludes revenue-generating objects from the notion of military objective. This would amount to replacing 'effective contribution to military action' by 'contribution to the war effort', which is not the ordinary meaning of the words, and is supported neither by the work of the Diplomatic Conference nor by subsequent State practice. While acknowledging the long-standing position of the US and the fact that they have not ratified AP I, this is arguably also the case under customary law, as this notion evolved and developed on the basis of the treaty definition.

Encompassing revenue-generating objects in the definition of military objective is the broadest possible understanding of the war-sustaining position, and limiting principles articulated so far in the academic literature do not seem to constitute real limitations. The position that war-sustaining capabilities may be targeted, and any precedent of doing so in practice, risks creating a slippery slope towards an overly permissive approach to targeting objects in current or future conflicts.

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37 *Ibid.*, pp. 9-10.

# THE CHALLENGES OF APPLYING THE PRINCIPLES OF DISTINCTION, PROPORTIONALITY AND PRECAUTIONS IN CONTEMPORARY MILITARY OPERATIONS FROM A STATE PERSPECTIVE

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## **Résumé**

*Dans sa contribution à la quatrième session, Marten Zwanenburg traite des questions épineuses sur l'application étatique des principes de distinction (1), de proportionnalité (2) et de précaution (3) à leurs opérations militaires. Pour chacun des principes discutés, il épingle une de ces questions controversées.*

### **1. Le principe de distinction**

*Quand il s'agit de biens, le principe de distinction impose aux Etats de distinguer les objectifs militaires légitimes d'une part, des biens qui ne constituent pas un objectif militaire légitime d'autre part. Seule la première catégorie peut être attaquée, alors que les civils ne peuvent faire l'objet d'attaques.*

*Une question liée à l'application du principe de distinction est suscitée par le fait de cibler des intérêts économiques et financiers comme des objectifs militaires, ce qui est vu comme un moyen effectif de combattre l'ennemi et particulièrement les groupes armés non étatiques. Cela pose la question de savoir si uniquement les biens contribuant directement à mener la guerre (« war-fighting objects ») peuvent être ciblés, ou si ceux permettant de maintenir la conduite des hostilités (« war-sustaining objects ») peuvent également être considérés comme des objectifs militaires. Les Etats-Unis, notamment, sont de ceux qui, parmi un nombre croissant d'Etats, répondent à cette question par l'affirmative, au contraire des Pays-Bas par exemple.*

### **2. Le principe de proportionnalité**

*Le principe de proportionnalité est vu comme un des principes fondamentaux du Droit international humanitaire (DIH). Il prohibe toute attaque qui causerait des dommages excessifs aux personnes ou aux biens civils par rapport à l'avantage militaire concret et direct anticipé. Selon le Comité international de la Croix-Rouge (CICR), ce principe constitue une règle de droit international coutumier tant en matière de conflit armé international (CAI) que de conflit armé non international (CANI).*

*Une question liée à l'application du principe de proportionnalité est soulevée lorsque les effets d'une attaque ne sont pas immédiats ou directs, mais « indirects ». Le principe ne restreint pas expressément les dommages collatéraux visés aux dommages « directs », au contraire de l'avantage militaire qui doit être pris en compte pour l'application de la règle de proportionnalité. C'est ainsi que les effets indirects devraient pouvoir être pris en compte, dans les limites de leur prévisibilité. Deux critères sont importants à cet égard : celui du lien de causalité entre l'attaque et le dommage d'une part, et celui de la prévisibilité du dommage causé, d'autre part.*

### **3. Le principe de précaution**

*Selon le CICR, le principe de précaution constitue une règle de droit international coutumier tant en matière de CAI que de CANI.*

*La question qui se pose ici concerne les coalitions multinationales impliquées dans des conflits armés, composées de personnel et d'infrastructures relevant de plusieurs Etats. Qui est responsable lorsqu'il s'agit de prendre les précautions liées à une attaque ? Différents éléments sont à prendre en compte pour répondre à cette question, parmi lesquels l'obligation pour celui qui planifie ou décide d'une attaque de prendre les précautions nécessaires.*

*Il faut notamment que l'attaque ait été commise intentionnellement, ce qui comprend également les cas de négligence, comme le soulignent les Commentaires du CICR relatifs aux Protocoles. Ce point de vue est également partagé par un certain nombre d'Etats et de tribunaux internationaux. La question des informations sur la base desquelles l'attaque est décidée est par ailleurs cruciale : la partie menant l'attaque a l'obligation de s'assurer de la véracité et de l'objectivité de ces informations, et doit en outre faire preuve d'un maximum de précaution à cet égard.*

### **4. Conclusion**

*Les Protocoles additionnels représentent une avancée significative, spécialement en ce qui concerne les principes de distinction, de proportionnalité et de précaution. Toutefois, un certain nombre de problèmes demeurent en ce qui concerne l'interprétation et l'application des dispositions liées à ces principes. La contribution de Marten Zwanenburg s'est dès lors concentrée sur une question spécifique liée à chacun des principes énoncés.*

*Ces trois cas exposés ne constituent que des exemples, et il existe certainement d'autres questions liées à l'application de ces principes. Les véritables problèmes ne sont toutefois pas créés par les parties à un conflit qui tentent d'interpréter et d'appliquer le DIH de bonne foi, mais plutôt par celles qui ne le respectent délibérément pas.*



## 1. Introduction

I have been asked to talk about the challenges of applying the principles of distinction, proportionality and precautions in contemporary military operations from a State's perspective. Before I do so, I need to make a few preliminary remarks. First, I am speaking in a personal capacity. Second, I will not be complete. There are many challenges to the principles of distinction, proportionality and precaution in contemporary military operations. It is impossible to discuss all of them in the framework of this presentation. Third, challenges may differ from State to State, depending in particular on the obligations the State concerned has under International Humanitarian Law (IHL). Not all States are party to the same IHL treaties, some States, including the United States (US), are not a party to the two Additional Protocols (AP) to the Geneva Conventions. States are also not necessarily bound by the same obligations under customary international law, if one or more of them have opposed the formation of a particular norm as a 'persistent objector'.

Challenges that States are faced with may also differ because the States concerned are engaged in different military operations. The challenges I will be talking about are based on conversations I have had with legal advisors and military personnel from the Netherlands. This means that they are mostly related to Operation Inherent Resolve.

In my presentation, I will address each of the three principles in turn, and discuss one challenge that has arisen in applying that principle.

These preliminary remarks bring me to the first principle, the principle of distinction.

## 2. Distinction

### 2.1. The principle

The principle of distinction with respect to objects requires States to distinguish between legitimate military objectives on the one hand, and objects that do not constitute a legitimate military objective on the other. Only the former may be attacked. Attacks may not be directed against civilian objects. This has been laid down in Articles 48 and 52 of Additional Protocol I. Additional Protocol II does not contain the principle nor the prohibition on directing attacks against civilian objects, even though it has been argued that the concept of general protection in Article 13(1) of Additional Protocol II is broad enough to cover this.<sup>1</sup> According to the International Committee of the Red Cross (ICRC) Customary Law Study, State practice

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1 M. Bothe, K.J. Partsch, W. Solf (eds.), *New Rules for Victims of Armed Conflicts* 677, Den Haag, Martinus Nijhoff, 1982.

establishes the rule that the parties to the conflict must at all times distinguish between civilian objects and military objectives, and attacks may only be directed against military objectives as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>2</sup>

## 2.2. Financial and economic targets as military objectives

Targeting objects that contribute to the financial or economic position of the adversary is a topical issue. It is of particular relevance in some recent operations because cutting off financial sources for non-State armed groups has been seen as an effective way of fighting them. With respect to the Islamic State of Iraq and Syria (ISIS), there has been much focus on cutting off its oil revenue, which reportedly constitutes a large part of its total income. Such cutting off can be done through other means than use of military force, in particular through the instrument of sanctions. Reference can be made to sanctions imposed by the United Nations Security Council (UNSC) on ISIS, and the particular attention paid by the Council to prohibiting trade in oil and oil products with ISIS in Resolution 2199 of 12 February 2015.<sup>3</sup>

In addition to other means such as sanctions, military force can also be used to limit the profits ISIS makes from oil. Certain members of the international coalition fighting ISIS in Iraq and Syria have attacked, amongst others, objects used in extracting and transporting oil, oil stills, oil tanks, wellheads and separators.<sup>4</sup> Attacks on such objects raise the old question of whether only objects that contribute to 'war-fighting' are legitimate military objectives under IHL or whether objects that contribute to 'war-sustaining' also qualify. As is well known, the United States is one of the few States that adheres to the 'war-sustaining' theory. I will not dwell on this controversy, since it has been the subject of extensive analysis.<sup>5</sup>

The view of the Netherlands is reflected in answers that were given by the Government to questions from Parliament in February 2016. In response to a question whether it was possible for Dutch fighter jets operating against ISIS in Iraq and Syria to bomb oil fields, oil depots or money caches, the Ministers of Foreign Affairs, Foreign Trade and Development Coopera-

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2 J.M. Henckaerts & L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1, Rules 25, Cambridge, C.U.P. 2005.

3 Resolution 2199 of 12 February 2015, UN Doc. S/2015/2199.

4 See e.g. <<http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1286541/august-23-military-airstrikes-continue-against-isis-terrorists-in-syria-and-iraq/>>; and <<http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1278423/august-15-military-airstrikes-continue-against-isis-terrorists-in-syria-and-iraq/>>.

5 For a recent defence of this view, see R. Goodman, "The Obama Administration and Targeting 'War-Sustaining' Objects in Non-International Armed Conflict", 110, in: *American Journal of International Law* 663 (2016).

tion and of Defence responded that, under IHL, only military objectives may be attacked. Oil refineries and banks will usually not qualify as such, even when they are financially lucrative for ISIS. Only oil refineries that contribute directly to military action – for example because they provide oil to military materiel of ISIS – can form a legitimate target. The neutralisation of such an objective would also have to offer a definite military advantage.<sup>6</sup>

The Netherlands thus does not consider ‘war-sustaining’ objects legitimate military objectives. As mentioned, it is traditionally the US and a few other States that do. Recent practice however raises the question of whether the US position is now being followed by a larger number of States. This has been suggested by Dunlap, who stated that:

‘Given that the U.S., Russia, Great Britain, and likely other nations have struck ISIS oil facilities, and the fact that there has been very little outcry against the bombing of the bank, I think we may be witnessing an evolution of law of war towards a broader international acceptance, at least in limited circumstances, of a norm that the U.S. has long recognised.’<sup>7</sup>

In this respect, reference can also be made to a statement by the then President of France Francois Hollande, who said:

‘Regarding further action on our part, it is necessary to attack ISIS, its training centres, the centres where this terrorist army is being trained, but most importantly, attack its sources of financing, the sources of its livelihood – primarily oil.’<sup>8</sup>

It may be questioned, however, whether this statement must be regarded as support for the legality of attacking war-sustaining objects. A French legal adviser close to the practice of the application of IHL has written in the context of determining what is a legitimate military objective that ‘In the case of an oil refinery, for example, it would be necessary to establish the amount of fuel being directly supplied to enemy troops and the precise impact the destruction of the plant would have on the conduct of the enemy’s operations.’<sup>9</sup> This suggests that the actual interpretation used by the French armed forces may be more restrictive than could be read into President Hollande’s statement.

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6 Kamerstukken (Parliamentary papers) II 2015-2016, 27925, nr. 571, p. 10.

7 See <<https://sites.duke.edu/lawfire/2016/02/14/the-loyola-conference-and-the-evolving-definition-of-military-objective/>>.

8 See <<https://casebook.icrc.org/case-study/syria-press-conference-french-president-francois-hollande-and-russian-president-vladimir>>.

9 N. Durhin, “Protecting Civilians in Urban Areas: A Military Perspective on the Application of International Humanitarian Law”, 98, in: *International Review of the Red Cross* 177 (2016), at 179.

### 3. Proportionality

#### 3.1. The principle

The principle of proportionality has been regarded as one of the basic principles of IHL for a long time, but was only codified in 1977 in AP I, in Articles 51 and 57. Article 57 (2) (a) (iii) AP I provides that those who plan or decide on an attack shall:

‘refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’

According to the ICRC, State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>10</sup>

#### 3.2. Indirect effects

One important topical question concerning proportionality relates to effects of an attack that are not immediate or direct. Such effects are sometimes referred to as indirect, secondary, cascading or reverberating effects. If we look at the wording of the principle of proportionality in Articles 51 and 57 AP I, what is required in a proportionality analysis is to take into account effects ‘which may be expected to cause’ death, injury or damage. As Laurent Gisel stated in his presentation at the Bruges Colloquium in 2015, it can be noted that the proportionality principle does not expressly restrict the relevant incidental harm to ‘direct’, contrary to the relevant military advantage.<sup>11</sup>

As Gisel stated, despite some exceptions, it is today generally agreed in the literature that the incidental harm relevant for the rules on proportionality and precautions in attack is not limited to the direct effects of the attack, but include the reverberating or indirect ones. A number of military manuals or other official State documents on collateral damage or targeting make reference to this and it is also the position taken in the Tallinn Manual.

Having said that, the question remains how the words ‘may be expected’ must be understood. In my view, the statement in the United Kingdom’s 2004 Law of Armed Conflict Manual that commanders must bear in mind ‘the foreseeable effects of attack’ is helpful in this regard.<sup>12</sup>

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10 Henckaerts & Doswald-Beck, *op. cit.*, note 2, at 46.

11 L. Gisel, “Relevant Incidental Harm for the Proportionality Principle”, in: *Proceedings of the 16<sup>th</sup> Bruges Colloquium* 118 (2016), at 126.

12 United Kingdom, Joint Service Publication 383, *The Joint Service Manual of the Law of Armed Conflict* 86 (2004).

This statement, in my view correctly, draws attention to the fact that there are two criteria that are important.

The first is the question of causality: will a particular death, injury, or damage, be caused by the attack? As referred to before, there is no requirement that causation be direct, i.e. that there is only one step between the death, injury or damage and the attack. A relevant example is the bombing of a bridge in Yemen on 11 August 2016. It was reported that this bridge was critical for delivering humanitarian aid to a particular area. Deaths caused by the inability of humanitarian aid to reach this area could in my view be said to have been ‘caused’ by the attack on the bridge.<sup>13</sup>

That is not the end of the analysis, however. There is also a second element, namely whether death, injury or damage that was caused by an attack was foreseeable. One aspect of this is that the foreseeability concerned must be reasonably certain. This can be concluded from the fact that during the negotiations on Article 57, the words ‘which may be expected to cause’ were deliberately chosen over ‘which risks causing’. A mere risk in the minds of the persons concerned is thus not sufficient.

Those ‘persons concerned’ are those who plan or decide on an attack. It is they who in accordance with Article 57 (2) (a) (iii) must refrain from deciding to launch an attack that is not proportional. These persons will generally be military personnel. Military personnel can only make determinations on what is foreseeable based on information available to them. This is reflected in the declaration made by the Netherlands with regard to Articles 51 to 58 inclusive of Protocol I, and which states:

‘It is the understanding of the Government of the Kingdom of the Netherlands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.’

In contemporary operations, which often take place in an urban setting that is complex and dynamic, the information available may be limited. This is illustrated by an incident that occurred in the context of Operation Inherent Resolve (OIR). An aerial attack was carried out on a building used by ISIS fighters. The explosion that occurred was much larger than had been expected, causing more damage to surrounding buildings. After this was investigated, it

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13 See for a detailed analysis B. van Schaack, “Evaluating Proportionality and Long-Term Civilian Damage under the Law of War”, at: <<https://www.justsecurity.org/32577/evaluating-proportionality-long-term-civilian-harm-law-war/>>.

turned out to be the result of the fact that ISIS had stored munitions in the building, unknown to the coalition.

Another relevant aspect is that what may be expected from persons who plan or decide on an attack in terms of foreseeing may not be the same as what might be expected of some others. What they may foresee may differ from what, for example, a medical doctor or scientist may foresee. What I am referring to here is the background and training of the personnel concerned. This is closely linked to the specific circumstances of the attack. In case of a pre-planned attack, there may be time to consult relevant expertise that is available at a higher level of command. This may be different in the case of time-sensitive targeting.

## **4. Precautions in Attack**

### **4.1. The rule (or principle)**

The requirement of precautions in attack is laid down in Article 57 AP I. According to the ICRC, this is a customary rule of IHL in both international and non-international armed conflicts.<sup>14</sup>

### **4.2. The role of partners in taking precautions**

In contemporary conflicts, there is often a multinational force fighting on one side. The coalition fighting ISIS in Iraq and Syria is an example, but there are many others. To make it even more complex, the multinational forces may work with local forces. The cases of Syria and Iraq again illustrate this very well: the coalition works closely with the Iraqi armed forces and the Kurdish Peshmerga, and several partners in the coalition also work with Syrian opposition groups. The Syrian armed forces are assisted by Russia, Iran and Hezbollah in fighting the armed opposition and ISIS.

Within such multinational operations, it is often the case that units or individuals from different States play a part in the same targeting process. For example, my own country has provided a Processing Exploitation and Dissemination team to Operation Inherent Resolve. This team contributes to the targeting process on the basis of analysis of Unmanned Aerial Vehicle (UAV) imagery. There are often many other States involved in the process that leads to an attack on a specific object.

Such joint efforts in the context of targeting raise the question of who has which responsibility when it comes to taking precautions in attack. I believe there are several aspects that are relevant to answering this question.

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<sup>14</sup> Henckaerts & Doswald-Beck, *op. cit.*, note 2, at 51.

One is that the rule requires that those who plan or decide on an attack should take precautions. In case of pre-planned attacks from the air, the actual pilot of an aircraft may have only a limited role in this process. Others may have already spent days, weeks or even months planning and deciding on the attack before the pilot is tasked. The pilots will rely on the accuracy of the information fed to them, and may simply direct a munition to geographical coordinates conveyed to them or sent directly to their weapon.<sup>15</sup> In some cases, the pilot of the aircraft, who fires the weapon, will be so remote from the target that he or she will have no additional information concerning its status. That is not determinative of whether the required precautions have been taken.

This does not mean that the pilot has no responsibility. For example, if the pilot drops a bomb on the civilian population based on faulty information, the pilot may still have committed the war crime of attacking the civilian population. It is true that for this war crime to be proven, the pilot must have had intent. Article 85 (3) (a) AP I establishes attacking the civilian population as a grave breach of the Protocol 'when committed wilfully'. Another requirement in that Article is that the act caused death or serious injury to body or health. If the pilot should have had doubts concerning the target, however, I doubt whether a court would accept that there was no intent. Indeed, there are good arguments for the position that wilfulness includes recklessness. The ICRC Commentary to the Protocol states in this respect that 'wilfully':

'encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences'.<sup>16</sup>

This view appears to be shared by a number of States<sup>17</sup> and has also been adopted by international criminal tribunals.<sup>18</sup>

It has been suggested that when intelligence on a target comes from 'local' sources (allied forces, rebel fighters, etc.), the party involved must be able to verify the accuracy and objectivity of the information before taking responsibility for a strike based on the information

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15 W. Boothby, *The Law of Targeting* 122, Oxford, O.U.P., 2012.

16 Y Sandoz, C Swinarski, and B Zimmermann (eds.), "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" (1987), (*ICRC Commentary*) 994.

17 UK Law of War Manual, op. cit. note 9, at 441.

18 See e.g. the International Criminal Tribunal's Trial Chamber I in its judgment in the *Galic* case, *Prosecutor v. Stanislav Galic*, T. Ch, Case No IT-98-29-T, paragraph 54. For a critique, see J. Ohlin, *Targeting and the Concept of Intent* (2013). Cornell Law Faculty Publications. Paper 774. At: <<http://scholarship.law.cornell.edu/facpub/774>>.

received.<sup>19</sup> Whether there is a need to ‘double-check’ such information, and if so to what degree, will in my view depend on the circumstances. At the end of the day, the person carrying out the attack must determine to what extent he or she may rely on information provided by others.<sup>20</sup> Relevant factors in making that determination in my view include the capabilities those others have,<sup>21</sup> the level of cooperation, how reliable their information has been in the past, and whether the information corroborates information already available.

It is of course better to ensure to the maximum extent possible that the onus is not on the person carrying out the attack. It is better to ensure that any concerns are addressed earlier on in the targeting process, to the extent possible. This is the reason that in coalition operations many States make use of so-called ‘red card holders’. For example, the Netherlands has such an officer in the Combined Air Operations Centre that directs the air campaign in Operation Inherent Resolve. A red card holder is a representative of the troop contributing State who has been given the authority to reject missions given by the international commander to the troops contributed by that State.<sup>22</sup> Such a rejection may be based on the determination that carrying out the mission would lead to a violation of the red card holder’s obligations under IHL.

Another relevant factor in determining to what extent faith may be placed in information provided by others, in addition to those mentioned above, is the IHL obligations of the partner concerned. If the partner has different obligations from the State of the person making the determination, particularly if they are less stringent, more caution is called for. This also applies if it is known that a partner has a different interpretation of the same obligation. A good example is the interpretation of what is a legitimate military objective discussed above in the framework of the principle of distinction.

## 5. Conclusion

In conclusion, it must be noted first of all that the Additional Protocols of 1977 represent an enormous achievement, also or perhaps especially in relation to the principles of distinction, proportionality and precaution. These principles were codified for the first time in Additional Protocol I. Although Additional Protocol II does not contain an express statement of the principles of distinction in respect of objects, proportionality and precautions, it has been

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19 N. Durhin, *op. cit.*, note 9, at 189.

20 See also C. de Cock, “Targeting in Coalition Operations”, in: P. Ducheine, M. Schmitt & F. Osinga (eds.), *Targeting: The Challenges of Modern Warfare* 231, Den Haag, Asser Press, 2016, pp. 242-243.

21 Durhin refers to the possibility that the coalition partner from which intelligence was received has more sophisticated technological means at its disposal than the partner that received the intelligence. See Durhin, *op. cit.* note 9, p. 189.

22 See on ‘Red Card Holder’: A. Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* 244-247, Oxford, Routledge, 2015.



argued that the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that, as a result, the principle of proportionality cannot be ignored in the application of the Protocol.<sup>23</sup> With respect to the principle of precaution, in the AP II Commentary, it is suggested that the implementation of Article 13 protection 'requires that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked'. This implies that precautions such as those set out in Articles 57 and 58 of AP I should also be taken by parties to a non-international armed conflict.

Notwithstanding the achievements of the Additional Protocols, there are a number of challenges for States in interpreting and applying their provisions on distinction, proportionality and precautions. This contribution has focused on one challenge in relation to each principle.

In the context of the principle of distinction, there is the old controversy concerning whether 'war-sustaining' objects may be legitimate military objectives. Although traditionally there is only a small group of States, including the US, that answer this question in the affirmative, there are some State practice and statements that suggest that support for this interpretation is growing. It may be that certain States see a very broad interpretation of what is a military objective as justified in an armed conflict against an enemy like ISIS, which itself purposefully violates IHL. As has been noted however, historically this is an issue that stands at the edge of a very steep and slippery slope that has led directly to considerable humanitarian suffering.<sup>24</sup>

In the context of the principle of proportionality, the question whether indirect effects must be taken into account in a proportionality assessment was discussed. It was noted, *inter alia*, that causality and foreseeability are important elements in this regard.

With regard to the principle of precaution, challenges arising from coalition warfare were touched on. It was emphasised that this is an obligation that is imposed on those who plan or decide on an attack, which may not primarily be the person who actually carries out the attack, such as an aircraft pilot. The question of to what extent one person who is part of the targeting process may rely on information from a person from another State was also discussed. It was suggested that relevant factors in making that determination include the capabilities those others have, the level of cooperation, how reliable their information has been in the past, whether the information corroborates information already available, and the

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23 M. Bothe, K.J. Partsch, W. Solf (eds.), *New Rules for Victims of Armed Conflicts*, op. cit., p. 678).

24 K. Watkin, "Targeting 'Islamic State' Oil Facilities", 90, in: *International Law Studies* 499 (2014), p. 513.

IHL obligations that those others have and whether they are more lenient or more stringent than those binding the State of the person carrying out the attack.

As stated in the introduction, these are by no means the only challenges for States in applying the principles of distinction, proportionality and precaution. At the same time, the real challenge lies not so much with those parties to a conflict that try to interpret and apply their IHL obligations in good faith. The real challenge lies with those parties that deliberately disregard IHL, leading to the undermining of the idea that IHL is able to regulate armed conflict in the first place. In particular, it is of great concern that there seems to be impunity for such blatant violations of IHL as seem to be taking place in Syria at the moment. As the Latin *maxim impunita semper ad deteriora invitata* suggests, impunity always leads to greater crimes. It is thus of vital importance to ensure that serious violations of IHL do not remain unpunished.

I would like to conclude on a positive note, however, also based on a Latin maxim. This maxim is particularly appropriate to the present state of IHL compliance. *Dormiunt leges aliquando, nunquam moriuntur*: the laws sometimes sleep, but they never die.

## Q&A SESSION

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At the end of this fourth session related to the concept of military objective, a Q&A session allowed the audience to discuss two questions with the speakers.

### **1. The Principle of Proportionality and Psychological Incidental Harm**

A participant in the audience asked for a practical perspective on the principle of proportionality with regards to taking into account psychological incidental harm. Would that practically entail that besides a legal adviser you would have a psychologist advising on military operations?

According to a speaker, the fact that such harm should be taken into account in the proportionality test is still discussed as there exist legal arguments against it, such as the a contrario argument based on Article 35 of AP I which forbids superficial injury or unnecessary suffering, and seems to make a difference between physical injury and psychological effects.

If one would conclude that psychological harm must be taken into account, it would probably not be very feasible at the working or tactical level to have a psychologist attached to military units as it is hard enough for some States to make sure that they have military legal advisors. But if you have larger troops and at a higher operational level, there may be room for other expertise to be fed into the process. As an illustration, nowadays commanders have e.g. rule of law advisors.

### **2. The Issue of War-Sustaining Objects**

On the issue of war-sustaining economic targets, another participant asked for clarifications about war-sustaining objects, especially in the case where the military target is the enemy's main source of revenue.

The following illustration was given: for the United States military involved in the campaign against ISIS, no other target would entail a better military advantage than ISIS's oil infrastructure. They did take precautions and made the proportionality analysis to make sure that there were limited collateral effects for civilian objects and people. Maybe we should be updating the generally accepted rule to include this kind of target as a military object.

A speaker replied that proportionality and precautions are two issues that are not directly relevant for the determination of a military objective in the first place. For a proportionality assessment to apply, you first need a military objective.

On a possible update of these rules, another speaker expressed a diverging view from the one expressed by the participant: there are other means to address these issues such as embargos, financial sanctions, etc. War-sustaining objects should therefore not be included in the proportionality test. The fact that it is not considered a military objective does not mean that you cannot address this issue from a State's perspective – but it does not amount to targeting. It is also important to adopt a broader perspective and especially about the precedent it would constitute for other belligerents in other conflicts – which is likely to lead to a limitless war.

According to another participant, State practice seems to focus on taking revenue-producing objects in non-international armed conflicts where the items are illegally produced by the non-State party. Under domestic legislation, they could have been destroyed as part of criminal law implementation. Have we looked at the fact that State practice mainly looks at the items illegally produced?

A speaker replied by emphasising the importance of the question, particularly when it comes to the situation of an embargo. However, once again, the speaker is not sure that this issue is relevant to the targeting process. It would be relevant once the object is under the control of the party in question, as there are several means of law enforcement that can be applied, such as seizing the object. Targeting rules include anything about the lawfulness or not of the production of those items.

## Panel Discussion

# The IHL Rules on the Conduct of Hostilities and their Articulation with the Notion of Self-Defence and Rules of Engagement

Chairperson: **Laurent Gisel**  
*ICRC Legal Division*

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## THE NATO HOSTILE ACT AND HOSTILE INTENT CONCEPTS AND THEIR RELATIONSHIP WITH SELF-DEFENCE

**Camilla Guldahl Cooper\***

Norwegian Defence University College

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### **Résumé**

*Dans le cadre de cette table ronde, Camilla Guldahl Cooper présente une analyse des concepts d'acte hostile et d'intention hostile (AHIH) à travers le prisme de l'usage de la force dans les opérations militaires régies par des règles d'engagement (RdE). Plus spécifiquement, cette contribution se concentre sur les différences existant entre la manière dont les concepts d'AHIH sont utilisés, d'une part par l'Organisation du traité de l'Atlantique nord (OTAN) et d'autre part par les Etats-Unis.*

### **1. Les notions d'AHIH : de la légitime défense à des règles d'engagement pour l'accomplissement de missions**

*Les concepts américains d'AHIH sont utilisés dans les RdE américaines pour faire référence à des situations donnant lieu au droit à la légitime défense. A l'origine, les RdE de l'OTAN étaient largement influencées par celles des Etats-Unis mais ces derniers se détachèrent progressivement de la réglementation des AHIH par l'OTAN, étant donné la position plus conservatrice des Etats européens, susceptible de limiter les capacités opérationnelles américaines.*

*Par conséquent, les Etats-Unis ont pris la décision d'exclure les règles relatives à l'usage de la force des RdE de l'OTAN en réponse à des attaques imminentes. C'est ainsi que ces RdE ne régissent désormais plus que les attaques démontrant des AHIH dans le cadre de situations ne*

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*donnant pas lieu à la légitime défense. Les cas de légitime défense sont désormais laissés à la libre appréciation des alliés.*

## **2. Des concepts différents, des bases juridiques différentes**

*La distinction entre les concepts utilisés par les Etats-Unis d'une part, et l'OTAN d'autre part, ont un impact sur la base juridique qui fonde le recours à la force dans leurs RdE respectives. Il est crucial qu'une base juridique claire puisse être identifiée, d'autant plus lorsqu'il s'agit d'autoriser l'usage de moyens létaux. Etant donné que les RdE de l'OTAN autorisent l'usage de la force dans les cas autres que ceux ayant trait à la légitime défense, la base juridique à appliquer dans ce dernier cas doit être trouvée ailleurs. C'est ainsi qu'elle peut être contenue dans le droit des conflits armés si l'usage de la force concerné implique une participation à un tel conflit : il est ainsi permis d'user de la force contre les personnes participant directement aux hostilités. En conséquence, alors que les RdE américaines relatives aux AHHI sont basées sur la légitime défense, les concepts utilisés par l'OTAN sont eux encadrés par le concept de « participation directe aux hostilités » tiré du droit des conflits armés.*

## **3. Une confusion conceptuelle**

*Les RdE relatives aux concepts d'AHIH sont considérées comme étant parmi les RdE les plus complexes au sein de l'OTAN, étant donné que leur application effective dépend fortement du contexte en cause. La compréhension de ces concepts n'est en outre pas facilitée par leur articulation avec la notion de légitime défense, ce qui provoque des confusions importantes entre les acceptions utilisées d'un côté par l'OTAN et de l'autre par les Etats-Unis.*

*Toutefois, en dépit de leur complexité, les RdE de l'OTAN ont été amenées à jouer un rôle crucial dans le cadre d'opérations où les forces ennemies ne se distinguaient pas des populations civiles, justifiant un ciblage basé sur le comportement. Cela a permis de ne pas attendre qu'une situation se présente où l'ennemi posait une menace imminente, comme c'est le cas lorsqu'il s'agit de légitime défense.*

## **4. L'apparition d'un concept opérationnel de légitime défense**

*Le rôle de la légitime défense pour les forces armées dans un contexte de conflit armé doit nécessairement être compris pour pouvoir saisir entièrement les concepts d'AHIH utilisés par l'OTAN. Les RdE relatives aux AHHI de l'OTAN sont comprises comme une autorisation à user de la force dans le cadre de situations qui ne donnent pas lieu à la légitime défense.*

*En cas d'opérations complexes ou politiquement sensibles, des RdE plus restrictives peuvent être adoptées, ce qui pousse généralement les forces armées à davantage porter leur attention sur la légitime défense. Cependant, le fait que les RdE n'autorisent pas tel usage de la force n'altère pas leur possible légalité en droit des conflits armés. C'est ainsi que la légitime défense peut fonctionner comme un concept opérationnel qui peut avoir pour effet d'autoriser l'usage de la force, qui serait en l'occurrence considéré comme légal bien que prohibé par les RdE. Il convient dès lors de distinguer les concepts opérationnel et juridique de la légitime défense.*

*Enfin, pour terminer, Camilla Guldahl Cooper insiste sur la diversité des cas existant en matière d'usage de la force, qui sont loin de se résumer uniquement à des situations de légitime défense. Les acteurs politiques et stratégiques – et non pas uniquement les acteurs militaires – gagneraient ainsi à comprendre davantage l'application de la légitime défense en période de conflit armé.*

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The use of force during military operations is regulated through rules of engagement (ROE). The ROE of the North Atlantic Treaty Organization (NATO) are defined as '[d]irectives to military forces that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied'.<sup>1</sup> They function both as political constraints on the use of otherwise lawful force, and as an operational tool for command and control. ROE commonly employ operational terms to describe the authority provided, such as 'hostile act' and 'hostile intent'. The focus of this presentation is on these ROE concepts, specifically the difference between the NATO concepts on the one hand, and the concepts used in the United States' (US) Standing Rules of Engagement<sup>2</sup> and the Sanremo Handbook on Rules of Engagement<sup>3</sup> on the other.

## **1. From Hostile Act and Hostile Intent as Self-Defence to ROE for Mission Accomplishment**

The US concepts of hostile act and hostile intent are used in the US ROE to refer to situations giving rise to a right of self-defence. In the beginning of NATO operations, NATO ROE were heavily influenced by US ROE. This included the references to hostile act and hostile intent to denote the ability to use force in self-defence situations. However, States have different views

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1 NATO: *STANAG 2597: Training in Rules of Engagement*, Annex B to ATrainP-4, 4 May 2015, p. 1.

2 US Chairman of the Joint Chiefs of Staff (CJCS): *Standing Rules of Engagement (SROE)/Standing rules for the use of force (SRUF) for US Forces*, CJCS Instruction 3121.01B, unclassified excerpt, 13 June 2005, p. A-4.

3 Cole, Alan *et al.*: *Sanremo Handbook on Rules of Engagement*, International Institute of Humanitarian Law, 2009, p. 3.

on when a right of self-defence may arise and how it may be applied. There are even differing views on whether military forces are applying a self-defence form that is legally founded on State self-defence, personal self-defence, or a separate concept of unit self-defence. The US in particular was concerned about the regulation of hostile intent in the NATO ROE because European States had a more conservative view on this than the US, which meant that the NATO ROE could impose a limitation on the ability of the US to respond to imminent self-defence.

As a result, the decision was made to exclude the regulation of the use of force in response to attacks and imminent attacks from NATO ROE. Instead, NATO ROE regulate the authority to attack individuals carrying out hostile acts or demonstrating hostile intent in situations that do not give rise to self-defence. The current NATO hostile intent and hostile act ROE authorise the attack on 'persons demonstrating a hostile intent (not constituting an imminent attack) or who commit or directly contribute to a hostile act (not constituting an actual attack)'.<sup>4</sup> The importance of self-defence is emphasised both in doctrine and in the ROE for an operation, but it is left for NATO member States to define when and how it applies for their respective forces.<sup>5</sup>

## 2. Different Concepts, Different Legal Bases

The distinction between the US and NATO concepts have an impact on the potential legal basis for the use of force authorised by those ROE. ROE impose political constraints on the otherwise lawful use of force, meaning that the use of force must have a legal authority. A clear legal basis is particularly important for ROE that permit the killing of other persons. Because the NATO hostile act and hostile intent concepts authorise the use of force in situations other than self-defence, the legal basis for the use of such force must be found elsewhere. If the operation involves participation in an armed conflict, the use of force by the military during that operation is likely to be regulated by the Law of Armed Conflict (LOAC). According to LOAC, attacks may be directed at persons who are lawful targets, either due to their status or on the basis of their conduct, namely that they directly participate in hostilities.<sup>6</sup> Because of the focus on the actions and intentions of the opposing forces in the NATO hostile act and hostile intent ROE, these ROE are useful tools for regulating the use of force in conduct-based targeting. As a result, while the US hostile act and hostile intent ROE are based on self-defence, the NATO concepts are likely to be regulated by the LOAC concept of direct participation in hostilities. There is no technical or legal reason for not applying the hostile act and hostile

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4 NATO MC 362/1 "NATO Rules of engagement", citation made publicly available, in: NATO: *STANAG 2597*, op. cit., pp. B-35 and B-37.

5 Ibid, pp. B-17-18.

6 Article 51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.



intent ROE to regulate attacks on combatants as well, if the decision is made to limit attacks on combatants to when they are committing a hostile act or demonstrating hostile intent. However, combatants are usually targeted on the basis of their status rather than conduct, and this is commonly dealt with in a different ROE.

Although the NATO hostile act and hostile intent ROE are mostly used in operations involving participation in an armed conflict, they may also be included in the ROE for other operations. The use of force beyond personal self-defence would, however, require the consent of the host nation, and the host nation's consent would be influenced by its national legislation on the use of force during peacetime. As a result, the application of these ROE outside armed conflict, for instance in a train and assist mission, is likely to be in situations that resemble law enforcement. Furthermore, because human rights require that State actors use no more force than necessary,<sup>7</sup> the term 'attack' in the ROE would have to be interpreted and applied in a manner which takes such escalation of force requirements into account.

### 3. Conceptual Confusion

The hostile act and hostile intent ROE are considered some of the most complex NATO ROE. Their application is very context-dependent. In order to recognise threatening or abnormal behaviour, it is necessary to understand what normal behaviour is. Identifying threats before they are imminent therefore requires good situational awareness and an understanding of the local culture. The understanding of the NATO hostile act and hostile intent concepts is not helped by their complicated relationship with self-defence. Firstly, both self-defence and the NATO hostile act and hostile intent concepts relate to threatening behaviour by other persons resulting in a need to use force. Secondly, because the full reference to the concepts do not exactly roll easily off the tongue, they are commonly just referred to as hostile intent and hostile act ROE, rather than ROE authorising attack on 'persons demonstrating a hostile intent (not constituting an imminent attack) or who commit or directly contribute to a hostile act (not constituting an actual attack)'. As a result, the references to the NATO concepts are identical to the US concepts, which, as mentioned, are ROE concepts for self-defence. People are, in other words, using the same terms when referring to different concepts, though they may not even realise that the concepts are different. In fact, the NATO hostile act and hostile intent ROE are viewed by many as self-defence ROE, while they should be viewed as closely related to but still conceptually distinct from self-defence.

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<sup>7</sup> See for instance UN Human Rights Committee: Draft general comment No. 36: Article 6: *Right to life, Advance Unedited Edition*, 2017, available at: <[http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf)>, paragraph 18, and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, *ETS* 5.

Despite their complexity, the NATO hostile act and hostile intent ROE have played an important role in operations where the opposing forces fail to distinguish themselves from civilians, resulting in a focus on conduct-based targeting. The authority to use force against persons that pose a threat to NATO forces, without forcing them to wait until the situation is so serious that they face an actual or imminent attack, is important for both mission accomplishment and force protection. It enables military forces to be proactive and take the initiative, rather than only reacting to the opposing forces' actions.

#### 4. The Evolvement of an Operational Self-Defence Concept

In order to fully understand the NATO hostile act and hostile intent concepts, it is also necessary to understand the role of self-defence for military forces during armed conflict. NATO ROE are commonly declared to not limit the ability of military forces to rely on self-defence, as defined by the respective troop contributing nations. The hostile act and hostile intent ROE are defined as authorising the use of force in situations that do not give rise to a self-defence situation.

As mentioned above, according to current NATO policy, all use of force must either be authorised by ROE or amount to self-defence. Politically sensitive or complex operations often result in restrictive ROE. If the ROE become too restrictive, military forces are likely to focus their attentions more on self-defence. However, the lack of ROE authorisation does not alter the fact that the use of force is allowed by LOAC. LOAC regulates the use of force in both offence and defence.<sup>8</sup> By contrast, self-defence, especially in the form usually referred to among European NATO States, namely the criminal law concept of self-defence, only has a limited scope of application during an ongoing armed conflict.<sup>9</sup> If restrictive ROE or other operational use of force direction is permitted to be set aside in exceptional cases, the use of force is still likely to be regulated by LOAC. For instance, if military forces are prohibited from carrying out attacks that are expected to cause civilian casualties, even those considered proportionate under LOAC, but this limitation is not applicable if the NATO forces are under attack, the use of force to respond to that attack will still be regulated by LOAC. However, the only way to operate outside the ROE or use of force directives is in self-defence. Self-defence is in other words functioning as

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8 Article 49(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, *op. cit.*

9 See also Boddens Hosang, Hans F.R.: "Force Protection, Unit Self-defence, and Personal Self-defence: Their Relationship to Rules of Engagement", in: Terry D. Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (2<sup>nd</sup> Edition), OUP, Oxford, 2015, pp. 499-501; Bagwell, Randall and Molly Kovite: "It is not self-defence: Direct participation in hostilities authority at the tactical level", 224(1), in: *Military Law Review* 1 (2016); and Henderson, Ian and Bryan Cavanagh: "Military members claiming self-defence during armed conflict – Often misguided and unhelpful", in: Petrovic, Jadranka (ed.): *Accountability for Violations of International Humanitarian Law – Essays in honour of Tom McCormack*, Routledge, London/New York, 2016.

an operational concept permitting the use of otherwise lawful force not authorised by ROE. In many cases, however, the use of force under this operational self-defence concept is likely to be LOAC, for instance the notion of direct participation in hostilities. As a result, it is necessary to distinguish this operational concept from the legal concept of self-defence.

As long as military forces only use force that is necessary and proportionate when acting in operational 'self-defence', they will most likely also comply with LOAC. However, the use of force not regulated by ROE is subject to less control by the chain of command. Even though it may sound better politically that military forces limit themselves to only use force in self-defence, the reduced control this shift entails may not sit comfortably with the political levels. Furthermore, the overemphasis on self-defence shifts the responsibility for the use of force from the military chain of command, and hence the State responsible for employing military force in the first place, onto the individual soldier. The concepts of combatants and lawful acts of war are based on the idea that soldiers are acting as a tool for the State and not in a private capacity.<sup>10</sup> Self-defence, on the other hand, is a criminal defence individuals may argue to justify otherwise unlawful use of force. The idea that soldiers fight wars by only using force in self-defence is therefore at odds with the fundamental premises of LOAC. It is in other words not just military forces who need to better understand the application self-defence during armed conflict, but the strategic and political levels as well. It must also be understood that imposing too many restrictions on the use of force within the main framework, namely ROE, while still expecting the military forces to achieve their mission, result in an overemphasis on the exceptional framework in the form of self-defence that is 'misguided and unhelpful'.<sup>11</sup>

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10 Baxter, Richard: 'The Municipal and International Law Basis of Jurisdiction over War Crimes', 28, in: *British Yearbook of International Law* 382, (1951), p. 385.

11 Henderson, Ian and Bryan Cavanagh, op. cit. note 10.

# INTERNATIONAL HUMANITARIAN LAW, SELF-DEFENCE AND RULES OF ENGAGEMENT: APPLICATION IN THE NETHERLANDS

**J.F.R. Boddens Hosang<sup>1</sup>**

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## **Résumé**

*Hans Boddens Hosang présente lors de son intervention la perspective néerlandaise relative à l'articulation entre les règles de Droit international humanitaire (DIH), la légitime défense et les règles d'engagement.*

*Les Pays-Bas adoptent une approche par paliers dans l'implémentation du DIH en lien avec l'usage de la force, et ce principalement à travers les Règles d'Engagement (RdE) et les instructions de ciblage. Plus précisément, la mise en œuvre du DIH se fait à travers une combinaison de ces deux directives interagissant l'une avec l'autre au moment de la planification des opérations de ciblage.*

## **1. Le fondement juridique de la légitime défense**

*Hans Boddens Hosang part de la base juridique de la légitime défense afin de traiter de l'articulation complexe de la notion de légitime défense avec les RdE – qui pose un nombre important de questions aux Pays-Bas.*

*Dans les situations de conflit armé, la notion de légitime défense perd sa pertinence dans le contexte de la conduite des hostilités contre les forces ennemies étant donné que la situation relèvera des règles de DIH. En ce qui concerne les situations qui ne peuvent être qualifiées de conflit armé, la base juridique de la légitime défense peut être trouvée tant au niveau national – dans le droit pénal national – qu'international – dans le Droit international des droits de l'homme qui prévoit que la légitime défense est une exception au droit à la vie.*

*Enfin, il est important de noter qu'aucun vide juridique n'existe en matière de légitime défense ou d'usage de la force : ceux-ci sont régulés soit par le Droit international des droits de l'homme, soit par le DIH.*

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1 Deputy Director of Legal Affairs of the Netherlands Ministry of Defence. This contribution was written in a personal capacity and the opinions expressed herein do not necessarily reflect the official views of the Netherlands Ministry of Defence.

## **2. L'application de la légitime défense dans les RdE**

*En ce qui concerne l'application de la notion de légitime défense dans les RdE, il convient de noter que les ceux-ci contiennent généralement une exception quant à la légitime défense. Cependant cette dernière est souvent peu comprise et donne lieu à de nombreuses ambiguïtés et malentendus.*

*Il faut d'abord souligner que la légitime défense à laquelle il est fait référence est la légitime défense individuelle dans le sens du droit pénal. Toutefois, ce concept varie considérablement d'un pays à l'autre, pour une multiplicité de raisons. Aux Pays-Bas par exemple, la loi pénale régissant cette situation paraît claire, mais cette clarté est mise à mal par l'interprétation qui en est faite par la Cour suprême dans sa jurisprudence : que signifie légitime défense pour les militaires sur le terrain ?*

## **3. L'application de la légitime défense dans les RUF**

*Etant donné la nature individuelle du concept de légitime défense tel qu'il est entendu dans les RdE, il n'est pas surprenant que celui-ci – en termes de règles sur l'usage de la force – apparaisse de manière significative dans les « cartes RUF » (règles sur l'usage de la force) distribuées au personnel militaire leur autorisant l'usage de la force pour un usage réactif, défensif.*

*Il est particulièrement intéressant de noter que les militaires analysent la situation à travers un prisme qui est davantage celui des droits de l'homme que du DIH, appliquant notamment les principes de proportionnalité et de nécessité tels que conçus en Droit international des droits de l'homme, par exemple.*

*Par ailleurs, les autorisations de légitime défense font souvent appel à des règles basées sur le comportement – davantage utilisées lorsque les combattants ennemis ne sont pas aisément identifiables – qu'à des règles basées sur l'identité, qui ne sont, elles, utilisées que de manière exceptionnelle, quand on a une définition parfaite des contours de l'ennemi à combattre.*

## **4. Conclusions**

*Pour conclure, Hans Boddens Hosang insiste sur la nécessité de prendre en compte des considérations qui ne sont pas purement juridiques au moment de la conduite de telles opérations militaires. C'est ainsi que la variable politique peut jouer un rôle fondamental dans les restrictions qui sont faites à l'usage de la force, notamment motivées par une inquiétude de la réaction du public à d'éventuels dommages collatéraux.*

Before discussing the application and implementation of International Humanitarian Law (IHL), the law governing self-defence, and (their interaction with) the rules of engagement, a few preliminary explanations are required in order to clarify some of the terminology used below.

Instructions and directives regarding the use of force by military personnel consist of a number of specific documents. Within that structure, the actual authorisations regarding the use of force are set forth in two types of documents.<sup>2</sup> The rules of engagement (ROE) consist of numbered rules issued to commanders,<sup>3</sup> along with specific guidance and instructions relevant to the operation in question. Soldier's cards, also referred to as rules on the use of force (RUF), are cards issued to individual personnel, summarising their individual authority as regards the use of force. Although the RUF cards can also serve to summarise the ROE, they only set forth the rules applicable or relevant at the level of individual military personnel and consequently do not contain authorisations for weapons or weapons systems or types of use of force which require higher command level authority.

In addition to the ROE and RUF cards, targeting directives are commonly issued to military forces. These directives delineate which persons or objects may be lawfully targeted either by kinetic means or otherwise.<sup>4</sup> Although applicable to all forces participating in the operation for which they are issued, for reasons which will be explained below, the targeting directives are generally most relevant for commanders and for combat aircraft.

The Netherlands applies a tiered approach in implementing International Humanitarian Law in relation to the use of force via ROE and related documents. Additionally, and in keeping with the obligations under Article 82 of the first Additional Protocol, military legal advisers are deployed with military forces of relevant size<sup>5</sup> and a 24/7 reach-back system for legal advice from the ministry is available (also for forward deployed military legal advisers if consultation

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2 See *inter alia* Boddens Hosang, J.F.R., "The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations", in: *Netherlands International Law Review*, Vol. 64, no. 3, 2017.

3 Bear in mind that 'commander' can refer to the commander of the force as a whole, but also to lower level officers or even non-commissioned officers in command of a unit or (crew served) weapons system or platform.

4 For a more detailed discussion of non-kinetic targeting, see Ducheine, P.A.L., "Non-Kinetic Capabilities: Complementing the Kinetic Prevalence to Targeting", in: Ducheine, P.A.L., Schmitt, M.N. and Osinga, F.P.B. (eds.), *Targeting: The Challenges of Modern Warfare*, Den Haag, TMC Asser Press, 2016.

5 Although there is no official quantitative approach, generally military legal advisers are deployed if the Netherlands deploys units of battalion size and equivalent units of the air and maritime forces. However, the complexity of an operation and the likelihood of requiring legal advice in the field can lead to the deployment of military legal advisers even for smaller units, or the not deployment of a military legal adviser (e.g. if the mission is aimed exclusively at training local forces).

is required). In this tiered system, the more complex considerations, including the application of those elements of IHL requiring higher level command decisions or which require more complex evaluations of the circumstances, are normally contained in the ROE and the targeting directive. These documents, as was explained above, are generally aimed at a level of command or autonomous authority which also has access to either the forward deployed legal adviser or to the reach-back system.

True implementation of IHL is achieved through a combination of the ROE and the targeting directive, which interact and apply to both pre-planned and *ad hoc* targeting. In this system, the ROE are aimed at authorising the use of force necessary for mission accomplishment, while ensuring, through legal review<sup>6</sup> of the ROE process, that all such use of force remains within the legal (principally IHL-based) constraints. For example, the principle of distinction is incorporated through specific ROE, such as those authorising identity-based use of force where possible or restricting the use of force to a behaviour-based approach. The targeting directive complements these ROE by identifying, on the basis of Articles 51 to 57 of the first Additional Protocol and similar provisions, the targets which may be made the subject of the use of force authorised in the ROE.

The concept of direct participation in hostilities (DPH) straddles this differentiation between identity-based and behaviour-based targeting. In operations in which it is possible to identify non-State forces with a continuous combat function,<sup>7</sup> identity-based ROE may be issued. In operations where the lines are blurred, however, behaviour-based ROE are the only viable option. Given the strict criteria for establishing a continuous combat function, it seems at least very likely, if not a given fact, that such behaviour-based ROE will generally be the norm, barring very specific exceptions.

The principle of proportionality is not incorporated through the ROE themselves, but is emphasised in the commander's guidance section of the ROE and in the targeting directive. This is logical, if one considers that proportionality (in the meaning of that term under IHL) requires

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6 The role of legal advisers in the ROE process varies from country to country. In the Netherlands, ROE are drafted by legal advisers with input from the operational units to whom they will be issued and subject to final political review, to ensure compatibility with the political mandate for the mission. ROE drafted by NATO, the EU or the UN are reviewed by the legal directorate with similar input and final political review. For a discussion of the ROE process, see Boddens Hosang, J.F.R., *Rules of Engagement: Rules on the Use of Force as Linchpin for the International Law of Military Operations*, Amsterdam University Press, 2017, chapters 1 and 2; Cammaert, P.C. and Klappe, B., "Application of Force and Rules of Engagement in Peace Operations", in: Gill, T.D. and Fleck, D. (eds.), *The Handbook of the International Law of Military Operations*, 2<sup>nd</sup> Ed., Oxford, O.U.P., 2015.

7 Melzer, N., *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, ICRC, 2009, p. 33.

a very context-specific evaluation of the specific target (and its surroundings) in question, while the ROE are intended and drafted to be applicable to the operation as a whole under all circumstances.

The relationship between personal self-defence and ROE is complex and provides a number of vexing challenges, also in the Netherlands. In order to address these issues, a closer look at the legal basis for self-defence might help to clarify matters. In situations of armed conflict, the concept of self-defence becomes mostly irrelevant in the context of the actual conduct of hostilities against enemy forces. If the target in question is a legitimate target under IHL, the use of force against that target, even if such use of force is a response to prior use of force by the target in question, is not governed by (the law related to) self-defence but is quite simply a case of combat between combatants.<sup>8</sup> While it is theoretically possible that force is used in an armed conflict against a person who is not a legitimate target under IHL, it would seem that such cases would normally be quite rare. With the exception of deliberate criminal acts, and therefore proactive use of force against a non-combatant, the reactive use of force against persons who are not members of the enemy armed forces<sup>9</sup> would either be covered by the rules regarding direct participation in hostilities or be one of the exceptional cases of self-defence in the context of an armed conflict. For that to be the case, the attack by the civilian would need to be missing the belligerent nexus.<sup>10</sup> It would seem unusual, however, for a civilian to attack members of the armed forces during an armed conflict without any nexus to the armed conflict in question, although such a situation would theoretically be possible if the operation in question, although governed by IHL, is more law-enforcement oriented, such as maintenance of public order, quelling riots, and similar operations. In such exceptional cases, the use of force in what is then properly classified as self-defence would fall under the same legal basis as such use of force outside the context of an armed conflict.

The legal basis for the use of force in self-defence in situations other than armed conflicts can be found at both the national and international levels. At the national level, self-defence is commonly regulated by national criminal law in the form of a justification or excuse for the

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8 It might be observed as well that the criminal law concept of self-defence commonly requires that the attack being defended against is an illegal or unwarranted attack. In an armed conflict governed by IHL, however, the notion of combatant privilege and legal equality between combatants as regards the use of force renders that approach or requirement irrelevant.

9 As defined in Article 43 of the first Additional Protocol. It may be argued that members of organised armed groups with a continuous combat function fall under the same exception intended here as their – essentially – continuous direct participation in hostilities renders their loss of protection under IHL equally continuous.

10 Applying the threshold criteria proposed by the ICRC, it would seem that in the type of circumstances under discussion the threshold of harm and the direct causation requirement would already be satisfied, thus leaving only the belligerent nexus as being absent or questionable. ICRC, *op. cit.*, note 7.



use of force which would, when not part of the exercise of the right of self-defence, constitute a criminal act. At the international level, self-defence is an exception to the right to life as protected by human rights instruments, whether as an explicit exception in the human rights instrument itself<sup>11</sup> or through decisions or clarifications issued by the human rights body under the relevant instrument,<sup>12</sup> albeit in all cases subject to strict requirements as regards the necessity and proportionality of any such use of force.<sup>13</sup>

As a final observation on the legal basis for self-defence, and for the use of force by government agents in general, it should be noted that either IHL or human rights law applies; there is no vacuum. That means that if the situation in which force was used is not governed by IHL or the person against whom force was used is not a legitimate target under IHL, the use of force must be evaluated on the basis of human rights law (or be investigated as a violation of IHL, should the circumstances so indicate).

Turning to the implementation of self-defence in the ROE, it may be observed that all ROE sets traditionally contain an exception regarding self-defence, emphasising that nothing in the ROE limits or negates the right of self-defence. However, the meaning of the concept of self-defence is not fully explained and frequently gives rise to confusion and discussion. First of all, it should be emphasised that the self-defence referred to in the clause in question refers to personal self-defence in the criminal law sense, not national self-defence. Clearly, in a national self-defence situation, subsequent military deployments and the use of force in that context will be guided by ROE and the exception would render the ROE moot if the very context of the operation would already render the ROE inoperative or non-applicable. The dividing line between national self-defence (governed by ROE) and personal self-defence (which may authorise setting aside the ROE to the extent necessary) is formed by unit self-defence. In the view of the Netherlands, unit self-defence is an 'on the spot reaction'<sup>14</sup> based on national self-defence as its authority and governed by the 'Caroline criteria': an instant and overwhelming necessity to respond, leaving no alternatives and no moment for further deliberation, and limited by the principle of proportionality. While such use of force in the context of unit self-defence may be guided by ROE, ultimately

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11 Article 2, paragraph 2 under (a), of the European Convention on Human Rights.

12 For example, the Human Rights Committee has made it clear that lethal use of force in self-defence does not constitute 'arbitrary' deprivation of life, provided a number of strict requirements and conditions are met. See Human Rights Committee, *Suárez de Guerrero v. Colombia*, communication no. R.11/45, paragraph 13.2; and (Draft) General Comment No. 36, paragraphs 16 and 18. Available at <[http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf)>.

13 For example, European Court of Human Rights, *McCann and Others v. United Kingdom*, application no. 18984/91, paragraphs 149 and 200; *Armani da Silva v. United Kingdom*, application no. 5878/08, paragraphs 244 – 248. See also below as regards the use of these concepts in the RUF cards.

14 Dinstein, Y., *War, Aggression and Self-Defense*, 5<sup>th</sup> Ed., Cambridge, C.U.P., 2012, pp. 242 – 244.

the unit commander must decide what is necessary and proportional under the circumstances and may, if absolutely necessary to protect his or her unit, set aside the ROE in a similar manner as intended by the exception set forth in the ROE themselves.

Focusing on personal self-defence as the type of self-defence specifically intended by the exception in the ROE, it should be noted that the concept in question varies considerably from country to country. Such differences can relate to issues such as defence of others, defence of property, the (absence or existence of a) duty to retreat, as well as other issues. In the Netherlands, the criminal law statute text on personal self-defence appears clear,<sup>15</sup> but the case law of the Supreme Court has set additional requirements and has clarified what is to be understood by the concepts of necessity and proportionality in the context of self-defence under Dutch law. Most of those elements would appear incompatible with military operations and the military operational environment, leaving it unclear how to interpret self-defence for military personnel on duty.<sup>16</sup> In recent operations, this has, for example, led to discussions on the authority to use force in defence of others. Based on the case law regarding self-defence, it is clear that defence of others is limited to persons in the immediate vicinity of the person invoking self-defence. In an operational context, however, it is not always clear what that means, given the ability to use force over greater distances than an unarmed civilian in a civilian context – the ‘baseline context’ on which the law is based – would be able to do.

Given the individual nature and the individual responsibilities inherent in the concept of personal self-defence, it is not surprising that in terms of the rules regulating the use of force, the concept is an exception in the ROE but appears significantly in the RUF cards. In the approach used by the Netherlands, the authorisations set forth in the RUF cards are essentially limited to reactive, defensive use of force, leaving the proactive and mission accomplishment-oriented authorisations in the ROE.<sup>17</sup> In combination with the authorisations for such reactive use of

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15 Article 41 of the civilian Criminal Code authorises necessary and proportional use of force in defence against an unlawful (imminent) attack, if the attack is aimed at the life or physical integrity of any person or against property. While the statute text also refers to attacks on the ‘honour’ of any person, that clause is understood to refer to physical assault, including sexual assault, and is therefore identical to attacks on physical integrity.

16 A differentiation needs to be made between off-duty military personnel, in which case the military status is coincidental (or even irrelevant) as regards the legality of any use of force in self-defence, and on-duty military personnel. For the latter, a concept of ‘functional self-defence’ is applied in practice, but this concept is still in a developmental phase and is not based on formal statutes or significant case law.

17 Although the RUF cards are limited to reactive use of force, they normally contain an additional authorisation to use force ‘when so ordered by your commander’. In other words, the authorisations for individual military personnel to use force on their own volition is reactive, while the unit commander (to whom the ROE have been issued) can order the application of the proactive use of force authorised by the ROE.

force, the RUF cards place considerable emphasis on the elements of necessity and proportionality. What is of interest for the present discussion, is that the RUF cards use those elements in the human rights law version. For example, the cards commonly require that no more force is used than absolutely necessary to counter the threat in question, thus applying the requirement of absolute necessity<sup>18</sup> rather than military necessity<sup>19</sup>, and applying the human rights definition of proportionality rather than the meaning of that concept in, for example, Article 57, paragraph 2 under iii, of the first Additional Protocol.<sup>20</sup>

In essence, therefore, the RUF cards are self-defence cards and, as regards the use of force, set forth behaviour-based rather than identity-based rules on the use of force. Moreover, the RUF cards reflect the requirements of human rights law for the use of force in self-defence, regardless of the operation for which they are issued and therefore regardless of whether the operation takes place in the context of an armed conflict to which IHL applies. While the ROE and concomitant targeting directive will always need to reflect the applicable paradigm for the operation in order to ensure compatibility between mission accomplishment and applicable law, the RUF cards, at least in the Netherlands, invariably take the 'safer' approach by implementing the (stricter) human rights law criteria.

Given the ready source of confusion or lack of clarity as regards the precise meaning and scope of the right of self-defence, as well as the inherent complexity of reconciling the concept of self-defence with the ROE and RUF system, the United States system of Standing ROE (SROE) and concomitant guidance on self-defence, supplemented as needed by ROE and RUF specific to a given operation and thus specific to the applicable paradigm, etc., for that operation, can be seen as an inspirational model. While obviously the actual contents would need to be specifically adapted to reflect the national legal interpretations, statutes and policies regarding

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18 As contained in, *inter alia*, Article 2, paragraph 2, of the European Convention on Human Rights. See also ICRC, "Report on the Expert Meeting on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms", November 2013, p. 8. As regards case law, see (*inter multos alia*) European Court of Human Rights, *McCann v. United Kingdom*, application no. 18984/91, paragraph 149; *Isayeva v. Russia*, application no. 57950/00, paragraph 173; *Jaloud v. Netherlands*, application no. 47708/08, paragraph 199.

19 See, for example, Article 14 of General Orders No. 100 (*The Lieber Code*) and Department of Defense Joint Publication 1-02, *Dictionary of Military and Associated Terms*, 9 January 2003.

20 For a more detailed discussion of the differences between the IHL and human rights versions of necessity and proportionality, see, for example, Lubell, N., "Challenges in Applying Human Rights Law to Armed Conflict," in: *International Review of the Red Cross*, Vol. 87, no. 860, 2005, pp. 745 – 746; ICRC, op. cit. note 12, p. 8; and Scobbie, I., "Human Rights Protection During Armed Conflict: What, When and for Whom?" in: Wet, E. and Kleffner, J.K. (eds.), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria, Pretoria University Law press, 2014, p. 13.

self-defence, the document structure and concept as such can possibly offer a useful system for providing clarity to military personnel.

One final observation relevant to all of the topics addressed above needs to be included. While the comments and observations presented above were made from the perspective of the law governing military operations, the actual conduct of such operations is guided as well, of course, by political considerations. In practice, it may be observed that such political views commonly lead to far greater restrictions on the use of force than those required by law, motivated in no small part by concerns over public support for the operation in question. A conservative estimate based on prior experience would lead to the conclusion that purely legal considerations regarding the (legality of the) use of force rarely satisfy public concerns over casualties resulting from military operations. Proper understanding of the law therefore needs to be combined with knowledge of the dynamics of military operations, and continued and open communication between operators, lawyers, politicians and academics remain vital in order to ensure proper understanding between all the parties concerned.

# THE LEGAL SOURCES OF THE CONCEPT OF SELF-DEFENCE AND THEIR RELEVANCE DURING ARMED CONFLICTS

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## **Résumé**

*Dans cette contribution, Gloria Gaggioli analyse les différentes facettes du concept de légitime défense en droit international, ainsi que ses sources juridiques.*

### **1. La légitime défense des Etats**

*La légitime défense des Etats trouve sa source dans l'article 51 de la Charte des Nations unies et est un concept propre au jus ad bellum. Ces règles requièrent qu'une intervention en légitime défense soit proportionnée et limitée à ce qui est nécessaire. Toutefois la légalité de l'usage de la force lors d'une attaque spécifique durant un conflit armé doit être évaluée au regard du droit international humanitaire (DIH), indépendamment du fait que le recours à la force soit licite d'un point de vue du jus ad bellum.*

### **2. La légitime défense personnelle comme exception au droit à la vie**

*La légitime défense peut également trouver sa source dans le droit international des droits de l'homme comme exception au droit à la vie. Il s'agit d'une circonstance dans laquelle un agent de l'Etat peut faire usage de la force létale à l'encontre d'un individu afin de répondre à une menace illicite et imminente à sa vie ou son intégrité physique. Le recours à la force létale doit être utilisé en dernier ressort et limiter au maximum les pertes de vies incidentes. Les critères de la légitime défense en droits de l'homme sont donc plus stricts qu'en DIH.*

*Le concept de légitime défense en droits de l'homme est pertinent dans le cadre d'un conflit armé. Par exemple dans la situation où un civil ne participant pas directement aux hostilités attaquerait un soldat, celui-ci pourra avoir recours à la force dans le cadre de la légitime défense.*

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### **3. La légitime défense comme motif d'exonération de la responsabilité pénale dans un crime international**

*La responsabilité pénale pour les crimes internationaux, en particulier les crimes de guerre, est exclue dans les cas de légitime défense. On retrouve cette notion notamment à l'article 31-1-c du Statut de Rome. Considérant qu'une action en légitime défense ne présente aucun lien avec les hostilités et ne peut donc constituer un crime de guerre, l'application concrète de cette notion est illusoire.*

### **4. La légitime défense étrangère au DIH**

*A l'exception de certaines dispositions des Conventions de Genève et des Protocoles additionnels concernant le personnel médical, le concept de légitime défense est étranger au DIH. Bien qu'il reste pertinent dans un contexte de conflit armé, il ne se confond pas avec le régime du recours à la force en DIH. Le DIH permet l'usage de la force contre un objectif licite à tout moment et sans qu'il soit requis de démontrer une menace imminente à la vie ou l'intégrité.*

### **5. La légitime défense invoquée comme défense ou justification en droit pénal**

*En droit pénal interne, la légitime défense comme défense ou justification peut être vue comme un principe général du droit. Elle doit être une réaction à une attaque illicite, être nécessaire et proportionnée et doit respecter les standards des droits de l'homme. Dans le contexte d'un conflit armé, la légitime défense peut être invoquée en cas de poursuites pénales.*

*Les combattants ont le droit de participer aux hostilités et ne peuvent donc pas invoquer la légitime défense l'un contre l'autre, faute d'attaque illicite. En revanche, un combattant peut invoquer la légitime défense face aux actes hostiles d'un civil lorsqu'il n'est pas établi que ces actes sont liés aux hostilités. De plus, en situation de conflit armé non international, en l'absence du privilège de belligérance, la légitime défense est un moyen pertinent de justification ou de défense.*

### **6. La légitime défense dans le droit opérationnel**

*Le concept de légitime défense reste pertinent dans le droit opérationnel. Toutefois son interprétation diverge énormément entre les Etats et il semble parfois totalement déconnecté du droit international et même parfois du droit national. Certaines règles d'engagement considèrent que la légitime défense n'est pas limitée aux attaques illicites mais à tout acte hostile ou à toute intention hostile. Une interprétation aussi large crée une confusion entre le régime du recours à*

la force en DIH et le régime de la légitime défense. Cette confusion peut mener à des résultats dangereux dans la mesure où les Etats sont alors moins stricts dans l'application des principes de proportionnalité et de précaution s'ils doivent réagir dans le cadre d'une situation de légitime défense.

## Conclusion

L'oratrice remarque que si la notion de légitime défense peut dans certains cas diminuer le seuil de recours à la force en DIH, elle peut également être un critère plus adapté et plus protecteur dans certaines circonstances, si tant est qu'elle soit bien appliquée par les Etats.

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Self-defence is a multi-faceted and/or multi-layered concept in international law.<sup>1</sup> In these introductory remarks for our panel discussion, my task is mainly to clarify the legal sources of the concept of self-defence and to determine the relevance of these various notions of self-defence during armed conflicts. In doing so, I will provide examples to illustrate how these various notions of self-defence and International Humanitarian Law (IHL) relate.

## 1. State self-defence

It might be surprising to see a panel discussion dedicated to self-defence included in the programme of an IHL conference such as the Bruges Colloquium: is not self-defence a *jus ad bellum* consideration that should be kept separate from *jus in bello*?<sup>2</sup> The answer to this question is certainly affirmative, but *jus ad bellum* self-defence – i.e. State/national self-defence as derived from Article 51 of the United Nations (UN) Charter – is just one layer, or facet, of the concept of self-defence.<sup>3</sup> In my view, this facet of self-defence is only remotely relevant to our discussion as it has generally no direct impact on the degree and amount of force used

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1 Nils Melzer and Gloria Gaggioli, "Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities", in: Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* 85 (Oxford, OUP, 2<sup>nd</sup> edn. 2015).

2 On the well-established distinction between *jus ad bellum* and *jus in bello* see e.g. Marco Sassòli, "Ius ad bellum and Ius in Bello, the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?", in: Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden, Martinus Nijhoff, 2007).

3 Article 51 of the United Nations Charter recognises the 'inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. See also Article 21 of the Draft Articles on State Responsibility of the International Law Commission presenting national self-defence as a circumstance precluding wrongfulness (rather than as an 'inherent right'). See "Report of the International Law Commission to the General Assembly", 53 U.N. GAOR Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

at the tactical/operational level in the context of an ongoing armed conflict. Although ‘the requirement that the force used in [ad bellum] self-defence must be necessary and proportionate may have an impact upon which weapons and methods of warfare the State asserting the right of self-defence is entitled to employ’,<sup>4</sup> the lawfulness of the kind and degree of force used in specific attacks (in offence or in defence) occurring during an armed conflict has to be mainly assessed through an IHL lens, including the IHL principles of distinction, proportionality and precautions.<sup>5</sup> Thus, for instance, when – in the midst of an armed conflict – a military unit is being attacked by the enemy, the lawfulness of the response is to be mainly assessed under the IHL principles of distinction, proportionality and precautions, not under the *jus ad bellum* concept of self-defence. From an IHL perspective, the principles of the conduct of hostilities apply irrespective of who is the aggressor versus aggressed party from a *jus ad bellum* perspective.

## 2. Personal self-defence as an exception to the right to life

At the international level, the concept of self-defence also finds its legal basis under human rights law (HRL), and more precisely as an exception to the right to life. This is notably evidenced by the UN Basic Principles on the Use of Force and Firearms (Principle 9)<sup>6</sup> and by Article 2, paragraph 2 a) of the European Convention on Human Rights<sup>7</sup>. Under HRL, self-

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4 Christopher Greenwood, “Self-Defence”, in: Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), Oxford, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL>>.

5 The principle of proportionality in *jus ad bellum* must not be confused with the principle of proportionality under IHL. One notable difference, for instance, is that under *jus ad bellum* self-defence, the proportionality principle is to be taken into account in relation to the aggressed party as a whole, while the proportionality test under IHL is specifically focused on the protection of civilians. See Elizabeth Wilmshurst, “Principles of International Law on the Use of Force by States in Self-Defence” 10 (Chatham House, Working Paper No. 05/01 2005).

6 “United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the United Nations General Assembly Resolution 45/166, Dec. 18, 1990, principle 9 [hereinafter UN Basic Principles on the Use of Force]: ‘Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.’

7 Article 2, paragraph 2 a), of the European Convention on Human Rights reads: ‘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.’



defence is neither portrayed as an 'inherent right' (a wording that is used in Article 51 of the UN Charter) nor as a 'human right'.<sup>8</sup> It is rather one of the circumstances under which State agents may use lethal force and thus deprive an individual of his/her life. It is thus part and parcel of the use of force in law enforcement by State agents. Law enforcement is broader than self-defence though, because State agents, unlike private individuals, may use force (including deadly force) to effect a lawful arrest or to cope with a riot situation, for instance.<sup>9</sup> The use of lethal force in self-defence must respond to an unlawful and *imminent* threat to life or limb, i.e. 'a matter of seconds not hours', to quote Christof Heyns, former Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution.<sup>10</sup> It must be the last resort (which involves de-escalation and a graduated use of force if possible) and incidental loss of lives must be avoided as far as possible.<sup>11</sup> The human rights principles of necessity, proportionality and precautions are thus more restrictive than their IHL equivalent.<sup>12</sup>

To the extent that human rights law applies in armed conflict situations as well as extraterritorially (both controversial issues), this human rights notion of self-defence is certainly relevant in armed conflict situations. For instance, when a soldier is attacked by a civilian for reasons that are unrelated to the armed conflict situation (no nexus), he/she may use force in self-defence. The same is true when a soldier is under an imminent threat of attack and has a doubt as to whether the aggressor is a legitimate target under IHL. In such a case, he/she may nevertheless use lethal force in self-defence (or, more broadly, for law enforcement purposes).<sup>13</sup> Situations of civilian unrest in the framework of an armed conflict have equally to be assessed under a law enforcement paradigm as derived from human rights law, which includes the legitimate aim of self-defence.<sup>14</sup> Unlike *jus ad bellum* self-defence, self-defence in human rights law, including defence of others, is situated at the personal level, not at the State level. This is to say that self-defence and defence of others under human rights law come

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8 Jan Hessbruegge, *Human Rights and Personal Self-defense in International Law*, Oxford, OUP (2017) pp. 75-89.

9 See wording of Principle 9 of the UN "Basic Principles on the Use of Force" (op. cit.) and of Article 2, paragraph 2 a), of the European Convention on Human Rights (op.cit.).

10 Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution), "Report", UN Doc. A/HRC/26/36 (April 1, 2014), p. 59.

11 Ibid. See also: "For a Concise Overview of the Use of Force in Law Enforcement", in: ICRC Fact sheet, *The Use of Force in Law Enforcement Operations* (2015). Available at: <<https://www.icrc.org/en/document/use-force-law-enforcement-operations>>.

12 Gloria Gaggioli, "ICRC Report of the Expert Meeting on the Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms" (2013) [hereinafter: ICRC Use of Force Report] at 8-9.

13 Ibid., discussion in relation to case study 5.

14 Ibid., discussion in relation to case study 3.

into play when a State agent (an individual), not a State as an abstract entity, is confronted with an imminent threat of death or serious injury to himself or herself, or others.

### 3. Self-defence as grounds for excluding criminal responsibility in relation to international crimes

International criminal law also provides for self-defence as grounds for excluding criminal responsibility in relation to international crimes, in particular war crimes, as evidenced notably by Article 31, paragraph 1 c), of the Rome Statute.<sup>15</sup> This provision has been very much criticised by IHL experts.<sup>16</sup> In practice, exoneration of responsibility for international crimes based on self-defence has been very rare.<sup>17</sup> Convincing examples where self-defence may justify war crimes are difficult to find. Most of the time, the examples provided by jurisprudence or legal scholarship are misguided because they refer to situations that have no nexus to the hostilities or where the use of force cannot be qualified as a war crime in the first instance.<sup>18</sup>

For example, consider the framework of an inter-ethnic non-international armed conflict, such as the conflict between Hutus and Tutsis in Rwanda in the 1990s. If a civilian Hutu attempted to kill a peaceful civilian Tutsi and the Tutsi responded by killing the Hutu aggressor, could the Tutsi invoke self-defence to justify a war crime? Although, in the abstract, the killing of a civilian Hutu by a civilian Tutsi might be seen *prima facie* as a potential war crime in the

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15 See Article 31, paragraph 1 c) of the ICC Statute, which reads: 'In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph'. Although the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) does not provide for self-defence as grounds for excluding criminal responsibility, the ICTY has recognised that this defence is to be 'found in most national criminal codes and may be regarded as constituting a rule of customary international law'. See ICTY, *Prosecutor v. D. Kordić and M. Čerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), 26 February 2001, 451. See also in this sense, Antonio Cassese, *International Criminal Law* 229, Oxford, OUP (2003) (considering that Article 31(1) (c) of the ICC Statute simply codifies a general principle of criminal law).

16 See the collective research conducted by the Belgian Red Cross Society in 2000 in relation to the compatibility of Article 31(1)(c) of the ICC Statute with international law. See L'article 31-1-c, du Statut de la Cour pénale internationale, (Dossier), XXXIII: 2, RBDI, 359-488.

17 Antonio Cassese, *op. cit.*, at 229.

18 For an analysis of the usual examples provided, see Gloria Gaggioli, "The Use of Force in Armed Conflicts: Conduct of Hostilities, Law Enforcement and Self-Defence?", in: Christopher Ford and Winston Williams (eds.), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (in press).

context of an inter-ethnic civil war, such an initial thought could not withstand scrutiny and close examination. Irrespective of whether the initial act (the Hutu's attempt to kill the Tutsi) is related or not to the ongoing armed conflict, the Tutsi's reaction cannot be equated with a war crime. If the initial act was unrelated to the hostilities (e.g. a family dispute), the reaction is actually even less so; and without a nexus to the hostilities, no war crime can possibly exist.<sup>19</sup> Instead, if the initial act was related to the armed conflict, it would amount to direct participation in hostilities and the use of force in reaction would not in any case be prohibited under IHL. Moreover, even then, the Tutsi's reaction has no real nexus to the hostilities. As emphasised in the International Committee of the Red Cross's (ICRC) *Guidance on Direct Participation in Hostilities*, '[t]he causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus'.<sup>20</sup> This is because the objective purpose of the act is not to cause harm to the enemy, but rather to defend oneself. In other words, the Tutsi's reaction is not sufficiently connected to the hostilities and would probably have been the same in peacetime. The situation may become more complicated if the Tutsi's reaction would be disproportionate (e.g. the Tutsi finishes off the Hutu after he is already *hors de combat*). In such a case, it could be convincingly argued that a war crime has been committed: the over-reaction may constitute evidence that the objective purpose was not only to defend oneself but also to directly participate in hostilities.<sup>21</sup> However, self-defence could not justify such a war crime as it not only requires an initial unlawful attack, but also a necessary and proportionate response.

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19 On the notion of nexus, see: ICTY, *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23&23/1 (Appeals Chamber), 12 June 2002, paragraph 58.

20 International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law" 78 (2009) [hereinafter ICRC DPH Guidance] at 61. Although the notion of "belligerent nexus" is used in the specific context of framing the notion of direct participation in hostilities, it relates to the same concept of nexus as defined by international criminal courts and tribunals for the purpose of defining war crimes. Even adopting the seemingly broader interpretation of nexus as defined in the international criminal law context, an act of pure self-defence is by definition not committed 'in the furtherance of or under the guise of the armed conflict' (see Kunarac, paragraph 58, *ibid.*). The mere existence of an armed conflict is not sufficient for a nexus to exist as further indicated by the "Elements of Crimes" of the ICC Statute, which require that war crimes be committed 'in the context of and associated with' an armed conflict. See, e.g., ICC, *Elements of Crimes*, 2011, Article 8(2)(a)(i)-1, available at: <[www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf](http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf)>.

21 ICRC DPH Guidance, at 61. The ICRC DPH Guidance further indicates that 'the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities', thus implying that unnecessary and disproportionate force in self-defence might amount to direct participation in hostilities, as it may indicate that the objective purpose was not only to defend oneself but also take part in hostilities. If directed against civilians or persons *hors de combat*, such direct participation in hostilities would give rise to war crimes.

It is thus submitted that, at least in the vast majority of cases, self-defence as a reason for excluding criminal responsibility for international crimes is illusory. This is even more so regarding the defence of 'property which is essential for accomplishing a military mission'<sup>22</sup> I would therefore suggest putting aside the international criminal law notion of self-defence for our discussion.

#### 4. Self-defence as extraneous to International Humanitarian Law

As for International Humanitarian Law, it does not actually refer to the concept of self-defence as such,<sup>23</sup> except in quite particular cases, such as the provision according to which medical personnel may use arms only in their own defence, or in that of the wounded and sick in their charge.<sup>24</sup> Additional Protocol I specifies that the weapons that may lawfully be used by the civilian personnel of a medical unit is limited to 'light individual weapons'.<sup>25</sup> Such use of force that is necessary and proportionate in self-defence does not imply loss of protection<sup>26</sup> and does not amount to direct participation in hostilities,<sup>27</sup> and a medical unit or establish-

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22 The introduction of the defence of property was the most controversial part in the negotiation of Article 31(1)(c) of the Rome Statute. See Spyridon Aktypis, "Article 31: motifs d'exonération de la responsabilité pénale", in: Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour pénale internationale : Commentaire article par article*, 911, 921-23 (2012). In the Draft General Comment No. 36 on the Right to Life, the Human Rights Committee opined that the use of force in law enforcement to protect private property cannot be regarded as proportionate use of force. See Human Rights Commission, "Draft General Comment No 36 on the Right to Life", Sept. 2, 2015, U.N. Doc. CCPR/C/GC/R.36/Rev.2, paragraph 18, available at: <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>>. This view is too extreme. In some exceptional cases, protecting property might amount to protecting life (e.g. the famous example of protecting water tanks in a desert). Nevertheless, it is true that it is difficult to find a case where the commission of a war crime might be considered as justified in order to protect property.

23 Ian Henderson and Bryan Cavanagh, "Military Members Claiming Self-Defence During Armed Conflict: Often Misguided and Unhelpful", in: Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, Routledge 2016, at 76.

24 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 22(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereafter GC I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 13(2)(a), June 8, 1977, 1125 U.N.T.S. 3 [hereafter AP I]. See also *ibid.*, Article 65(3).

25 Article 13(2)(a) AP I. Arguably, the same obligation also applies to military medical personnel despite the fact that Article 22 of the First Geneva Convention does not specify the type of weapons that may be used in self-defence. See, in this sense, Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", at paragraph 562 (1987); ICRC "Customary IHL Study", Commentary to Rule 25.

26 On the obligation to 'respect and protect' medical personnel, see Articles 24-26 GC I; Article 36 GC II; Article 20 GC IV; Article 15 AP I; Article 9(1) AP II. This rule is considered as customary for both international and non-international armed conflicts. See Rule 25 of the ICRC "Customary IHL Study".

27 *Op. cit.*, note 21.

ment whose personnel is using force in self-defence cannot be considered as used to commit, outside its humanitarian duties, acts harmful to the enemy.<sup>28</sup> What is an accepted use of force in self-defence in such a context must be assessed in light of domestic law as well as international human rights law.

Although the notion of self-defence is mostly absent from IHL, some have argued that the 'internal logic of LOAC [Law of Armed Conflict] rests upon a generalised notion of individual self-defence,<sup>29</sup> that 'the morality of the battlefield (...) is a variation on the morality of individual self-defence,<sup>30</sup> or that 'the capacity to injure' is precisely the reason why combatants are legitimate targets under IHL.<sup>31</sup> These remarks are certainly valid but are the result of a philosophical rather than a legal analysis. In other words, from an international law perspective, individual self-defence and IHL cannot and should not be conflated. They co-exist, but their conditions of application are different and they are governed by legal principles that are different and operate differently. Typically, IHL generally allows the use of force against legitimate targets at any time and not only when the latter pose an imminent threat to life or limb.

## 5. Self-defence as a criminal law defence or excuse.

At the domestic level, self-defence is found in most, if not all, criminal law systems – be they common law or civil law systems – and may be considered a general principle of law.<sup>32</sup> Depending on the domestic law system, self-defence is either construed as a defence or an excuse for otherwise criminal behaviour.<sup>33</sup> As in international law, domestic self-defence is allowed in response to an 'unlawful attack/act' and must be necessary and proportionate.<sup>34</sup> Despite these commonalities, the definitions of self-defence provided vary considerably depending on the country. For instance, while in some States force can be lawfully used in defence of property,

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28 See Article 22§1 GC I. See also Article 13§2 AP I.

29 See Charles Kels, "Guest Post: Henderson and Cavanagh on Self-Defence During Armed Conflict, *Opinio Juris*", July 25, 2014, 12:30 PM EDT), at: <<http://opiniojuris.org/2014/07/25/guest-post-henderson-cavanagh-self-defence-armed-conflict/>>, recognising that self-defence is not a part of IHL, but highlighting nevertheless that the moral framework undergirding it is based on the notion of self-defence.

30 Paul W. Kahn, "The Paradox of Riskless Warfare", 22, *Yale Law School Faculty Scholarship Series, Phil. & Pub. Pol. Q.* 4 (2002).

31 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* 34 (5th edn. 2015), New York, Basic Books.

32 Melzer and Gaggioli, *op. cit.*, at 87.

33 Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* 455, Cambridge, CUP (2013), at 456 n. 245.

34 For domestic law cases setting the standards for the use of force from which countries have derived their self-defence rules in armed conflict situations, see for example, *Tennessee v. Garner*, 471 U.S. 1 (1985); UK House of Lords, *R. v. Clegg* [1995] UKHL.

in others it can only be used to protect life or limb from an attack or imminent attack.<sup>35</sup> Additionally, some countries require a duty to retreat to be able to claim self-defence while others do not.<sup>36</sup> Although a uniform concept of self-defence at the domestic level does not, and probably never will exist, it is worth recalling that the notion of personal self-defence in domestic criminal law must comply with human rights law rules and standards.

An individual's (serviceman or civilian) ability to claim "self-defence" when facing criminal charges does not disappear merely because the relevant event occurred in the context of an armed conflict, whether international or non-international. However, in the context of international armed conflicts, when IHL provides an explicit authority to use force against legitimate targets through the combatant's privilege,<sup>37</sup> resorting to self-defence under criminal law would be unnecessary or even inapplicable.<sup>38</sup> For instance, a regular combatant ('A') who is attacked by another regular combatant ('B') is not only allowed to fight back under IHL but is also not able to claim self-defence under criminal law since (and provided<sup>39</sup>) the initial attack by 'B' is not unlawful under international law. On the other hand, if serviceman 'A' was attacked by a civilian directly participating in hostilities, self-defence could be claimed at the national level as the attack by the civilian is neither prohibited nor privileged under IHL<sup>40</sup> and would probably be considered an illegal act of violence by the State to which 'A' belongs. Although the self-defence argument seems *prima facie* unnecessary here, in certain cases it could provide a useful alternative argument, for instance, when it is unclear whether the initial attack had a belligerent nexus.

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35 See Blaise Cathcart, "Application of Force and Rules of Engagement in Self-Defence Operations", in: Terry D. Gill and Dieter Fleck, *op. cit.*, 201, 210; see also Cameron and Chetail, *op.cit.*, at 463 n.265; Hessbruegge, *op. cit.* note 8, 255–58, 264–68.

36 Hessbruegge, *ibid.*, 258–64, 148–50. This author makes a useful distinction between the duty to retreat for law enforcement officials and for private persons. In brief, while the former should in most cases not be required to retreat, the latter should, at least from an IHRL perspective. We fully agree with this analysis, although we would point out that the absence of a duty to retreat for law enforcement officials derives from their law enforcement powers which go beyond self-defence rather than from an extended notion of self-defence for State agents.

37 See 1907 Hague Regulations, Article 1; AP I, Article 43(2). The question whether this authority to use force under IHL will be directly applicable at the domestic level or the manner in which it will be translated at the domestic level will very much depend from one jurisdiction to the other. See Henderson and Cavanagh, *op.cit.* note 23, at 84.

38 Henderson and Cavanagh, *ibid.*, at 86.

39 It may be an unlawful attack if for instance "B" were using unlawful weapons. See *ibid.* at 87.

40 ICRC DPH Guidance, Recommendation X ('International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed').

Moreover, when IHL does not provide any authority to use force, self-defence becomes an important means of justification. This is why, in non-international armed conflicts, self-defence under criminal law may be particularly relevant as IHL does not provide an explicit authority to use force (no combatant's privilege) in such situations and domestic law may tuationsoes not provide an explicit authority to use force either.<sup>41</sup> Situations in which service personnel rely, rightly or wrongly, on self-defence to justify their use of force in the context of domestic trials is not exceptional.<sup>42</sup>

## 6. Self-defence in operational law.

Lastly, self-defence is a concept that is prevalent in operational law. In this realm, self-defence is generally understood as a right that cannot be limited/restricted by rules of engagement issued for a mission.<sup>43</sup> Here again, the military concept of self-defence differs widely from one country to another. For some nations, self-defence is simply not governed by rules of engagement.<sup>44</sup> For others, like the United States of America (US), the meaning and scope of self-defence is provided notably in the US Standing Rules of Engagement (Enclosure A).<sup>45</sup> While for some States (e.g. the United States), self-defence requires a 'hostile act' or 'demonstrated hostile intent', for others (e.g. the United Kingdom) these notions pertain to 'mission accomplishment' not self-defence.<sup>46</sup> In the NATO Rules of Engagement MC 362/1 for instance, 'hostile act' or 'demonstrated hostile intent' do not pertain to self-defence, which is left to be defined by each and every State.<sup>47</sup> The San Remo Rules of Engagement Handbook (2009) follows more or less the US approach, which is described as the 'more generally accepted view' of self-defence.<sup>48</sup> It recognises a self-defence right at four levels: 1) individual self-defence;

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41 In IHL provisions pertaining to non-international armed conflicts (NIACs), there is no equivalent to Article 1 of the 1907 Hague Regulations or of Article 43(2) of AP I, which recognise the combatant privilege. The majority view among scholars is thus that such a privilege does not exist in NIACs. See, e.g., Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1344 (Martinus Nijhoff, 1987); Michael Bothe et al., *New Rules of Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 740 (2nd edn., Martinus Nijhoff, 2013).

42 Henderson and Cavanagh, *op. cit.* note 23 (discussing relevant Australian cases); see also *Jaloud v. The Netherlands*, App. No. 47708/08, ¶40 (2014) (ECtHR).

43 See e.g. Alan Cole et al., *San Remo Handbook on Rules of Engagement (2009)* [hereinafter *San Remo Handbook*], International Institute of Humanitarian Law, at 3-4.

44 *Ibid.* at 3.

45 Chairman, Joint Chiefs of Staff, Instr. 3121.01B, *Standing Rules of Engagement / Standing Rules for the Use of Force for U.S. Forces encl. A (13 June 2005)* [hereinafter *U.S. SROE*]; see also Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, JA 422, *Operational Law Handbook 84 (2015)* [hereinafter *OPLAW Handbook*].

46 *San Remo Handbook*, *op. cit.* note 43, at 3.

47 See presentation by Camilla Cooper in these proceedings.

48 *San Remo Handbook*, *op.cit.*, at 3.

2) unit self-defence; 3) protection of others; 4) national self-defence.<sup>49</sup> The legal basis and contours of such operational self-defence notions are obviously at the centre of our discussion today. For the purpose of these introductory remarks, it will not be necessary to clarify each of these operational law terms in their various acceptations. Suffice it to say that such operational law concepts must presumably be based on existing self-defence notions in domestic or international law, unless it can be proven that operational concepts such as 'unit self-defence' are *sui generis* and belong now to customary law.<sup>50</sup>

Yet, certain rules of engagement refer to the concept of self-defence in a way that seems disconnected from international law and occasionally even from domestic criminal law. From an international law perspective, the military concepts of self-defence are therefore sometimes puzzling. For instance, some rules of engagement do not limit self-defence to an *unlawful* use of force, but merely refer to attacks, hostile acts or imminent attacks, and demonstrated hostile intent.<sup>51</sup> This opens up avenues for confusing overlaps between IHL and self-defence. Typically, a military unit is attacked by enemy combatants or civilians directly participating in hostilities in the context of an international armed conflict, and may call in an airstrike in 'self-defence' from an operational law perspective.<sup>52</sup> Under international law, the use of force in response to this lawful attack is plainly allowed and regulated by IHL.<sup>53</sup> Although it is an 'attack in defence' to use an IHL terminology,<sup>54</sup> it is unrelated to self-defence, be it under *jus ad bellum*, human rights law, or domestic law.

This confusion between IHL and self-defence or, as some would say, imprecision in the terminology chosen, is not merely a formal issue. In practice, such inaccurate and expansive notions of self-defence may imperceptibly jeopardise IHL and lead to bypassing the principles of proportionality and precautions. For instance, in relation to the erroneous attack conducted against the Kunduz Trauma Centre operated by *Médecins Sans Frontières* on 3 October 2015, it

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49 *Ibid.*, at 3-4.

50 Dale Stephens, "Rules of Engagement and the Concept of Unit Self Defence", 45, in: *Naval L. Rev.* 130 (1998); Charles P. Trumbull IV, "The Basis of Unit Self-Defense and Implications for the Use of Force", 23, in: *Duke J. Comp. & Int'l L.* 133 (2012). *Contra*: Hans F.R. Boddens-Hosang, "Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement", in: Terry D. Gill and Dieter Fleck, *The Handbook*, op. cit., 482-84 (2nd ed. 2015) (opting for unit self-defence as a 'tactical-level representation of the sovereign right of nations to national self-defence'). See also his presentation in these proceedings.

51 See e.g. above note 45.

52 "ICRC Use of Force Report", Summary of the presentation by Richard Gross, at 86. See also: Gary D. Solis, *The Law of Armed Conflict* (2006), Cambridge, CUP, at 503.

53 See Article 49 AP I: "'Attacks' means acts of violence against the adversary, whether in offence or in defence'.

54 See Article 49 (1) of Additional Protocol I to the Geneva Conventions.



has been argued that the fact that the US airstrike had initially been called in in self-defence by Afghan forces, allowed bypassing certain precautionary measures and notably to forego higher-up approval for the strike, thus increasing the risk of error.<sup>55</sup> In terms of process, portraying a situation as self-defence-related (or 'troops-in-contact') may authorise foregoing a formal collateral damage estimate<sup>56</sup> and may have an impact in terms of weapons availability (e.g. opening up options for close air support)<sup>57</sup>, thus potentially impacting the principles of proportionality and precautions. The perceived advantages attached to self-defence situations – i.e. a situation considered as a top-priority – may further incentivise military commanders to portray situations as self-defence ones, even when they are not, or to “create” situations that may be portrayed as self-defence.

There is a recent and growing trend amongst scholars to rightfully draw attention to the potentially confusing and sometimes perverse effects of rules of engagement in relation to self-defence and their interplay with IHL. Henderson and Cavanagh emphasise that 'self-defence has a narrower application on the battlefield than is generally understood'.<sup>58</sup> My co-panellist, Randall Bagwell, has shown in a fascinating article that United States forces wrongly assert self-defence when faced with direct participation in hostilities and argued that this unduly limits the capacity to react to attacks and has the perverse effect of incentivising military commanders and soldiers to distort the notion of self-defence and to adopt ever-expanding understandings of “imminence”.<sup>59</sup> Erica Gaston, based on an empirical study conducted in Afghanistan, shows that expansive views of self-defence 'result in overbroad threat designations and wide latitude in the level of force permitted' and 'can increase the risk of civilian casualties and disproportionate uses of force'.<sup>60</sup>

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55 See Matthieu Aikins, “Doctors With Enemies: Did Afghan Forces Target the M.S.F. Hospital?”, in: N.Y. Times Mag., May 17, 2016, available at: <<https://www.nytimes.com/2016/05/22/magazine/doctors-with-enemies-did-afghan-forces-target-the-msf-hospital.html>>.

56 See Chairman of the Joint Chiefs of Staff Instruction, joint pub., instr. 3160.01, No-strike and the Collateral Damage Estimation Methodology (13 Feb. 2009), Enclosure D, at D-3. See also: Major Yevgeny S. Vindman, “Is U.S. Operational Self-Defense a State Practice Creating New Customary International Law?”, 5 (2), in: *Journal of Int'l & Comp. L.* 38 (2015).

57 See Human Rights Watch, “Troops in Contact Airstrikes and Civilian Deaths In Afghanistan” (2008) at 29.

58 Henderson and Cavanagh, *op.cit.* note 57, at 73.

59 Randall Bagwell and Molly Covite, “It Is Not Self-defence: Direct Participation in Hostilities Authority at the Tactical Level” 224:1, in: *Mil. L. Rev.* 1 (2016).

60 See Erica L. Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent*, Global Public Policy Institute, June 2017, at 7. See also: Erica L. Gaston, “Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege”, 8, in: *Harv. Nat'l Sec. J.* 322 (2017) (highlighting that military studies have raised concerns that misperception of hostile intent is the leading cause of civilian casualties in Afghanistan).

In brief, although the increasing reliance on self-defence in contemporary armed conflicts, especially in counterinsurgency or stability operations, might have been intended to diminish civilian casualties, in practice it might, in some cases, have the opposite effect, notably through a subliminal sense of legitimacy and permissiveness the alleged 'inherent right to self-defence' conveys and because of the grey areas surrounding *in bello* self-defence.<sup>61</sup>

## 7. Concluding remarks

On the basis of the foregoing, it appears that both the human rights and domestic law concepts of self-defence are relevant in relation to the use of force during armed conflicts. This is not to say that self-defence provides an additional authority for the use of force along with the IHL conduct of hostilities paradigm and human rights law enforcement paradigm. On the contrary, in my view, self-defence is already part and parcel of the use of force by States in law enforcement and is therefore regulated by human rights law and domestic law (which must be consonant with human rights law). This bears consequence not only with respect to the rules and principles governing the use of force, but also in terms of training and equipment.<sup>62</sup> Criminal law concepts of self-defence are certainly relevant and available to service personnel but these cannot provide an 'authority to use force' to individuals/military units *ex ante*; they merely justify certain individual conducts *ex post*. As for operational law concepts of self-defence, it is submitted that they should remain consonant with international law concepts of self-defence and not purport to create a "third paradigm" besides the conduct of hostilities and law enforcement paradigms.

Lastly, I would like to make a few remarks regarding the trend to increasingly rely on self-defence in contemporary military operations. On the one hand, it is a worrying evolution because notably it may lead to 1) an unwarranted conflation between *jus ad bellum* and *jus in bello*<sup>63</sup>; 2) a "Babel Tower phenomenon" and interoperability issues in multinational operations because various stakeholders refer to self-defence but have different meanings/definitions in mind; 3) a progressive replacement of a stable, agreed-upon framework – IHL – with an uncertain/multifaceted concept of self-defence; 4) a "legitimation" of the use of force beyond what is authorised under IHL. In this regard, expansive definitions of self-defence in operational law are not only legally unsound, but may also imperceptibly weaken the IHL framework and potentially lead to IHL violations. On the other hand, if self-defence is understood properly as a sub-set of law enforcement and as a restrictive framework for the use of

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61 See Erica L. Gaston, *ibid.*, at 322–27.

62 ICRC Use of Force Report, at 43–49.

63 Geoffrey S. Corn, "Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and Jus in Bello", 88, in: *Int'l Law Studies* (2012) 57–92 (criticising notably the concept of "naked self-defence" developed by Kenneth Anderson).

force, it may save lives in the context of armed conflicts. I see no compelling reason why a State could not decide for policy reasons to adopt a more restrictive framework for the use of force in certain circumstances. For instance, self-defence rules of engagement may in practice be more appropriate to deal with riot situations even if some enemy fighters may be hiding in the crowd and could be targeted on sight under IHL.<sup>64</sup>

A clarification of self-defence during armed conflicts and a better understanding of its interplay with IHL is therefore crucially needed, especially in light of current attempts by States and International Organisations to revise existing rules of engagement and operational law approaches. The Bruges Colloquium gives us an opportunity to start this discussion.

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64 ICRC Use of Force Report, at 27.

# CURRENT CHALLENGES OF US SELF-DEFENCE POLICY

**Randall Bagwell**

US Army Judge Advocate General's School

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## **Résumé**

*Dans ses remarques relatives à la politique appliquée par les Etats-Unis en matière de légitime défense, Randall Bagwell souligne tout d'abord que celle-ci n'est pas fondamentalement différente de celle des autres pays. C'est son application et son interprétation qui expliquent la singularité des Etats-Unis dans ce domaine.*

*Trois questions méritent une attention particulière, étant donné le rôle qu'elles jouent dans la confusion existante en ce qui concerne la politique américaine, et ce tant auprès des autres alliés que des Etats-Unis eux-mêmes.*

### **1. La confusion entre légitime défense nationale et légitime défense individuelle**

*Le fondement de la politique appliquée par les Etats-Unis en matière de légitime défense se trouve dans ses Règles permanentes d'Engagement (RdE), qui ne font aucune distinction entre la légitime défense nationale – relevant du jus ad bellum – et individuelle – dont il est question dans le cadre du débat relatif à la conduite des hostilités. La confusion des deux concepts dans les RdE a donné lieu à un certain nombre d'interprétations problématiques comme celle de la réaction à l'usage imminent de la force par l'ennemi.*

### **2. La légitime défense comme nouveau mandat pour faire la guerre**

*Étant donné la configuration actuelle des règles américaines relatives à l'usage de la force, il est fait recours à la légitime défense à titre résiduel dans les cas où les conditions de recours à la force sur d'autres bases ne sont pas remplies – notamment dans le cas où l'acte ennemi ne peut être considéré comme « hostile ». C'est ainsi que la légitime défense est devenue une sorte de blanc-seing justifiant le recours à la force dans le cadre d'opérations récentes de contre-insurrection.*

### **3. L'abandon par le commandement des paradigmes du DIH en matière d'usage de la force en faveur de la légitime défense érigée en modèle juridique à part entière**

*Les différents régimes juridiques existant pour fonder le recours à force constituent des législations distinctes obéissant à des logiques différentes. La légitime défense (individuelle) est ainsi généralement un concept de droit pénal national, ne relevant pas du droit international. Le recours croissant à cette dernière, au détriment de l'application des principes du Droit international humanitaire (DIH), permet au commandement d'éviter l'application de règles plus spécifiques et peut-être plus strictes qui auraient dû normalement s'appliquer. En conséquence, cela a provoqué ces dernières années des situations où l'usage de la légitime défense s'est fait en ignorance du DIH, au détriment tant des opérations militaires que des civils innocents.*

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First, I would like to thank the International Committee of the Red Cross (ICRC), the College of Europe, and my fellow panel members for the opportunity to speak here today. It is truly an honour and I am humbled to be in your company. Because I want to be completely candid in my comments and because I am a United States (US) Army officer, I need to let you know that I am speaking today in my private, not my official capacity, and the comments I make here are my own and may not reflect the official policy of the US Army, the Department of Defence, or the US government.

It may surprise some of you to learn that the written US policy on self-defence is not that different from the self-defence policies of other countries. In some form or other almost every nation recognises the notions of both national self-defence and individual self-defence. The exact wording of various self-defence policies does vary between nations, however the principles behind the policies are largely the same. For the most part, it is not the wording of self-defence policies that separates the US from its allies, rather it is the US' application and interpretation of its own self-defence policy that sets the US apart from many of its allies.

Since the early 1980s, in the days of the US Peacetime Rules of Engagement, or PROE as it was called, the US has been a leader in ROE development with many of the world's militaries modelling their ROE structure after that of the US. Having a similar approach to ROE has clearly benefited the US and its allies by allowing them to have a shared understanding of most aspects of ROE. However, the *application* of self-defence has been one area where the US has taken a different approach from many, if not most, of its allies. The US' application of its self-defence policy has proven to be at times confusing and counterproductive, both to its allies and to US forces.

Over the past several years, three issues have emerged with US self-defence that need to be addressed in order to reduce the confusion among US forces and to better align the application of US self-defence policy with that of its allies. I'll touch on each issue briefly and answer questions from anyone who wishes to continue the discussion.

The three issues are:

- 1) conflating national self-defence with individual self-defence;
- 2) allowing self-defence to become a war-fighting authority;
- 3) allowing commanders to abandon the International Humanitarian Law (IHL) use of force legal paradigm in favour of a self-defence legal paradigm.

## **1. Conflating National Self-Defence with Individual Self-Defence**

Despite the US Department of Defence Law of War Manual being 1,176 pages, it contains very little discussion on self-defence. With the few pages that it does use to address self-defence, it is national self-defence, rather than individual self-defence, that is addressed. To find the US policy on individual self-defence, you have to look to the unclassified Appendix A to the US Standing Rules of Engagement (or SROE).

To understand today's SROE, it is important to know that it originates from the 1980s US Navy Peacetime ROE. The Peacetime ROE, as the name implies, were not intended to be used during armed conflict, but rather were designed to provide guidance to senior US naval commanders operating in the global commons of the sea and air when they were not in an armed conflict. The intent being to clearly set out their authority to invoke national self-defence in the event of an incident with another country. In the early PROE there was no mention of individual self-defence.

Later as the PROE evolved into the SROE, they were expanded to be applicable to all US forces during both times of peace and armed conflict. With the new SROE now applicable all the time and including ground forces, the notion of individual self-defence was added. Unfortunately, a clear distinction was not made between national self-defence and individual self-defence. Merging these two concepts – one from *jus ad bellum* and one drawn from US criminal law – into one policy has led to issues such as the US stating that imminent use of force against US forces does not necessarily mean immediate or instantaneous use of force. While likely a valid statement under the notion of national self-defence, there is a strong argument that this statement is not valid for individual self-defence. This somewhat unusual definition of 'imminent' resulted in situations where the US interpretation of self-defence is much broader than those of its allies.

## **2. Allowing Self-Defence to Become a War-Fighting Authority by Failing to Have an Adequate Use of Force Authority to Use against Civilians who Take a Direct Part in Hostilities**

The US SROE allow US forces to use force in two situations: in self-defence and for mission accomplishment. Under mission accomplishment US forces may attack a person, group, or armed force that has been declared hostile. The term 'declared hostile' has a specific meaning in the SROE. It is used to describe when an authorised approval authority within the US government or military has determined that a person, group, or armed force meets the requirements under IHL to be subject to attack. Because a civilian who directly participates in hostilities often does so for a short period of time and may not be personally identifiable before or after the act of direct participation, it is not realistic, practical, or in many cases even possible to declare such a person as hostile under the meaning of the SROE. Without them being declared hostile, self-defence is the only remaining authority under the SROE for using force against them. This situation has resulted in self-defence becoming a primary war-fighting authority in recent counterinsurgency fights. While self-defence is a viable authority to use against someone based on their actions, it is a poor war-fighting authority. If US forces rigorously applied the self-defence principles stated in the SROE of de-escalation, necessity, proportionality, and pursuit, in most counterinsurgency situations it would be very difficult to successfully engage the enemy when the enemy primarily consists of civilians directly participating in hostilities, or at the least, groups of armed people who are indistinguishable from civilians directly participating in hostilities.

## **3. Allowing Commanders to Abandon the IHL Legal paradigm and Opt for a Self-Defence Legal Paradigm, Seemingly to Avoid Constraints Placed on the Commanders under IHL and ROE**

Under US policy, when a commander or soldier acts in self-defence, they are allowed to use all necessary means available and all appropriate actions, provided that they comply with the principles of self-defence as stated in the SROE. The self-defence principles of necessity and proportionality, as defined in the SROE, are different from the principles of necessity and proportionality under IHL. Additionally, other IHL principles such as precautions in the attack do not apply in self-defence. Self-defence is a different legal paradigm for using force that exists outside IHL. Even national self-defence, a legal justification for going to war, is a *jus ad bellum* concept, not a *jus in bello* method of fighting a war. Likewise, individual self-defence is generally a component of national criminal law, not a concept found in international law.

While the three legal paradigms for using force – self-defence, law enforcement and IHL – may share the same geographical and temporal space, they are separate legal authorities with separate rules. Allowing a commander or soldier to choose to abandon the IHL paradigm in favour

of the self-defence paradigm in situations where IHL is the more specific, and perhaps more restrictive authority, allows them to avoid the constraints of IHL and ROE that were intended to shape their actions. Over the last several years, this has resulted in situations where opting for self-defence over IHL have been detrimental to both the mission and innocent civilians.

I'll stop my comments here. However I look forward to your questions and comments either during this panel or afterwards. Thank you.



## Q&A SESSION

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A Q&A session allowed the following to be discussed among the panellists, as well as with the audience:

### **1. The Applicability of the Principle of Precautions in Self-Defence**

One panellist asked another for clarifications about the non-applicability of the principle of precaution when acting in self-defence: would there be no obligations in terms of the planning and the conduct of an operation which might then have implications in terms of self-defence at the tactical level by individual soldiers?

The answer revealed diverging views among the panellists: according to one panellist, self-defence is a national concept that applies when one goes to war. When it comes to individual self-defence, a soldier has no more right to individual self-defence than a civilian. That is why International Humanitarian Law (IHL) must apply if a soldier is attacking someone: the soldier would have to follow all the precautions in attack, as laid down in IHL. Turning to self-defence, whether for a civilian or for a soldier, self-defence proportionality would apply in order to only respond to the level of threat that is presented. So it is similar to precautions in attack but it is a different type, unlike applying a proportionality test or precautions in an attack, as we do not attack under self-defence.

As an illustration, if an attack happens at a check-point, the precautions would have to apply, as IHL is regulating the military setting that is the check-point. But when it comes to the soldier responding to the attack at the check-point, only self-defence would apply and not IHL: a proportionate response will then have to be given to the threat that is presented, and not precautions under IHL.

### **2. Self-Defence as a more Restrictive Authority than IHL?**

Panellists diverged in their remarks when it came to assessing whether self-defence or IHL would be more restrictive in terms of allowing the use of force.

A panellist clarified his position arguing that self-defence is more restrictive in the amount of force one is allowed to use, but more permissive on whom one can use force against, given that you can use force against anyone that is presenting a threat. IHL, on the contrary, is very restrictive on whom you can use force against, i.e. only certain people that qualify as belligerents or combatants or civilians directly participating in hostilities. But once you have made the determination, it restricts very little the amount of force you can use. This issue

is unique to the United States (US) as commanders are allowed to use self-defence in a less restrictive way.

In that respect, another panellist highlighted the North Atlantic treaty Organization's (NATO) practice for the last 15 years: there has been an increasing focus on self-defence on the operational side, but not really on the legal concept of self-defence – rather more on the political side: on the authority to operate outside the commander control structure.

### **3. Confusion on the Understanding of the Concept of Self-Defence**

A person in the audience raised the following issue, specifically when it comes to the United Kingdom (UK): there is friction between those who create the Rules of Engagement (ROE) as a policy – in particular on individual self-defence – and the UK civil service on the issue that there might be some unregulated use of force that cannot be written down and constrained by London.

A panellist agreed with this comment and added that it is the reason why policy makers and operators and lawyers must communicate: it is fundamental that instructions regarding what amounts to self-defence are understood at ground level. That is one of the main challenges to which education would be the solution, and should go beyond the operational servicemen and perhaps also concern policy makers.

Another panellist highlighted the disconnection that exists between the policy makers and the lawyers on the one hand, and the troops on the ground on the other, also in the case of the US. The policy rules sometimes do not match the needs and reality of the operations, for diverse political and legal reasons.

### **4. The Understanding of Self-Defence in *Jus ad Bellum***

A participant in the audience emphasised that a State must always act proportionally when using force, even when acting in self-defence. There is also a view that proportionality applies not only to its first reaction but also to its subsequent operations as well. And if we take a look at the International Criminal Court's judgment *DRC v. Uganda*, it is suggested that one particular attack on an airport might not have been proportionate in the *jus ad bellum* sense even if it might have been perfectly compliant with IHL. The participant was interested to know, in the panellists' thinking about self-defence, to what extent particular operations can be considered disproportionate even if they are in compliance with IHL?

A panellist explained that confusion in terminology can also be seen when it comes to necessity and proportionality: one should always specify which area is being discussed, as the meaning of proportionality can change entirely depending on the applicable regime.

According to a person in the audience, referring to an article written by Christopher Greenwood on the Falklands/Malvinas conflict, proportionality in the *jus ad bellum* continues to apply in the overall conduct of hostilities. The participant gave the following example: if an Argentinian warship encountered an Indian warship in the Ocean, it would have been lawful to attack it under IHL, whereas it would have been seen as being disproportionate under the *jus ad bellum*, as it would extend the geographical scope of the conflict. Greenwood is not mixing different types of proportionalities, he is just determining which would apply.

There are three kinds of proportionalities: proportionality in the *jus ad bellum*, strategic proportionality in the *jus in bello* and tactical proportionality in the *jus in bello*. If you look at some of the criticism made of the conduct of operations by Israel outside its territory, the complaint is actually not about tactical proportionality, but about strategic proportionality.

## **5. A Possible Reassessment of the US Policy on Self-Defence?**

A representative of the International Committee of the Red Cross asked how one of the panellists would assess the current appetite in the US, at different administration levels, to reassess or reconsider the US policy on self-defence as it has negatively impacted, according to the panellist, US missions on the ground?

Panellists offered a wide-range of possible solutions.

- Raising awareness within the military about the ROE and what the policy on self-defence actually says.
- Calling upon States to be less politically reluctant on acknowledging when they are in an armed conflict and apply IHL clearly when it gives more certainty to the troops in the field.
- Stopping being afraid of self-defence as a concept, educating people on what it means but particularly on what it does not mean.
- On the US: need for a deliberate approach on the issue of self-defence, starting by rewriting the ROE to clarify what is meant by self-defence as a national concept, then embracing the concept of direct participation in hostilities and add it to the ROE, and finally being very clear on what individual self-defence means. Forces will thereafter have to be retrained on the clarified concepts.

A panellist emphasised that self-defence is not a problem as such, but the issue lies in the way it is interpreted.

## CONCLUDING REMARKS AND CLOSURE

**Christine Beerli**

Vice-President of the ICRC

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Mesdames et Messieurs,

Il est extrêmement difficile de prendre la parole après les riches débats qui viennent d'avoir lieu, ainsi que de synthétiser les fructueuses discussions que nous avons eues ces deux derniers jours. Je dois dire que le Colloque de cette année fut particulièrement intéressant, et nous avons beaucoup appris et compris sur le Droit international humanitaire – particulièrement sur l'articulation des règles qu'il contient avec les contraintes opérationnelles.

I would like to thank all the speakers and panellists for their knowledgeable contributions and also for their openness, which is the specialty of the Bruges Colloquium and makes it so valuable, as it can bring discussions forward on many different topics. There is no doubt that each one of us will go home reflecting on what has been said and perhaps elaborate on solutions and innovative ideas, which could then be discussed during upcoming editions of the Colloquium.

I will personally be reflecting on two specific issues that were discussed. Firstly, humanitarian access with regard to which one of the very knowledgeable speakers highlighted the tensions during the negotiations leading to the adoption of the Additional Protocols: some States at that time were advocating against free and unrestricted access for humanitarian operations as they feared that it would lower their chance to win armed conflicts. A compromise had to be found in the Additional Protocols, which is reflected in the requirement of the parties' consent that itself triggered a new discussion on who has to give consent. I personally would argue that different interpretations and practices might not be an issue after all. As an illustration, look at the case of humanitarian access in Syria where different stances lead to cross-border as well as cross-line humanitarian operations and therefore a wider coverage of the humanitarian needs. Secondly, the issue of international humanitarian law regulating non-international armed conflicts: the whole process leading to the adoption of the Protocols was a long journey leading to a better regulation of non-international armed conflicts, a journey that should still be continued as we have seen that the body of rules regulating this type of conflict has developed positively over the years.

What is the most important is to keep a constant dialogue between stakeholders on these issues. The Colloquium is a wonderful way to maintain that dialogue, and to build bridges between different understandings and practices of International Humanitarian Law.

Pour terminer j'aimerais tous vous remercier, ainsi que l'équipe du CICR responsable pour l'organisation de ce bel événement. Merci à tous et bon retour.



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# The Additional Protocols at 40: Achievements and Challenges

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18<sup>th</sup> Bruges Colloquium, 19-20 October 2017

Simultaneous translation into French / English

*Traduction simultanée en anglais/français*

## DAY 1: Thursday, 19<sup>th</sup> October

9:00 – 9:30 **Registration and Coffee**

9:30 – 9:40 **Welcome address by Prof. Dr. Dr. Jörg Monar,**  
Rector of the College of Europe

9:40 – 9:55 **Welcome address by Mr Walter Füllemann,**  
Head of Delegation, ICRC Brussels

9:55 – 10:15 **Keynote address by Christine Beerli,** Vice-President, ICRC

### **Session One: THE PROTECTION OF THE DELIVERY OF HEALTH CARE UNDER THE ADDITIONAL PROTOCOLS**

*Première Session : La protection de la fourniture de soins de santé selon les Protocoles  
additionnels*

Chairperson: **Knut Dörmann,** ICRC Legal Division

10:30 – 10:50 **The advances of the Additional Protocols related to the protection of  
civilian wounded and sick, medical personnel, units and transports**

Speaker: **Marco Sassòli,** University of Geneva

10:50 – 11:10 **Specific protection of medical units v. general protection of civilian  
objects under the Additional Protocols**

Speaker: **Alexander Breitegger,** ICRC Legal Division

11:10 – 11:30 **The contribution of the Additional Protocols to the respect of medical  
activities in line with medical ethics**

Speaker: **Dustin Lewis,** Harvard Law School

11:30 – 12:15 **Discussion**

12:15 – 13:45 **Sandwich lunch**

**Session Two: HUMANITARIAN ACCESS AND ASSISTANCE IN LIGHT OF THE ADDITIONAL PROTOCOLS**

*Deuxième Session : Accès et assistance humanitaires à la lumière des Protocoles additionnels*

Chairperson: **Elzbieta Mikos-Skuza**, College of Europe and University of Warsaw

13:45 – 14:05 **Humanitarian assistance post 1977: do the Additional Protocols answer all the challenges?**

Speaker: **Michael Bothe**, Goethe University of Frankfurt

14:05 – 14:25 **Humanitarian access and IHL: the ICRC perspective**

Speaker: **Tristan Ferraro**, ICRC Legal Division

14:25 – 14:45 **Humanitarian action: a non-State armed groups' perspective**

Speaker: **Annyssa Bellal**, Geneva Academy of IHL and Human Rights

14:45 – 15:15 **Discussion**

15:15 – 15:30 **Coffee break**

**Session Three: THE RELATIONSHIP BETWEEN THE ADDITIONAL PROTOCOLS AND INTERNATIONAL HUMAN RIGHTS LAW**

*Troisième Session : La relation entre les Protocoles additionnels et le droit international des droits de l'homme*

Chairperson: **Alexander Breitegger**, ICRC Legal Division

15:30 – 15:50 **The relationship between the fundamental guarantees contained in the Additional Protocols and IHRL**

Speaker: **Françoise Hampson**, University of Essex

15:50 – 16:10 **The relationship between the Additional Protocols and economic, social and cultural rights**

Speaker: **Amrei Müller**, Queen University Belfast

16:10 – 16:30 **The relationship between the Additional Protocols and IHRL from a State's military perspective**

Speaker: **Léa Bass**, French Ministry of Defence

16:30 – 17:00 **Discussion**

17:0 – 18:00 **PANEL DISCUSSION: ACCOUNTABILITY FOR SERIOUS VIOLATIONS OF IHL UNDER THE ADDITIONAL PROTOCOLS**

*Table ronde : La responsabilité pour des violations graves du DIH selon les Protocoles additionnels*

Moderator: **Paul Berman**, Council of the EU

**Panellists:**

**Geoffrey Henderson**, International Criminal Court

**Yasmin Naqvi**, UN Mechanism for International Criminal Tribunals

**Guénaél Mettraux**, Kosovo Specialist Chambers

**Brig Darren Stewart**, British Ministry of Defence

19:30 – 22:30 **Dinner (registration required)**

## **DAY 2: Friday, 20<sup>th</sup> October**

**Session Four: THE DEVELOPMENT OF THE NOTION OF MILITARY OBJECTIVE AND ITS IMPACT ON THE CONDUCT OF HOSTILITIES**

*Quatrième session : L'évolution de la notion d'objectif militaire et son impact sur la conduite des hostilités*

Chair person: **Andres Muñoz Mosquera**, SHAPE Legal Office

9:15 – 9:35 **The relevance of revenue-generating objects for the notion of military objective**

Speaker: **Laurent Gisel**, ICRC Legal Division

9:35 – 9:55 **The challenges of applying the principles of distinction, proportionality and precautions in contemporary military operations from a State perspective**

Speaker: **Marten Zwanenburg**, Dutch Ministry of Foreign Affairs

9:55 – 10:45 **Discussion**

10:45 – 11:00 **Coffee break**

11:00 – 12:30 **PANEL DISCUSSION: THE IHL RULES ON THE CONDUCT OF HOSTILITIES AND THEIR ARTICULATION WITH THE NOTION OF SELF-DEFENCE AND RULES OF ENGAGEMENT**

*Table ronde : Les règles de DIH relatives à la conduite des hostilités et leur articulation avec la notion de légitime défense et les règles d'engagement*

Moderator: **Laurent Gisel**, ICRC Legal Division

### ***Panellists:***

**Camilla Cooper**, Norwegian Defence University College

**Hans Boddens Hosang**, Dutch Ministry of Defence

**Gloria Gaggioli**, University of Geneva

**Randall Bagwell**, U.S. Army Judge Advocate General's School

12:30 – 13:00 **CONCLUDING REMARKS AND CLOSURE**

**Christine Beerli**, Vice-President, ICRC



College of Europe  
Collège d'Europe

Brugge



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## SPEAKERS' BIOGRAPHIES CURRICULUM VITAE DES ORATEURS

### Welcome Addresses and Keynote Speech

#### *Allocutions de bienvenue et discours d'ouverture*

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**Jörg Monar** has been the Rector of the College of Europe (Bruges/Natolin, Warsaw campuses) since 1 September 2013. His former positions include Director of the Department of Political and Administrative Studies of the College of Europe (2008-2013), Professor of Contemporary European Studies and Co-Director of the Sussex European Institute, University of Sussex (Brighton, UK), EU Marie Curie Chair of Excellence and Director of the SECURINT project on EU internal security governance at the Robert Schuman University in Strasbourg (France), Professor of Politics and Director of the Centre for European Politics and Institutions at the University of Leicester (UK), and Director for the Institute for European Politics (IEP) in Bonn (Germany). In addition to his research and teaching functions Professor Monar also held consultancy assignments with the European Parliament, the European Commission, the Planning Staff of the German Ministry of Foreign Affairs, the Dutch Scientific Council for Government Policy (WRR, The Hague), the German Bundestag, the French Commissariat général au plan (Paris) and the British House of Lords and House of Commons (London). He has also been elected a Fellow at the Royal Historical Society (London). Professor Monar holds a PhD in Modern History (University of Munich, 1989) and in Political and Social Sciences (European University Institute, 1991). He is the author of over 200 articles and books on the political and institutional development of the EU, EU justice and home affairs and EU external relations. He is also a founding editor of the European Foreign Affairs Review.

**Walter A. Füllemann** has been with the International Committee of the Red Cross (ICRC) since 1989. His field missions include Nicaragua (1989-1990), Peru (1991), South Africa (1992-1994), as well as Croatia and Bosnia-Herzegovina (1994-1995). He served as Head of the ICRC delegation in Baku, Azerbaijan, from 1996 to 1997. Between 1997 and 1999, he worked as delegate and spokesperson for the ICRC delegation to the United Nations in New York. At ICRC Headquarters in Geneva, he headed the operational desk for the former Yugoslavia from 1995



to 1996. From 1997 to 2002 he worked as Deputy Head of the External Resources Division (donor relations and fundraising), and from 2002 to 2009 as ICRC's Deputy Director of Operations. During the period 2009-2014 he served as Permanent Observer of the ICRC to the United Nations in New York. Since October 2015, he has been the ICRC Head of Delegation to the EU, NATO and the Kingdom of Belgium in Brussels. He holds a master's degree in International Relations from the University of Saint-Gallen, Switzerland.

**Christine Beerli**, Vice-President of the International Committee of the Red Cross (ICRC), was born in 1953. A member of a law firm in Biel, Ms Beerli began her political career on that city's municipal council, where she served from 1980 to 1983. From 1986 to 1991 she was a member of the legislative assembly of the Canton of Bern. In 1991 she was elected to the upper house of the Swiss parliament, where she remained until 2003, chairing the foreign affairs committee (1998-1999) and the committee for social security and health (2000-2001). Ms Beerli chaired the caucus of the Free Democratic Party in Switzerland's federal assembly from 1996 to 2003. She also served on committees dealing with security policy and economic and legal affairs. She retired from politics in 2003. Since 1st January 2006 she has headed Swissmedic, the Swiss supervisory authority for therapeutic products. She is a former director of the School of Engineering and Information Technology at Bern University of Applied Sciences. In January 2008, Ms Beerli was appointed permanent Vice-President of the ICRC. As such she is a member of the ICRC Assembly – the institution's supreme governing body – as well as the Assembly Council and the Presidency, where she works closely with the President and deputises for him whenever necessary. This includes handling the ICRC's external relations, representing the ICRC on the international scene and, in close cooperation with the directorate general, handling the ICRC's humanitarian diplomacy. Her particular areas of focus include helping to ensure the cohesion, smooth running and development of governance mechanisms and internal control, as well as strengthening and developing relationships within the International Red Cross and Red Crescent Movement.

**Session One: The protection of the delivery of health care under the Additional Protocols**  
*Première Session : La protection de la fourniture de soins de santé selon les Protocoles additionnels*

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**Knut Dörmann** is Head of the Legal Division and Chief Legal Officer of the International Committee of the Red Cross (ICRC). He was Deputy Head of the Legal Division between June 2004 and November 2007 and Legal Adviser at the Legal Division between December 1998 and May 2004. He was a member of the ICRC Delegation to the Preparatory Commission of the International Criminal Court. He holds a Doctor of Laws degree (Dr. Iur.) from the University of Bochum in Germany (2001). He was Managing Editor of *Humanitäres Völkerrecht – Informa-*

tionsschriften (1991-1997). Prior to joining the ICRC, he was Research Assistant (1988-1993) and Research Associate (1993-1997) at the Institute for International Law of Peace and Armed Conflict, University of Bochum. Dr. Dörmann is a member of several groups of experts working on the current challenges of international humanitarian law. He has extensively presented and published on international law of peace, international humanitarian law and international criminal law. He received the 2005 Certificate of Merit of the American Society of International Law for his book *Elements of War Crimes under the Rome Statute of the International Criminal Court*, published by Cambridge University Press.

**Marco Sassòli**, a citizen of Switzerland and Italy, is professor of international law at the University of Geneva, Switzerland. From 2001 to 2003, he was professor of international law at the Université du Québec à Montreal, Canada, where he remains an associate professor. He is also commissioner and alternate member of the Executive Committee of the International Commission of Jurists (ICJ). Marco Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. From 1985 to 1997 he worked for the International Committee of the Red Cross (ICRC), at the headquarters, inter alia as Deputy Head of its Legal Division, and in conflict areas, inter alia as Head of Delegation in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he again joined the ICRC delegation this time in Islamabad. He has also served as registrar at the Swiss Supreme Court, and from 2004-2013 as chair of the board of Geneva Call, an NGO engaging non-State armed actors about adhering to humanitarian rules. From 2009 to 2016, he was director of the Department of international law and international organisation at the University of Geneva. He has published on international humanitarian law, human rights law, international criminal law, the sources of international law and the responsibility of States and non-State actors.

**Alexander Breitegger** has been Legal Adviser at the International Committee of the Red Cross (ICRC) Headquarters in Geneva since February 2011, and has been working especially on the relationship between IHL and IHRL, and the protection of health-care delivery in armed conflict or other emergencies. As regards his action in favour of the legal protection of the delivery of health care in armed conflict or other emergencies, he provides support especially to the Red Cross and Red Crescent Movement's HCrD initiative. In this context, he participated in most HCrD expert consultations between 2012 and 2014, and was intimately involved in the drafting of Resolution 4 on HCrD for the 32nd International Conference of the Red Cross and the Red Crescent in 2015. He also provided substantive input to ICRC's suggestions for Resolution 2286 which was adopted by the UN Security Council by consensus in May 2016, and continues to give legal advice to the ICRC's follow-up to Resolution 4 on HCrD, to UN Security Council Resolution 2286 and other relevant multilateral diplomacy initiatives related to this

issue, including to the WHO resolution on a Global Workforce of Health-Care Professionals for 2030. He has a PhD on international law, with a specialisation on international humanitarian law from the University of Vienna, Austria, and holds a master's degree from the European Master's Programme on Human Rights and Democratisation.

**Dustin A. Lewis** is a Senior Researcher at the Harvard Law School Programme on International Law and Armed Conflict (PILAC). With a focus on public international law sources and methodologies, Mr Lewis leads PILAC research projects on the theoretical underpinnings and application of international norms related to contemporary challenges concerning armed conflict. He explores legal, as well as policy, technical, and ethical, dimensions of such topics as autonomous (weapons) systems, wartime medical care for terrorists, extraterritorial use of lethal force, the goals of war and the end of war, and dilemmas at the intersection of counter-terrorism frameworks and principled humanitarian action. Mr Lewis oversees the Programme's publications, research assistants, and online platforms. And he regularly briefs government officials, United Nations system actors, members of the media, and NGOs.

## **Session Two: Humanitarian access and assistance in light of the Additional Protocols**

### ***Deuxième Session : Accès et assistance humanitaires à la lumière des Protocoles additionnels***

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**Elzbieta Mikos-Skuza** is an associate professor in Public International Law at the Faculty of Law and Administration of the University of Warsaw, a director of NOHA (Network on Humanitarian Action) master studies and director of postgraduate studies on humanitarian aid at the same university. She served as Faculty Vice-Dean in 2008 – 2012. She is also a visiting professor at the College of Europe in Natolin. Dr E. Mikos-Skuza for thirty years has been volunteering with the Polish Red Cross, mainly in the field of dissemination of IHL. In 2004 – 2012 she was a Vice-President of the Polish Red Cross. She is also a member and First Vice-President of the International Humanitarian Fact Finding Commission established under 1977 Protocol Additional I to the 1949 Geneva Conventions and of the San Remo International Institute of Humanitarian Law. She is the author and co-author of numerous publications on public international law and International Humanitarian Law, including the collection of IHL documents published in the Polish language.

**Michael Bothe** is Professor emeritus of Public Law at the J.W. Goethe University Frankfurt/Main. He held chairs in Public International Law at the Universities of Hannover and Frankfurt (where he was also Dean), and has served as a visiting professor in many universities around the world. He has been president of various associations and commissions: the German Society for International Law, the European Environmental Law Association, the International Humanitarian Fact-finding Commission and the German Committee for International Humanitarian Law.

tarian Law. Among his fields of specialisation are International Humanitarian Law and the law concerning peace and security. He is the author of many publications in this field. He served as agent and counsel in cases before the International Court of Justice, the European Commission of Human Rights and the German Federal Constitutional Court.

**Tristan Ferraro** is thematic legal adviser at the Legal Division of the ICRC (HQ Geneva). He has the in-house responsibility for legal issues relating to multinational forces, occupation (head of the ICRC project on occupation), protection of civilians and the notion of armed conflict. He is also in charge of the files relating to humanitarian access as well as to IHL and terrorism. Before coming back to the Legal Division at the ICRC HQ in 2007, he served with the ICRC some years in the field – in particular as a legal coordinator – in Afghanistan, Pakistan and Israel/Palestinian occupied territory. Prior to joining the ICRC in 2002, Tristan Ferraro worked as a senior lecturer at the University of Nice-Sophia Antipolis (France), teaching inter alia public international law, including International Humanitarian Law. He holds a Doctor of Laws degree from the University of Nice-Sophia Antipolis.

**Annyssa Bellal** is the Strategic Adviser on International Humanitarian Law and Research Fellow at the Geneva Academy of International Humanitarian Law and Human Rights. She is also a senior lecturer in international law at Sciences Po, Paris. In the past years, she has worked as a legal adviser for the NGO Geneva Call, the UN Office of the High Commissioner for Human Rights, the International Committee of the Red Cross and the Swiss Department of Foreign Affairs. In 2012, she was Assistant Professor in public international law at the Irish Centre for Human Rights in Galway. Dr Bellal was awarded several fellowships for her research, notably from McGill University (O'Brien Fellow in Residence), New York University (Hauser Global Law School research fellow) and the Graduate Institute of International Studies and Development (Albert Gallatin Research Fellow). She edited and authored the War Report 2014 (Oxford University Press, 2015) and 2016 (Geneva Academy) and is the author of several articles on various IHL and human rights law issues, including an award-winning article on 'International Law and Armed Non-State Actors in Afghanistan' (International Review of the Red Cross, 2011, SNIS Geneva Award 2011).

### **Session Three: The relationship between the Additional Protocols and international human rights law**

#### ***Troisième Session : La relation entre les Protocoles additionnels et le droit international des droits de l'homme***

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**Alexander Breitegger** *see above, Session I.*

**Françoise Hampson** is Emeritus Professor of Law at the University of Essex. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the United Kingdom (UK), United States, Canada and Ghana. She represented Oxfam and Save the Children Fund (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. From 1998 to 2007, she was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded the title of Human Rights Lawyer of the Year in 1998 jointly with her colleague from the Human Rights Centre, Professor Kevin Boyle. More recently, together with her colleague Professor Noam Lubell, she has submitted third party interventions to the European Court of Human Rights on the relationship between Law of Armed Conflict and the European Convention on Human Rights (ECHR). She has taught, researched and published widely in the fields of armed conflict, International Humanitarian Law and on the ECHR.

**Amrei Müller** is a Leverhulme Trust Early Career researcher at the Health and Human Rights Unit, School of Law, Queen's University Belfast, where she conducts research for the project Healthcare in Conflict: Do Armed Groups Have Obligations and Responsibilities? She has obtained a PhD from the University of Nottingham and has previously worked at law faculties at the universities of Zürich and Oslo. Her research interests lie in the areas of human rights law, in particular the right to health and the law of the European Convention on Human Rights, and International Humanitarian Law. Among her publications is the monograph 'The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law – An Analysis of Health-related Issues in Non-international Armed Conflicts' (Brill, 2013).

**Léa Bass** est juriste au sein du Bureau du droit des conflits armés de la Direction des affaires juridiques du Ministère français des armées, où elle travaille depuis le mois d'octobre 2012. Elle est à ce titre chargée de conseiller les autorités civiles et militaires du ministère en matière de droit international humanitaire, de droit international des droits de l'homme et de droit international pénal. Avant d'occuper ce poste, Mme Bass a eu l'occasion d'effectuer des stages ou de travailler dans différentes institutions, dont l'Office français de protection des réfugiés et apatrides, l'État-major de la marine, la Commission nationale consultative des droits de l'homme et le Tribunal pénal international pour l'ex-Yougoslavie. Titulaire d'un Master 2 en droit international public de l'Université Paris II Panthéon-Assas, Mme Bass est également titulaire du CRFPA ou « examen du barreau » de Paris, avec une spécialisation en droit pénal et procédure pénale.

**Panel discussion: Accountability for serious violations of IHL under the Additional Protocols**

**Table ronde : La responsabilité pour des violations graves du DIH selon les Protocoles additionnels**

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**Paul Berman** joined the Legal Service of the Council of the European Union in 2012 where he is currently the Director for External Relations. He holds degrees from the Universities of Oxford and Geneva and is qualified as a barrister in England and Wales. Paul joined the legal cadre of the British Diplomatic Service in 1991. In addition to working in the Foreign and Commonwealth Office in London, he has served as legal adviser in the International Humanitarian Law Advisory Service of the International Committee of the Red Cross in Geneva, as international law adviser to the UK Attorney General, as Legal Counsellor at the UK Permanent Representation to the European Union in Brussels and as Director of the UK Cabinet Office European Law Division. He is a member of the Advisory Board of the Centre for European Law at King's College London and a visiting professor at the College of Europe in Bruges.

**Geoffrey Henderson** has been a judge at the International Criminal Court since 1 February 2014, with a term until 10 March 2021. Prior to his election to the ICC in 2013, Judge Henderson served as a trial judge in the Criminal Division of the High Court of Justice of Trinidad and Tobago, where he was appointed in January 2009. He has previously served as a State prosecutor, joining the Office of The Director of Public Prosecutions in 1990. Here, he held various positions until 2002, when he was appointed to the position of Director of Public Prosecutions for Trinidad and Tobago. Earlier in his career, he was a board member of the Judicial Education Institute of Trinidad and Tobago, a former Associate Tutor at the Sir Hugh Wooding Law School and was involved in regional training workshops for prosecutors. He chaired a steering committee that was responsible for the roll-out of a pilot Drug Treatment Court in Trinidad and Tobago. Judge Henderson is also a Fellow of the Commonwealth Judicial Education Institute, University of Nova Scotia. He is a graduate of the University of the West Indies, Bachelor of Arts (Hons), Bachelor of Laws and obtained a Legal Education Certificate from the Sir Hugh Wooding Law School, Trinidad.

**Yasmin Naqvi** is an international lawyer currently serving as Legal Officer in the Immediate Office of the Registrar of the UN Mechanism for International Criminal Tribunals where she heads the litigation team. She previously worked for the Organisation for the Prohibition on Chemical Weapons, providing legal advice on contingency situations, including in Syria, Iraq and Libya. Prior to this, she spent seven years at the International Criminal Tribunal for the former Yugoslavia working in Chambers at the trial and appeal levels. She has also worked for the International Criminal Court, the UN High Commissioner for Human Rights and the

International Committee of the Red Cross. Yasmin holds a PhD and a master's degree in Public International Law from the Graduate Institute of International Studies, Geneva, and BA and LLB (Honours) degrees from the University of Tasmania, Australia. She is a legal practitioner of the Supreme Court of Tasmania. She has published widely on International Humanitarian Law, terrorism and international criminal law.

**Guénaél Mettraux** is a judge of the Kosovo Specialist Chambers. He appears as Defence counsel before international criminal jurisdictions. Over the past decade, he has represented several high-ranking military and civilian leaders accused of international crimes. He also acts as a consultant before the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia. He advises countries, NGOs and international organisations on various issues pertaining to regulatory regimes, criminal trials, terrorism, international cooperation, criminal prosecutions, legislations and transitional justice. He is also a member of the European Union's Human Rights Review Panel. Dr Mettraux is a Professor of Law at the University of Amsterdam and a guest lecturer at the University of Fribourg. He has published extensively in the field of international criminal law. His scholarly works include three books: 'International Crimes and the ad hoc Tribunals' (OUP, 2005), 'Perspectives on the Nuremberg Trial' (OUP, 2008) and 'The Law of Command Responsibility' (OUP, 2009), which was awarded the Lieber Prize from the American Society of International Law. He is a member of the Editorial Committee of the Journal of International Criminal Justice and the Board of Editors of the International Criminal Law Review.

**Darren Stewart** has served in a number of appointments during his career in the British Army Legal Services including operational, prosecution and training posts. He deployed to Kosovo in 1999 as the legal adviser to the Commander British Forces. Over the period 2000-2003 whilst serving at the UK Permanent Joint Headquarters, Brigadier 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. He was posted to SHAPE in 2003 as the Assistant Legal Adviser (UK). From 2005 to 2006 he also served as the Commander Legal, Headquarters Northern Ireland. In August 2006 he was posted to Headquarters Allied Rapid Reaction Corps (HQ ARRC) and deployed to Afghanistan as the Chief Legal Adviser. In 2009 Brigadier Stewart was appointed Director of the Military Department, International Institute of Humanitarian Law, San Remo Italy. He served as Chief of Staff, Directorate of Army Legal Services at Army Headquarters Andover and subsequently Assistant Director Administrative Law from 2012 to 2015. He was appointed Deputy Assistant Chief of Staff – Legal, Headquarters Field Army in November 2015. Brigadier Stewart assumed his current appointment as of Head of Operational Law for the British Army in October 2016.

## Session Four: The development of the notion of military objective and its impact on the conduct of hostilities

### *Quatrième session : L'évolution de la notion d'objectif militaire et son impact sur la conduite des hostilités*

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**Andres B. Muñoz Mosquera** served in the Spanish Armed Forces in two cavalry regiments as *secretario de causas* (case officer/paralegal) and tank commander until 1991. From 1991 to 1999 he worked at the Spanish CHOD as a permanent member of the Spanish inter-ministerial delegation before the International Telecommunications Union (ITU). Mr Muñoz-Mosquera joined NATO in year 2000 as a civilian and he has been the NATO Commander's Legal Advisor (ACO/SHAPE Legal Advisor, Director) since 2014. He deployed in Bosnia-Herzegovina and performed press information duties for General Rose. He was involved in the negotiation of anti-sniping agreements and exchange of prisoners and corpses in the area of Sarajevo. In 1997 and 1998 he was assigned for the identification and collection of evidence of war crimes committed in 1991-1995. Mr Muñoz Mosquera is author of several publications relating to international law and international relations. He was visiting professor of the UNICIT in Nicaragua. He is a member of the International Society of Military Law and the Law of War, the Madrid Bar Association. He is also a CCB European Lawyer.

**Laurent Gisel** has been working for the International Committee of the Red Cross (ICRC) since 1999. From 1999 to 2003, he carried out assignments in Israel and the Occupied Territories, Eritrea, and Afghanistan, and from 2003 to 2005 he held the position of Deputy Head of Delegation in Nepal. From 2005 to 2008, he served as Diplomatic Adviser to the ICRC Presidency. Since 2008, Laurent Gisel has been working in the ICRC Legal Division. As Legal Adviser to the Operations from 2008 to 2013, he covered notably the Western countries, Iraq and Afghanistan. He is currently working in the Thematic Legal Advisers Unit and is notably the file holder for the rules governing the conduct of hostilities, including in cyberspace and outer space. Prior to joining the ICRC, Laurent Gisel became an attorney-at-law in Geneva and worked at the Public and Administrative Law Court of the Canton de Vaud. He holds a degree in law from the University of Geneva and a master's degree in international law from the Graduate Institute of International Studies (Geneva, Switzerland).

**Marten Zwanenburg** is a legal counsel with the international law division of the Ministry of Foreign Affairs of the Netherlands, where he advises inter alia on international law concerning the use of force and International Humanitarian Law. He previously worked in the Directorate of Legal Affairs of the Ministry of Defence. He also teaches a course on UN peacekeeping in the Advanced Studies in Public International Law Master's programme at Leiden University. Marten



has published widely on International Humanitarian Law and collective security law, and is an editor of the Military Law and the Law of War Review.

**Panel discussion: The IHL rules on the conduct of hostilities and their articulation with the notion of self-defence and rules of engagement**

***Table ronde : Les règles de DIH relatives à la conduite des hostilités et leur articulation avec la notion de légitime défense et les règles d'engagement***

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**Laurent Gisel** *see above, Session IV.*

**Camilla Cooper** is an assistant professor at the Norwegian Defence Command and Staff College (NDCSC), where she is working on her PhD research on NATO Rules of Engagement, with particular focus on hostile act, hostile intent, self-defence and direct participation in hostilities. She teaches operational law to all levels of the Norwegian Armed Forces, and has presented and taught at several specialised courses and seminars, most recently with a focus on ROE. These include the NATO/SHAPE Operational Law Discussions (2017), the Operational Law Course at the NATO School Oberammergau (2015-present), the IIHL in San Remo (2011-2015), where she was, among others functions, the Deputy workshop Director of the ROE Workshop, the EU Specialised Military Legal Officers Course (2014), the Vienna Course on International Law for Military Legal Advisers (2011-2013), the US Navy ILOMO course in Newport, Rhode Island (2010), and the Norwegian Air Force annual operational course for pilots (2009-2013). She has both acted as and supervised legal advisers and ROE officers at several war-gaming exercises, in Norway, Sweden and most recently at NATO HQ. In 2011, she deployed as a military legal adviser to ISAF, and in 2013, she completed the development of the first Norwegian Manual of the Law of Armed Conflict.

**Hans Boddens Hosang** is Deputy Director of Legal Affairs of the Netherlands Ministry of Defence, as well as head of the international law section of the Directorate. His duties include advising the minister of Defence and the Chief of Defence on legal aspects of planned and current international military operations, supervising all weapon reviews for the armed forces on the basis of Article 36 of the first Additional Protocol, and legal advice on various aspects of international and criminal law. He received his Master's degree in law at the University of Utrecht and his PhD in international law at the University of Amsterdam. In addition to his work at the Ministry of Defence, he is a guest lecturer at the University of Leiden and the University of Amsterdam and has published several articles and contributed to a number of books on international law.

**Gloria Gaggioli** is assistant professor and Grant Holder of Excellence at the University of Geneva. Her work focuses in particular on issues related to the interplay between International Humanitarian Law and international human rights law, the right to life and the use of force, including the conduct of hostilities, law enforcement and self-defence. Prior to joining the University of Geneva, she served as legal adviser in the legal division of the International Committee of the Red Cross (ICRC) and is the author of the ICRC report 'The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms'. Professor Gaggioli also worked as visiting professor at Lille Catholic University, External Lecturer at the University of Copenhagen and Researcher/Teaching Assistant at the Geneva Academy and University of Geneva. She wrote her PhD thesis (summa cum laude, Pedone 2013) on 'The Reciprocal Influence between Human Rights Law and Humanitarian Law in the Light of the Right to Life'.

**Randy Bagwell** began his military career in 1982. In 1986, he was commissioned as an infantry second lieutenant, in the Arkansas National Guard. Colonel Bagwell transferred to the active duty Army as a judge advocate in 1991. His numerous assignments include legal assistance, trial defence, administrative law and prosecution in postings in Germany and Hawaii. His International Humanitarian Law assignments include Chief of Operational and International Law, V Corps, Chief of International and Operational Law, U.S. Army Pacific, Chief of Operational Law, Multinational Forces, Iraq. Colonel Bagwell has served as the Senior Legal Advisor for Coalition Task Force 82, Bagram, Afghanistan, 2002-2003, U.S. Army Alaska, Ft. Richardson, Alaska, 2009-2011, 3rd Infantry Division, Ft. Stewart, Georgia, 2011-2012, NATO Regional Command, South, Kandahar, Afghanistan, 2012-2013, and I Corps, Joint Base Lewis-McChord, Washington, 2014-2016. His operational deployments include Hungary, in support of operations in Bosnia, 1996, Iraq, 2006-2007, and two tours in Afghanistan, 2003 and 2012-2013. Colonel Bagwell has also served as a professor of international law at the U.S. Naval War College, and taught International Humanitarian Law at the International Institute of Humanitarian Law in San Remo, Italy as well as in 25 other countries. In July 2016, Colonel Bagwell assumed duties as the Dean of the U.S. Army Judge Advocate General's School in Charlottesville, VA.