

International Institute of Humanitarian Law



International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

# The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives

STUDI



Politica



**FrancoAngeli**

International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
Istituto Internazionale di Diritto Umanitario

# **The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives**

40<sup>th</sup> Round Table on Current Issues  
of International Humanitarian Law  
(Sanremo, 7<sup>th</sup>-9<sup>th</sup> September 2017)

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## Preface

For almost fifty years now the International Institute of Humanitarian Law has played an important and unique role in providing an international and informal forum for in-depth reflections and open debates. By so doing it has brought together experts and key personalities from diplomatic, military, humanitarian and academic circles from different regions of the world, intent on discussing current developments in and challenges of relevance to international humanitarian law.

The 40<sup>th</sup> Round Table on current issues of international humanitarian law addressed the issue of “The Additional Protocols 40 years later: new conflicts, new actors, new perspectives”.

This Sanremo Round Table, while celebrating the 40<sup>th</sup> Anniversary of the Additional Protocols to the Geneva Conventions, placed particular focus on the protection of civilians and gender violence during both armed conflicts and internal violence.

It provided the opportunity to discuss important crucial topics, such as the provisions regarding persons deprived of their liberty, the protection of medical personnel, facilities and transport and the question of humanitarian access. Another essential question was at the core of this Round Table and that is, how sexual and gender-based violence is taken into account in IHL, especially in the Additional Protocols, and how to integrate the gender perspective into this field properly.

I wish to warmly thank all who contributed to the success of the event and I am confident that the publication of the complete proceedings of this Round Table will be useful to underscore the increasing importance of the promotion and enforcement of international humanitarian law and human rights in a swiftly changing international security environment.

*Fausto Pocar*

President of the International Institute of Humanitarian Law



## **Opening session**



## Welcome address

*Alberto BIANCHERI*

Mayor of Sanremo

Sono particolarmente onorato di porgere, a nome di tutta l'Amministrazione Comunale, il più caloroso benvenuto a tutte le personalità che prendono parte a questa 40<sup>a</sup> Tavola Rotonda sui problemi attuali del diritto internazionale umanitario, organizzata congiuntamente dall'Istituto Internazionale di Diritto Umanitario di Sanremo e dal Comitato Internazionale della Croce Rossa di Ginevra.

Vorrei limitarmi a qualche parola per sottolineare la mia grande soddisfazione e il sincero orgoglio che ho nel rappresentare la città in cui ha sede questo prestigioso Istituto – di cui il Comune di Sanremo è cofondatore – che da quasi 50 anni lavora assiduamente per promuovere in tutto il mondo il rispetto del diritto internazionale umanitario e dei diritti umani.

L'Istituto, grazie al suo prestigio sul piano internazionale costituisce, non solo per la città di Sanremo ma per il Ponente Ligure e tutta la Regione, una importante risorsa il cui operato ha tangibili e positivi risultati anche sul territorio.

La Tavola Rotonda, organizzata ogni anno nel mese di settembre – e che si pregia della Targa del Presidente della Repubblica Italiana e del patrocinio del Ministero degli Affari Esteri e della Cooperazione Internazionale e del Ministero della Difesa – rappresenta un consolidato appuntamento internazionale, apprezzato in tutto il mondo che approfondisce le problematiche umanitarie di maggiore attualità.

Nell'odierna realtà internazionale continuiamo ad assistere a continue violazioni delle norme di diritto internazionale umanitario che colpiscono profondamente e sistematicamente l'integrità, la dignità financo la sopravvivenza delle fasce più vulnerabili della popolazione civile. Siamo quotidianamente confrontati ad immagini di sofferenza e di morte che vengono dai numerosi focolai di crisi e di conflitti attivi in tutto il mondo e questa condizione ci ricorda come sia imperativo e necessario il rispetto dei principi fondamentali del diritto umanitario e dei diritti umani; il che presuppone comprendere il più possibile i fatti, comprendere le implicazioni politiche in gioco e i risvolti pratici e contingenti della lettera della legge.

Questa Tavola Rotonda, intitolata "I protocolli aggiuntivi 40 anni dopo: nuovi conflitti, nuovi attori, nuove prospettive" celebra quest'anno il quarantesimo anniversario dei Protocolli Aggiuntivi alle Convenzioni di Ginevra del 1949 e sarà l'occasione per considerare questi importanti

strumenti giuridici internazionali alla luce dell'evoluzione che contraddistingue la nostra epoca in relazione al contesto in cui sono stati adottati.

Sono più che mai convinto che, con il contributo di rappresentanti di governi, delle principali Organizzazioni Internazionali, di eminenti studiosi ed esperti provenienti dalle diverse aree geografiche del mondo, la Tavola Rotonda di Sanremo sarà, ancora una volta, l'occasione per uno scambio di punti di vista e di esperienze tra tutte le parti interessate.

Sono particolarmente lieto, anche a nome di tutta la cittadinanza, di esprimere ai presenti il mio augurio di buon lavoro con il più sincero auspicio che nel corso di questo breve soggiorno potrete trovare anche il tempo per scoprire le bellezze e le attrattive che offre questa città.

Spero di rivedervi presto a Sanremo.

## Opening remarks

*Fausto POCAR*

President, International Institute of Humanitarian Law

Excellencies, Civil and Military Authorities, Colleagues and Friends, Ladies and Gentlemen,

It is for me a great pleasure and indeed a distinct privilege to open this 40<sup>th</sup> Round Table on current issues of International Humanitarian Law (IHL), which has been organized as is tradition by the Institute in co-operation with the International Committee of the Red Cross, thus following a long and fruitful collaboration that has allowed distinguished experts - both academics, military officials and field operators – to come together to discuss significant issues of IHL in the neutral and friendly environment of our Institute, an environment which has been customarily referred to as the “Spirit of Sanremo”.

C'est bien dans cet esprit que j'adresse à tous et à toutes ici dans cette salle la bienvenue la plus chaleureuse au nom de l'Institut et ma gratitude pour s'être rendu(e)s à Sanremo pour être avec nous au cours de cette Table Ronde, qui marque le 40<sup>e</sup> anniversaire des Protocoles additionnels aux Conventions de Genève et en même temps constitue la 40<sup>e</sup> table ronde de notre Institut.

Nel porgere il mio benvenuto ai partecipanti, desidero esprimere la mia profonda gratitudine al Presidente della Repubblica, che ha voluto esprimere ancora una volta il suo apprezzamento per la manifestazione conferendo alla Tavola Rotonda la “Targa del Presidente della Repubblica”. È un riconoscimento che onora l'Istituto e ci incoraggia a continuare con sempre maggiore impegno nella nostra attività per il rispetto del DIU.

Vorrei anche esprimere il mio vivo ringraziamento a tutte le autorità civili e militari presenti in questa sala e alle illustri personalità che prenderanno la parola in questa cerimonia di aperture della Tavola Rotonda, a cominciare naturalmente dal Sindaco di Sanremo, Alberto Biancheri, per il suo costante sostegno a favore dell'Istituto; al Presidente del CICR, Ambasciatore Peter Maurer, che pur non potendo essere presente, ha inviato un messaggio con un video; all'Ambasciatore Elisabetta Belloni, Segretario Generale del Ministero per gli affari esteri e la cooperazione internazionale per essere intervenuta in rappresentanza del Ministero, che ringrazio per il continuo sostegno dato all'Istituto; al Sottosegretario Generale per gli affari giuridici e Consigliere giuridico delle Nazioni Unite, Miguel de Serpa Soares, che ci onora per la seconda volta consecutiva con la sua presenza. Desidero inoltre

esprimere la mia riconoscenza al Governo elvetico per il contributo offerto all'organizzazione di questa tavola rotonda.

Infine, un mio personale riconoscimento va ai coordinatori del programma della Tavola Rotonda, il vicepresidente Michel Veuthey, il prof. Wolff Heintschel von Heinegg, per molti anni membro del Consiglio dell'Istituto, e ai membri del servizio giuridico del CICR Helen Obregon e Jean-François Queguiner. E, *last but not least*, al personale dell'Istituto, che si è prodigato con la consueta solerzia per la riuscita di questo incontro.

Ainsi que le programme l'indique, cette Table Ronde se déroule à l'occasion du 40<sup>ème</sup> anniversaire des Protocoles Additionnels du 8 juin 1977 aux Conventions de Genève. Le colloque est toutefois bien loin d'être une simple célébration de l'anniversaire de deux instruments juridiques dont l'importance et l'actualité ne sauraient être mises en doute. Il s'agit non seulement de tracer un bilan de la contribution que les Protocoles ont donné à l'évolution du droit international humanitaire (DIH) et aux principes desquels il s'inspire, mais également d'identifier le rôle qu'ils peuvent jouer dans le cadre de la complexité des scénarios qui caractérise le présent contexte des conflits qui ont lieu aujourd'hui dans le monde: un contexte nouveau auquel une distinction rigide entre conflits armés internationaux et conflits armés non internationaux est de moins en moins susceptible de s'appliquer – ainsi qu'il a été mis en lumière au cours des débats de la 38<sup>ème</sup> Table Ronde qui a eu lieu il y a deux ans, en 2015, de laquelle la présente constitue d'une certaine manière la continuation.

Malgré ce nouveau contexte, malgré les défis auxquels le DIH se voit de plus en plus confronté, les Protocoles, ainsi que les Conventions de Genève dont ils sont le complément, restent le point de référence essentiel dans le droit des conflits armés et sont toujours la base de leur discipline juridique. Ils ont le potentiel de continuer à jouer un rôle fondamental à cet égard pourvu qu'on leur donne une interprétation évolutive et cohérente avec leur but et leur objet, et qu'on les respecte dans leur intégralité. Il s'agit donc d'identifier les situations qui demandent une interprétation évolutive des principes qui y sont affirmés et renforcer le respect de leurs dispositions par tous les acteurs, étatiques et non étatiques, engagés dans un conflit international ou interne.

In light of the above-mentioned considerations, the Round Table will focus on several issues dealt with in the Additional Protocols which may require further clarification, especially in the framework of NIACs, such as the treatment of persons deprived of their liberty, the protection of medical personnel and of medical activities, and the provision of health care for the civilian population in armed conflicts, as well as the question of humanitarian access. Furthermore, with a view to identifying features implying the need for a progressive interpretation and implementation of the Protocols, and more in general of IHL, the programme of the Round

Table has singled out the questions of gender violence in armed conflicts and of the integration of a gender perspective into IHL.

In recent years, increasing attention has been placed on gender issues in armed conflicts, and States and humanitarian actors have begun to integrate gender perspectives in their operations.

However, gender violence, whilst still prevalent in many armed conflicts, does not appear to be widely addressed in traditional IHL training packages for the armed forces and there could, therefore, be a perception that the issue has not been absorbed as a mainstream IHL subject. There remain detractors, including IHL specialists, who do not regard this area of IHL as “real IHL” in the same sense as they regard “proper” subjects such as, for example, targeting. It is true that the subject covers a wide range of behaviour which does not always amount to breaches of IHL, ranging from individual criminal conduct by, for example, peacekeepers, to its systematic employment as a means and method of warfare. But, even where the behaviour does amount to a breach of IHL, its inclusion in this field as a proper subject is sometimes perceived as emotional and controversial. It seems appropriate, at this stage, to explore how the issue of sexual and gender-based violence in armed conflicts and some of the situations related thereto should be addressed under the Additional Protocols.

The integration of a gender perspective into IHL has a wider dimension though. Save for a few provisions that provide specific protection to women, the majority of IHL rules, including those in the Additional Protocols, are intended to be gender neutral in that women and girls, men and boys are afforded the same protection. If this is certainly true, structural inequalities and gender stereotypes in society may entail the application of IHL rules in a way that is inherently discriminatory, and there may be a need to clarify or further develop the law to address these effects. Hence the problem of integrating a gender perspective into IHL, particularly at the level of its implementation, inevitably arises. Again, it is appropriate to address this issue and the Round Table will endeavour to explore and discuss it.

Let me finally stress that, while the 1977 Additional Protocols represented a milestone in the regulation of armed conflict and strengthened the protection of victims on many issues, that protection depends on the degree of respect for their rules by actors engaging in IAC and NIAC. In light of the frequent violations of these rules, a main issue is still how to enhance respect for and prevent violations of the Additional Protocols and IHL more in general. A wide range of measures have been adopted and initiatives have been proposed, both internationally and nationally, to increase respect for IHL in armed conflict, and it is important to reflect on lessons learned and possible ways forward to enhance the implementation and promotion of the Additional Protocols. This is a

recurrent subject at these Round Tables, and reflects the main object of the activity of the Sanremo Institute, whose goal, in almost fifty years of life, has been to promote and disseminate IHL through the organisation of courses, workshops and training activities, bringing together leading military experts, academics, civilian and military personnel from different regions of the world, as is the case of this Round Table.

In thanking all the participants for their presence in Sanremo, we look forward to a productive discussion over the next few days and to the contribution that all of you will give to the Round Table. Thank you for your attention.

## Message

*Peter MAURER*

President, International Committee of the Red Cross

Distinguished guests,

The ICRC is pleased to co-organise this event once again in partnership with the International Institute of Humanitarian Law, particularly on the occasion of the fortieth anniversary of the Additional Protocols. I am sorry that I cannot be with you in person today, but I trust that your discussions will be fruitful, as you consider the current challenges of International Humanitarian Law (IHL).

It is an auspicious year – forty years since the Additional Protocols were first adopted in 1977, to reflect a new world order and how modern wars were being fought. Conflicts leading up to 1977 were characterised by wars of national liberation throughout Africa and Asia, asymmetric conflicts, a spiking on international armed conflicts and the development of new weapons technologies. In non-international armed conflicts, civilians were often the main victims and were largely beyond the protection of IHL. Recognizing this growing need, the international community came together to create Additional Protocol 2, the first ever treaty devoted exclusively to non-international armed conflicts, and in doing so they secured greater protection for civilians and civilian objects. Of note to today's world, the Additional Protocols all sought to take account of the new realities of warfare – for instance, by strengthening the rules of addressing terrorism in armed conflicts.

Today, the Protocols remain relevant, useful, and a barrier to the worst excesses of war. The Protocols are among the most widely adhered international instruments. They are, together with the 1949 Geneva Conventions, the foundation of IHL and our cornerstones for the protection and respect of human dignity in armed conflicts.

The real triumph of the Additional Protocols has been their ability to translate into practice. The last forty years have proven that far from Ivory Tower idealism, they are battle-worn tools that make a tangible difference on the ground. For example, as peace was negotiated in Columbia at the end of last year, the final agreement between the government and the FARC, and the subsequent amnesty law, both largely drew from Additional Protocol 2 – a clear example of national integration of IHL.

The Additional Protocols have also set the ground work for multiple weapons treaties. The legally binding treaty prohibiting nuclear weapons, which was adopted two months ago, was driven by the concerns of the catastrophic humanitarian consequences of nuclear weapons and the

compatibility of these with fundamental IHL rules, including distinction, proportionality and precautions in attack. All of these rules were reaffirmed, clarified or developed forty years ago by Additional Protocol I.

Forty years later, today's world sees further changes in the nature of conflicts which creates live frictions about the developments of IHL, including the Additional Protocols.

When I speak with people in the various forums I attend, I am sometimes told that IHL falls short of addressing the new realities on the battlefield. It can seem that, with the daily headlines reporting the horrors of armed conflicts, the respect for the rules of war has diminished. You and I know how fundamental and relevant the law remains. But we do need to be aware of perceptions and tensions so we can contribute to the discussions and to help shape the narrative. The frictions I see and what is frankly a huge challenge for the respect of the law is the behaviour of some of the armed forces engaged in fighting terrorism. Often it is argued that these activities do not fall within the scope of IHL, or that armed groups are labelled as terrorist simply to deny that such groups may be parties to conflicts. Despite the important challenges faced by States fighting terrorism, these assertions often mask an unwillingness to apply time-tested rules to contemporary armed conflicts. The Additional Protocols provide a framework to address terrorism in armed conflicts, and strengthening the rules covering these situations was precisely one of their objectives.

The Additional Protocols represent a reasonable balance between military necessity and humanity and States must not be tempted to shift the cursor too far towards security interests and minimise their duty to uphold the important protections provided by the Additional Protocols.

How do we counter the narrative of annihilation tactics or unrestricted military force and the push to apply IHL selectively? What do we argue when forces pretend the law doesn't apply? Our experience shows that the failure to impose limits on means and methods of warfare may contribute to continuing cycles of excessive violence that will spiral through generations.

The ICRC remains convinced that the existing rules continue to be relevant and that the fundamental challenge is and remains the need to reinforce respect for these rules and improve their implementation. We must all focus our efforts on generating respect for IHL on the ground and it's important that this gathering and other forums continue to ask the right questions and to openly tackle these realities.

This is an essential challenge and I wish you well in your deliberations.

## Keynote address

*Elisabetta BELLONI*

Secretary-General, Italian Ministry of Foreign Affairs  
and International Cooperation

It is an honour to represent the Italian Ministry of Foreign Affairs and International Cooperation here today. I would like to thank the promoters of the Round Table – the International Institute of Humanitarian Law and the International Committee of the Red Cross – for having gathered such an influential group of experts to discuss fundamental issues, which require growing attention.

This year's Round Table is particularly important because it marks the 40<sup>th</sup> anniversary of the 1977 Additional Protocols to the Geneva Conventions.

The Italian Ministry of Foreign Affairs has a special relationship with the Sanremo International Institute of Humanitarian Law. We have a longstanding history of cooperation. The Institute's solid reputation as an advocate of international humanitarian law is a source of great satisfaction and pride for Italy.

At the *Farnesina*, we are committed to promoting the Institute's activities in education, training and research. We support the training programmes of the armed forces of many different countries. We also support the Institute's courses for diplomats, experts, representatives of NGOs and students of different nationalities. As you will remember, an Italian diplomat, Ambassador Maurizio Moreno, was President of the Sanremo Institute in the years 2007-2012, and gave great input to the role of the Institute at both national and international levels.

With regard to the issue of today's Round Table, it is clear that the Additional Protocols remain – 40 years later – a milestone in the protection of human rights in armed conflicts, and a major achievement of the international community in securing greater safety for civilians.

Nevertheless, the new global scenario is posing additional challenges to international humanitarian law. New weapons and technologies have increased their destructive power. The role of non-state actors, the new tactics of warfare and the absence of clear battlefields give rise to new threats. Nearly all armed conflicts are total war, waged in inhabited areas, where the distinction between military and civilian personnel is blurred. Civilians account for the vast majority of casualties in present conflicts. They are often subject to indiscriminate attacks and other violations of human rights. Hospitals, schools, cultural and archaeological sites are targeted and destroyed again and again.

Take Syria where the crisis has entered its seventh year. Despite recent diplomatic progress, unparalleled suffering and disregard for human life continue to mark the country. According to OCHA, 13.5 million people still require humanitarian assistance, while over half of the population has been forced out of their homes.

Today, more than ever, the principle of humanity in situations of conflict is in great danger. And not only in Syria: think of Iraq, Yemen and Libya. We all know that war and law do not always go hand in hand, and that international law is not perfect. But we cannot consider all the atrocities we have been witnessing in the last years as being the result of gaps or shortcomings of existing law. Let me quote on this point Ambassador Moreno: *“The main problems do not originate from alleged deficiencies, ambiguities or grey areas of the current legal framework: more often problems come from the lack of political will, ignorance of obligations and deliberate violations by States and groups or individuals involved in military operations”*. This is why, today, the most pressing issue must be to strengthen our efforts to guarantee full respect of international humanitarian law by both States and non-state actors.

Italy has ratified both Additional Protocols and is at the forefront in this endeavour in many respects.

Advocacy: we continue to encourage the widest membership to all the international tools of humanitarian and human rights law, fostering their effective implementation and enforcement as well. The Universal Periodic Review of the Human Rights Council in Geneva is a useful device towards this end.

Training: we provide qualified training for UN and EU peacekeepers, based on highly professional and ethical standards. We offer targeted training programmes on the rule of law, international humanitarian law, human rights law, protection of civilians, and prevention of sexual and gender-based violence in conflicts within the Women, Peace and Security Agenda.

The “Solferino spirit”: Italy actively and financially supports the work of the International Committee of the Red Cross, (6.4 million euros to the ICRC budget in 2016), and sponsors the “Solferino spirit”. We promote international humanitarian principles of neutrality, impartiality and independence for governments, organizations and people of different religions and cultural background.

Cultural heritage: furthermore, Italy encourages the implementation of those rules of international humanitarian law aimed at protecting cultural heritage in wartime.

Humanitarian access: we are committed to ensure humanitarian access to conflict areas. This is still one of the most delicate topics on the

international agenda. We need to speak up and condemn the recurring violations of international humanitarian law on this point.

Financial commitment: last year Italy committed itself to a significant pledge during the World Humanitarian Summit in Istanbul. With an overall humanitarian budget of more than 115 million euros we have increased our resources by 15% in 2017 and we expect to confirm this trend in 2018. These figures reflect the growing importance that we attach to humanitarian assistance.

Accountability: Italy is very much engaged in implementing the principle of accountability for serious and massive violations of international humanitarian law and human rights law in situations of armed conflict. As Professor Antonio Cassese said, “The most effective means of enforcing international humanitarian law remains the prosecution and punishment of offenders within national or international criminal jurisdictions”.

Overall, constant involvement and action by the international community is what we need to increase the respect of international humanitarian law. A broader engagement in the same issues by all actors in current conflicts, including non-state actors and organized armed groups, would be equally crucial. It would represent an important step forward in guaranteeing the safety of civilians and the safeguard of basic humanitarian standards during armed conflict.

International humanitarian law should remain at the top of the global agenda. In this respect, Italy recognizes the outstanding role of the International Institute of Humanitarian Law in raising awareness and supporting education by promoting international conferences and seminars on the matter, as the one in which we are participating today.

When I accepted the invitation to come to Sanremo I was asked to spend a few words in commemoration of a former president of the Institute, Ambassador Maurizio Moreno. I was very pleased to be given the honour to spend these few words in commemoration of Maurizio for a number of reasons. Of course, the most institutional one is that I represent the Ministry of Foreign Affairs as Secretary-General but there is also a very personal reason why I am pleased to be here to commemorate Maurizio and that is because I had the privilege of knowing Maurizio probably better than other colleagues. I was chief of his office when he was Director-General for Europe at the Ministry of Foreign Affairs and I was able to understand and appreciate his complex personality. Maurizio was a very knowledgeable person, with a great sense of State, who was fully committed to the principles and values that have always been fundamental to the Institute. Now let me turn to Italian to talk a little about Ambassador Moreno.

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L'Ambasciatore Maurizio Moreno è stato presidente dell'Istituto dal 2007 al 2012. Ricordo bene quando gli si è presentata l'occasione di assumere questo nuovo incarico e ricordo i motivi che lo rendevano particolarmente entusiasta. Il primo era perché tornava a Sanremo, una terra che amava e da cui traeva le origini e quindi, al di là dell'Istituto, c'era una componente personale che lo rendeva particolarmente felice. Ma c'era anche un certo senso di nostalgia, lo ricordo bene, perché Maurizio era stato membro della delegazione italiana che a Ginevra aveva concluso il negoziato che portò all'adozione dei Protocolli Addizionali e lui aveva quella strana e particolare voglia – una costante del suo carattere – di tradurre in pratica quello che sul piano teorico e sul piano istituzionale aveva contribuito a realizzare. Infine, c'era anche la profonda convinzione che l'Istituto fosse, come lui stesso diceva, una straordinaria risorsa per la comunità internazionale e poiché era una persona che amava molto affrontare le sfide vedeva nel ruolo che si accingeva a svolgere, nonostante non fosse di professione un giurista e tantomeno avesse esperienze umanitarie dirette, l'occasione di poter dare un suo contributo all'affermazione di quei principi e quei valori che avevano ispirato tutta la sua carriera.

Sono sicura che Maurizio sia pienamente riuscito nel suo intento e che il Professor Pocar, succedendogli, possa condividere con me questa valutazione.

Maurizio era consapevole che non poteva dare un contributo, al pari di autorevoli giuristi internazionali, nel merito delle problematiche giuridiche ma era certo di poter svolgere un ruolo importante in termini di valorizzazione dell'Istituto e di *advocacy*. Ho accennato prima all'importanza di promuovere e incoraggiare un'adesione più ampia a tutti gli strumenti internazionali di diritto umanitario, sia per gli attori statuali sia non statuali, favorendone un'effettiva attuazione e applicazione. Credo che in questo, anche per quanto ha fatto qui all'Istituto di Sanremo, nessuno meglio di Maurizio abbia lasciato un segno così tangibile.

Lasciatemi concludere questo breve ricordo di Maurizio, che vuole essere soprattutto un atto di riconoscenza per quello che ha fatto, richiamando un episodio personale a me particolarmente caro.

Maurizio amava stressare fino all'ultimo i propri collaboratori e io sono stata una delle sue vittime. Tendeva a dimenticare l'esistenza del Primo maggio, Natale e tutte le festività non ponendosi per nulla il problema. Ricordo che in occasione di un Primo maggio, uno dei rari casi in cui avevo programmato di passare la giornata con i miei nipotini che regolarmente trascuravo, puntualmente arriva la telefonata di Maurizio che mi dice di andare in ufficio. Io gli rispondo che avevo con me due bambini di 4 e 5 anni ma lui non ne volle sapere e, non avendo altra alternativa, fui obbligata a portarli in ufficio. Maurizio non si dimostrò minimamente imbarazzato

dall'idea di aver rovinato una giornata in famiglia e si presentò con due regali per i bambini. Il più piccolo immediatamente ruppe il regalo che gli era stato portato, ma la cosa imbarazzò più Maurizio che mio nipote al punto che si sentì in dovere di fare qualcosa e mi disse: *“Tu continua a lavorare e io porto tuo nipote a fare un giro per Roma sulla mia decapottabile”*. E mio nipote partì con lui.

La cosa divertente è come questo bambino, che non l'aveva mai visto prima, nel giro di mezz'ora riuscì a cogliere quello che Maurizio era realmente. Al ritorno in ufficio, di fronte a lui, mio nipote disse: *“Sai zia, quest'uomo qui non è proprio un Ambasciatore, non sembra proprio un Ambasciatore”* io lo guardai e gli chiesi *“Che cosa vuoi dire?”* e Maurizio incuriosito aggiunse *“Ma che idea hai degli ambasciatori?”*. Mio nipote rispose: *“Be' quelle persone serie, un po' grosse, magari con la pipa, un po' paffutelli”* al che Maurizio sorridendo gli chiese *“E io invece?”*. *“Tu sei proprio fico!”* rispose mio nipote lasciando Maurizio in grande imbarazzo.

Quello che voleva dire il mio nipotino, e dopo mi spiegò meglio, era che in quella mezz'ora in macchina con Maurizio aveva appreso tante cose, aveva scoperto l'aspetto umano che Maurizio tendeva a nascondere, ma al tempo stesso aveva percepito l'autorevolezza del ruolo che lui rivestiva. Mi piace molto ricordare con quest'espressione di mio nipote la figura di Maurizio Moreno.

## **Keynote address**

*Miguel de SERPA SOARES*

Under Secretary-General for Legal Affairs  
and United Nations Legal Counsel

It is a great pleasure for me to be able to attend this Round Table once again, and I thank the International Institute of Humanitarian Law for inviting me and giving me the opportunity to deliver this keynote address.

This is the second time I have participated in this Round Table, and I truly value the opportunity to share some of the issues related to international humanitarian law which my Office has been dealing with recently, and to exchange views with this distinguished audience. Interactions with the academia and fellow practitioners have been a key part of my work, and I am keenly aware of the importance of these interactions.

The theme of this year's Round Table, which is "The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives", is a timely one.

The adoption of the two Additional Protocols in 1977 was undoubtedly an extraordinary achievement in international humanitarian law, and I wish to emphasize that the United Nations played a crucial role in developing certain rules that were eventually included in the Additional Protocols.

The Additional Protocols supplemented the Geneva Conventions in many respects, such as the rules applicable to non-international armed conflict but, most importantly, the Protocols, for the first time, provided for comprehensive protection for civilians and civilian objects against the effects of military operations.

As the achievements of the Additional Protocols in the past 40 years and the contemporary challenges will be discussed extensively by other speakers during this Round Table, I have decided to speak about a topic that was left out from the Additional Protocols, namely United Nations peacekeeping operations. I would particularly like to speak about one specific aspect, which is the protection of UN peacekeeping personnel under IHL.

### **Protection of peacekeeping personnel under IHL**

It is interesting to note that, in the process of drafting the Additional Protocols, there were some discussions concerning compliance with IHL by UN forces. But the official records do not indicate that there were

discussions concerning the protection of UN peacekeeping personnel in times of armed conflict. The Additional Protocols do not make any specific reference to UN peacekeeping personnel.

However, subsequent practice indicates that UN peacekeeping personnel are also protected by the relevant provisions of the Geneva Conventions and the Additional Protocols. Here, I would like to focus on the rules of IHL that apply in non-international armed conflict, as UN peacekeeping personnel are increasingly deployed to situations of non-international armed conflict.

As far as the rules concerning the humane treatment of persons are concerned, they are formulated broadly and they, therefore, clearly cover UN peacekeeping personnel.

Article 3 common to the Geneva Conventions refers generally to “persons taking no active part in hostilities”, and Additional Protocol II further refers to “all persons who do not take a direct part or who have ceased to take part in hostilities”, and require that these persons be treated humanely in all circumstances. Notably, these rules do not make a distinction between civilians and fighters, and do not provide that they apply only to specific categories of persons. All persons who are not or no longer taking a direct part in hostilities are covered and must be treated humanely.

It is also noted that the International Criminal Tribunals for Rwanda and the former Yugoslavia have specifically dealt with the question as to whether Common Article 3 and Additional Protocol II apply to UN peacekeeping personnel. In the *Bagosora* case, the ICTR examined an incident in which 10 Belgian military personnel of the UN Assistance Mission in Rwanda were beaten to death by members of the Rwandan armed forces in April 1994. The ICTR determined that the Belgian military personnel qualified as “persons taking no active part in hostilities” and concluded that their killings constituted serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

More recently, in the *Karadzic* case, the ICTY dealt with a case in which over 200 military personnel of the United Nations Protection Force were taken hostage in 1995. The ICTY in this case concluded that these military personnel were “persons taking no active part in hostilities” and were afforded the protection of Article 3 common to the Geneva Conventions, which prohibits the taking of hostages. These cases clearly indicate that UN peacekeeping personnel, including military personnel, are covered by the rules concerning humane treatment in IHL.

On the other hand, the rules concerning the conduct of hostilities are different in nature from the rules concerning humane treatment. Unlike the rules on humane treatment, the rules concerning the conduct of hostilities make a clear distinction between civilians and fighters. These rules require

parties to the conflict not to direct attacks against civilians, and require them to only target fighters. Therefore, the determination of whether a person is a civilian or a fighter becomes crucial in the context of the conduct of hostilities.

While the Additional Protocols do not specifically provide whether UN peacekeeping personnel, including military personnel, could be considered as civilians, subsequent practice has clarified that they are generally treated as civilians.

In this regard, the Rome Statute of the International Criminal Court provides that it is a war crime to direct attacks against personnel of a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict. The phrase “as long as they are entitled to the protection given to civilians under the international law of armed conflict” clearly indicates that UN peacekeeping personnel are entitled to the IHL protection given to civilians.

The ICRC’s publication on customary IHL also mentions that directing an attack against personnel of a peacekeeping mission is prohibited, as long as they are entitled to the protection given to civilians under IHL.

It is clear that UN peacekeeping personnel are generally treated as civilians and protected as such under IHL in times of armed conflict. However, as UN peacekeeping operations become increasingly involved in hostilities, a question has arisen as to whether peacekeeping personnel, particularly military personnel, would lose the protection given to civilians under IHL, and if so, how that would happen. This question has been addressed in several cases before international tribunals and I would like to briefly refer to them.

In the *Sesay* case, the Special Court for Sierra Leone examined a number of incidents that occurred in 2000, in which the Revolutionary United Front, an armed group in Sierra Leone, ill-treated, captured or attacked a number of military personnel of the United Nations Mission in Sierra Leone.

The Court first stated that personnel of peacekeeping missions are entitled to protection as long as they are not taking a direct part in hostilities. The Court then went on to say that “where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law”.

In this particular instance, the Court found that UNAMSIL (United Nations Mission in Sierra Leone) personnel were not taking a direct part in hostilities at the relevant time. Therefore, attacks against them were considered as a crime.

The International Criminal Court also dealt with the issue in the *Abu Garda* case and *Banda and Jerbo* case, although these cases involved an African Union peacekeeping operation rather than a UN peacekeeping

operation. In these cases, the Court dealt with an incident in which armed groups in Darfur directed an attack against a base of the African Union Mission in Sudan in 2007.

In the *Abu Garda* and *Banda and Jerbo* cases, the ICC took a similar approach to the Special Court for Sierra Leone and stated that “personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities”.

In this particular case, the ICC found that AMIS personnel did not take any direct part in hostilities and that there were substantial grounds to believe that they were entitled to the protection given to civilians under IHL.

These cases seem to indicate that peacekeeping personnel would lose the protection given to civilians under IHL on an individual basis rather than collectively. In other words, these cases seem to indicate that only those individuals who are directly engaged in hostilities would lose the protection given to civilians, while others who are not would continue to benefit from such protection. These cases also seem to indicate that the personnel concerned would lose the protection given to civilians under IHL only while they take a direct part in hostilities, and that they would retain such protection outside that timeframe.

However, we are also aware that others have taken a different approach and have argued that all military personnel could collectively lose the protection given to civilians under IHL when a peacekeeping operation as a whole becomes a party to a conflict.

These are important questions that require further reflection and our Office is closely following the discussions on such questions.

## **Safety Convention**

Before I conclude, I would like to briefly mention another issue that has arisen with respect to the protection of UN peacekeeping personnel.

As a result of the sharp rise in the number of casualties suffered by peacekeeping operations in the early 1990s, Member States have decided to elaborate a new instrument on the protection of UN personnel.

In a short period of time, the Convention on the Safety of United Nations and Associated Personnel was negotiated, and eventually adopted in 1994.

The Safety Convention, among other things:

- Prohibits attacks against United Nations and associated personnel;
- Requires States parties to criminalize such attacks in their national laws;

- Requires them to submit relevant cases to the competent authorities of the State party concerned for the purpose of prosecution; and
- Requires States parties to take all appropriate measures to ensure the safety and security of such personnel.

This was an important step to supplement the protection provided for in IHL.

It is noted that the Convention specifically provides that it does not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter that is engaged in an international armed conflict. In other words, personnel of such a UN operation are not protected by the Convention but are, instead, covered by IHL. However, the Convention does not specifically address the question of whether it applies when a UN peacekeeping operation is engaged in a non-international armed conflict. Therefore, there is lack of clarity as to whether the Safety Convention applies in instances where peacekeeping personnel are engaged in an armed conflict with armed groups.

Different positions have been taken on this question ever since the Safety Convention was being negotiated in 1993 and 1994.

Some have argued that the Safety Convention ceases to apply, whereas others have argued that the Convention was intended to apply to peacekeeping personnel even when they were engaged in a non-international armed conflict. It appears that subsequent practice has not resolved this difference.

Therefore, it remains to be seen whether further practice might clarify this point in the future.

### **Concluding remarks**

In this address, I have tried to put UN peacekeeping operations in the context of IHL and highlight some issues that are related to the protection of UN peacekeeping personnel. It is evident that there are difficult questions to be addressed, and these questions may become more and more prominent in the context of the rapidly changing nature of peacekeeping operations.

There are, of course, other pressing issues related to the Additional Protocols and IHL in general, and I am confident that this Round Table offers an excellent forum to exchange views on critical issues.

I wish you all a successful Round Table.

**I. The scope of application of the additional protocols: a settled problem?**



## **Defining armed conflicts under the Additional Protocols: is there a need for further clarification?**

*Andrew CLAPHAM*

Professor of International Law,  
Graduate Institute of International and Development Studies

### **Introduction**

I have been asked to address the following question: *Defining armed conflicts under the Additional Protocols: is there a need for further clarification?*

My problem is, of course, that the Protocols do not really define armed conflicts but rather refer to other instruments to do this. The first Protocol refers back to Common Article 2 of the four 1949 Geneva Conventions and to the UN General Assembly's Friendly Relations Declaration of 1970, and the second Protocol refers back to Common Article 3 to the four 1949 Geneva Conventions, which it supplements and develops, and then also includes a negative definition of what is not included. So my remarks will inevitably have to stray beyond what is strictly found in the Protocols. Rather than outlining the full scope of the Protocols let me turn straight away to the real question of interest for this Round Table: *is there a need for clarification?*

I propose to highlight a few areas where there is confusion and where clarification might be in order. I am sure the word 'clarification' was deliberately chosen by the organizers; we are not talking here about amendment, adjustment or adding a new treaty. The academic debates are rather well worn and I think it might be more helpful if I try to highlight a few areas where I have come across confusion, and where indeed I can admit that I myself may have been confused, and where clarification would, therefore, be welcome.

What forms could such clarification take? We could consider that one sort of clarification could come in the form of resolutions of various organizations or even the Red Cross Conference, or alternatively another form could be in guise of a full discussion in Sanremo. We could consider future statements from government representatives and these could at least dispel some confusion with regard to those particular parties to the Protocols; and lastly, of course, it is my hope that in the question and

answer session the participants will come forward with lucid explanations clearing any remaining fog that surrounds this topic.

## **1. Armed conflicts under Additional Protocol I**

Armed conflicts under Additional Protocol I include inter-state conflicts covered by the 1949 Geneva Conventions where both states are a party to this Protocol (some states may choose to apply the Protocol up to a point even when the other party is not bound, and article 96(2) allows for the application of the Protocol as a matter of law where a state which is not a party accepts and applies its provisions.<sup>1</sup>

### *1.1 Military operations by a state against a non-state actor in another state without the consent of the territorial state*

But in recent times one particular area of confusion has divided commentators. What happens when a state engages in an armed conflict with a non-state armed group in the territory of another state without that state's consent? Let us assume this is the situation when a Protocol I Party decides to bomb areas controlled by Daesh/ISIS in Syria. One way would be to look at this and describe it as an armed conflict between a state and a non-state armed group properly covered by Common Article 3 and the relevant customary international law.

Another way, however, suggests that Syria's lack of consent means that we are in the presence of an international armed conflict and so Common Article 2 and Protocol I would apply (at least for those states in the coalition fighting ISIS that are also a party to Protocol I (Syria being a party since 1983).

I admit to this Round Table that this is causing confusion, and clarification is indeed in order. I have engaged various experts in

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<sup>1</sup> A separate question would be where a state chose to apply Additional Protocol I in a conflict where the other party had not ratified the Protocol or made a declaration. Interestingly, the Swedish International Humanitarian Law Committee suggested that 'Above all, a state that has ratified the Protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the Protocol.' Report reproduced in part in M. Sassòli, A.A. Bouvier, and A. Quintin, *How Does Law Protect in War?* Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, 3rd edn (Geneva: ICRC, 2011) Volume II, document 76 electronic version only, available at [www.icrc.org/en/download/file/19456/icrc-0739-part-ii-vol-i.pdf](http://www.icrc.org/en/download/file/19456/icrc-0739-part-ii-vol-i.pdf).

conversation, their responses often start with something along the lines, ‘well, this is academic, the rules for this sort of aerial bombardment are the same under customary international law’, but our conference is on the Protocols and in the legal world away from targeting decisions whether the First Additional Protocol applies as a matter of law may matter.

Let me give two examples of why this matters. In the first place the Protocol (in Articles 11 and 85) creates a supplementary set of grave breaches with obligations to extradite or prosecute such war crimes. Many states have these crimes as part of the national legal orders and yet do not have the equivalent customary war crime committed in a non-international armed conflict. So, knowing whether the acts are covered by Additional Protocol I as a grave breach under treaty law may mean the difference between a court having jurisdiction or having no jurisdiction.

Secondly, under the Arms Trade Treaty the mandatory prohibition on transfers apply to arms that could be used to commit a war crime defined in a treaty to which the transferring state is a party.<sup>2</sup> Again, for lawyers working in this area one could be faced with a question as to whether one is dealing with a grave breach under Protocol I (rather than a customary war crime) is key and so one would need to know whether one is in the presence of a possible future grave breach of the Protocol and for that one would need to know whether the acts concerned took place in an international or non-international armed conflict.

The latest ICRC Commentary to the First 1949 Geneva Convention has entered into the fray with the following comment: “Any unconsented to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter’s sphere of sovereignty and thus may be an international armed conflict under Article 2(1).”<sup>3</sup>

The language seems to be cautious: it *may* be an international armed conflict under Article 2. The Commentary is a bit firmer later on: “It is useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State’s infrastructure. For these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the territorial State and the

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<sup>2</sup> See for more detail: S. Casey-Maslen, A. Clapham, G. Giacca, and S. Parker, *The Arms Trade Treaty: A Commentary* (Oxford: OUP, 2016) at 235-6.

<sup>3</sup> ICRC, *Commentary on the First Geneva Convention*, 2nd edn (Cambridge: CUP, 2016) at para. 237, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>.

intervening State when force is used on the former's territory without its consent."<sup>4</sup>

Of course, the same Commentary admits that 'This does not exclude the existence of a parallel non-international armed conflict between the intervening State and the armed group.'<sup>5</sup>

This makes some sense if the intervening state were to capture members of this armed group – the intervening state would not grant these rebels prisoner of war status or combatant immunity. But their attacks on the state's infrastructure, even if aimed at the non-state group, may be considered an international armed conflict and so governed by Protocol I.

This is legally defensible, but I am not sure that it is clear that everyone agrees. It has recently been argued, for example, by Professor Noam Lubell that Article 2 applies to an armed conflict that 'arises between two or more' states. So he concluded in an article published in 2017 that 'it is submitted that the notion of "between" still carries weight, as it can be understood as pointing to the combination of the objective and subjective aspects of belligerent intent and *animus belligerandi*'.<sup>6</sup> He, and others (such as Professor Terry Gill) would separate cases where there was obviously an international armed conflict, 'due to the nature of the activities and the amount of harm caused',<sup>7</sup> from other uses of force directed against a non-state actor where there is no intent to engage the host state in an armed conflict.

Professor Dinstein, our chair, has recently stated that in this context 'as long as the governments wage hostilities only against the insurgents, the two NIACS [Iraq and Syria] remain non-international in character. The legal position is transformed only if States become entangled in combat with each other.' Later he summarizes 'Once there are two States locked in combat with one another, the armed conflict becomes an IAC.'<sup>8</sup> We might factor in at this point that states are not usually keen to consider that they are in an armed conflict with another state where there is no need to do so.

Clarity on the role of the relevance of a state's state of mind would be useful to understanding whether Protocol I applies where a state is acting abroad without the consent of the host state.

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<sup>4</sup> *Ibid.* at para. 262.

<sup>5</sup> *Ibid.* at para. 261.

<sup>6</sup> N. Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups', vol. 93 *International Law Studies* (2017) 215-50 at 236.

<sup>7</sup> *Ibid.* at 233 and T.D. Gill, 'Classifying the Conflict in Syria', vol. 92 *International Law Studies* (2016) 353-80 at 373 who lists a number of factors he considers are more persuasive than the issue of consent.

<sup>8</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (Cambridge: Cambridge University Press, 2016) at 36.

## *1.2 The Continuing Effect of Article 1(4) of the First Additional Protocol*

A second thorny issue with regard to what constitutes an armed conflict under Protocol I is, of course, the effect of Article 1(4). For a long time, this controversial provision was considered to be of purely academic interest. It allows for authorities representing peoples ‘fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’ to make a unilateral declaration under Article 96(3) addressed to the Swiss Federal Council as depositary. Such a Declaration was made by the Polisario Front and so with regard to Morocco, which is a party to the Protocol, the provisions of the Geneva Conventions and the Protocol are in force. This Protocol internationalizes certain types of self-determination struggle. Again, commentators are divided on which type of group might fall in this category. Leaving aside the history of this provision which is well known, what clarification could be useful for future conflicts? Let us assume for the sake of argument today and for this Round Table on the Protocols that we need not answer the question whether there is equivalent customary law on this topic, or, if there is, whether some states could be considered persistent objectors.<sup>9</sup>

What might the states parties agree to clarify? My guess is that any clarification would result in most parties seeking a very narrow reading of what sort of authorities would today be entitled to trigger the Protocol in this way. Rather than expending time and energy on this topic it seems that the issue would be better dealt with as each authority claims to be entitled to make such a declaration under the Protocol. Drawing up criteria would seem overly ambitious in the absence of obvious candidates. In short I am not suggesting that this is an area ripe for clarification.

## **2. Additional Protocol II**

Let me turn now to Additional Protocol II and again tackle two controversies.

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<sup>9</sup> Discussed in detail by A. Cassese, ‘Wars of National Liberation’, in C. Swinarski (ed.), *Studies and Essays in International Humanitarian Law and Red Cross Principles: Essays in Honour of Jean Pictet* (The Hague: Martinus Nijhoff, 1984) 314-24 and G. Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, vol. 165 *RCADI IV*, (1979) 353-445; M. Bothe, K.J. Partsch, and W.A. Solf, M. Eaton *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd edn (Leiden: Nijhoff, 2013) at 45-51.

## 2.1 Conflicts outside the territory of the State Party

The first concerns the assumption that because the wording of Article 1 seems to limit its application to conflicts which happen in a state's own territory it cannot apply to, for example, the multinational forces in Afghanistan fighting the Taliban.<sup>10</sup> Article 1(1) states: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) *and which take place in the territory of a High Contracting Party* between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Emphasis added).

From a humanitarian perspective it makes no sense to deny the applicability of the protective measures in the Protocol to conflicts where the state is a party to the Protocol but the fighting takes place outside its borders. Having reached the threshold for the application of Protocol II there would be little doubt that customary international humanitarian law applies to the extraterritorial force and the rebel group. In Afghanistan the situation is rendered even more bizarre by the fact that Afghanistan has been a party to the Protocol since 2009. On a formal reading this could lead to the strange result that the conflict between the Afghan Government and the Taliban is covered by the Protocol, but the conflict between the non-Afghan states parties to the Protocol and the Taliban is not.<sup>11</sup> Imagine those

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<sup>10</sup> See R.S.M. Geiß, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?', vol. 93 *IRRC* (2011) 11-46 at 16: 'Furthermore, the wording of Article 1(1) of Additional Protocol II suggests that it applies only to armed conflicts between the contracting state and opposing non-state parties that control part of that state's territory. It thus seems that states other than Afghanistan that are party to the armed conflict are not directly bound by Additional Protocol II either, even if they have ratified it.' (Footnote omitted); similarly J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', vol. 93 *IRRC* 881 (2011) 189-225 at 201. Contra A. Bellal, G. Giacca, and S. Casey-Maslen, 'International law and armed non-state actors in Afghanistan', vol. 93 *International Journal of the Red Cross* 881 (2011) 47-79, esp. at 60-61.

<sup>11</sup> F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 *International Law Studies* (2011) 187-213, see esp fn79 at 213 'When the conflict is of the requisite intensity for Additional Protocol II to be applicable, but it is not applicable because the conflict occurs in the territory of a State not a party to the conflict, it should be treated as an Additional Protocol II conflict for these purposes. It is beyond the scope of this article to consider whether Article 1.1 of Additional

who are seeking to explain the legal regime to the Taliban, as one set of authors wrote perhaps rhetorically: “Do the Afghan forces apply Additional Protocol II but not the foreign military? What are the Taliban supposed to do? Try to distinguish between Afghan forces and foreign military forces in their conduct of hostilities and adapt their methods of warfare accordingly? Are they relieved of their Additional Protocol II obligations when fighting foreign military forces?”<sup>12</sup>

The same authors argue that because the Protocol is taking place in the territory of a party to the Protocol (Afghanistan) then the parties to the armed conflict are bound by the Protocol as they are fighting on the same side as Afghanistan.

“At the very least, the forces of states that are also party to Additional Protocol II should be considered formally bound by its provisions in their military operations in Afghanistan, as they are engaged in the armed conflict that pits Afghanistan government forces against at least one armed group meeting the Protocol’s criteria for application. Otherwise this could lead to interoperability concerns, as well as a possible lack of clarity in operations between the different parties to the conflict.”<sup>13</sup>

This is not a view shared by all the intervening states parties to the Protocol. It is an area that could do with some clarification.

## 2.2. *The Intensity of Fighting Threshold in Additional Protocol II*

The last area which remains unclear for several commentators is whether today we really have two separate thresholds of intensity for the triggering of Common Article 3 and Additional Protocol II. Several commentators suggest that in addition to the requirement that the organized armed group control territory there should be a greater intensity of violence before the Additional Protocol applies.<sup>14</sup> This is a result of the difficulties in arriving at the adoption of the Protocol, and has perhaps been compounded by the language of the Rome Statute. But, today, does the

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Protocol II should be amended to replace “its armed forces” by “the armed forces of a High Contracting Party.”

<sup>12</sup> At 61.

<sup>13</sup> *Ibid.* at 61.

<sup>14</sup> Y. Sandoz, C. Swinarski, and B. Zimmermann (ed.s), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Dordrecht: ICRC/Nijhoff, 1987) at 1343ff; F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 *International Law Studies* (2011) 187-213 at 195-7 and 203; Y. Dinstein, *Non-International Armed Conflicts in International Law*, (Cambridge: CUP, 2014) 39-50; G. Abi-Saab, ‘Les protocoles additionnels 25 ans après’, in J.-F. Flauss (ed), *Les nouvelles frontières du droit international humanitaire* (Brussels: Bruylant, 2003) 17-39 at 24-5.

Protocol really require a greater level of intensity of violence than that required to trigger Common Article 3? And there is the parallel question of whether customary international law operates with two thresholds.

So far the International Criminal Court seems to have avoided creating two separate thresholds. The UK Military Manual seems only to demand that to move from Common Article 3 to Additional Protocol II the dissidents should ‘achieve a degree of success and exercise the necessary control over a part of the territory.’<sup>15</sup> Again to the extent that most of these issues are today discussed under the rubric of customary international law, perhaps it might be said that we should not waste time on such ‘academic’ questions, but I fear that these issues do get litigated as matters of treaty law, in many states only the treaty will be part of national law, and so having clarity about this threshold in Additional Protocol II is, I think, useful and (as explained by Professor Françoise Hampson) essential when one considers the possible interoperability with human rights law.<sup>16</sup> As Professor Dinstein highlights, the requirement for ‘sustained and concerted military operations’ in Article 1 of AP II seems to require more than that required to trigger Common Article 3.<sup>17</sup> The Sanremo Manual on the Law of Non-International Armed Conflict similarly suggests a ‘higher’ threshold for the Applicability of Additional Protocol II.<sup>18</sup>

I can see arguments for clarifying the contents of the two thresholds related to the level of military action rather than pretending that both Common Article 3 to the Four Geneva Conventions and the Second Additional Protocol are triggered as a result of the same level of violence. It makes sense for us to consider a rather low threshold for those in the hands of the enemy under Common Article 3, and a higher one for rules concerning the conduct of hostilities and the extra obligations we find in AP II.<sup>19</sup>

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<sup>15</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) at para 3.9.

<sup>16</sup> F. Hampson, ‘Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law’, 87 *International Law Studies* (2011) 187-213.

<sup>17</sup> Y. Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP, 2014) at 46-7.

<sup>18</sup> M.N. Schmitt, C.H.B. Garraway, Y. Dinstein *The Manual on the Law of Non-Armed Conflict* (Leiden: Nijhoff, 2006) at 3 (Available at [www.scribd.com/document/108685710/Manual-on-the-Law-of-Non-International-Armed-Conflict-Prof-Michael-N-Schmitt](http://www.scribd.com/document/108685710/Manual-on-the-Law-of-Non-International-Armed-Conflict-Prof-Michael-N-Schmitt)).

<sup>19</sup> Hampson makes a convincing case that human rights bodies are unlikely to accept status-based targeting without applying a human rights law test of conduct and absolute necessity in ‘NIACS generally or specifically in the case of NIACS between the threshold of Common Article 3 and that of Additional Protocol II,’ ‘Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law’, 87 *International Law Studies* (2011) 187-213 at 203. She also makes the point that prohibited weapons under Hague law may be necessary for law enforcement purposes (expanding

Also at a more political and journalistic level there is still a sense that some conflicts move from rebellion through insurgency into something called ‘civil war’. In the past, this term was seen to have specific legal implications but today, however much we insist that there is only one type of non-international armed conflict (a NIAC), Reuters, the BBC and the *New York Times* spend considerable time writing about whether the conflicts in Iraq or Syria constitute a civil war, and the authorities may choose to deny that there is a civil war (rather than some sort of insurgency or conflict) as acceptance that there were a ‘civil war’ would be to admit that they have lost control. Perhaps there is still an understanding of civil war that suggests that each side may have just as much legitimacy, and outside powers should refrain from any intervention, even assistance to the government. In short this second higher threshold may matter, especially if it is consciously, or unconsciously, assimilated to civil war in matters beyond the technical issue of when the Additional Protocol II applies.<sup>20</sup>

### 3. Summary

I have suggested that we could usefully work towards greater clarity on three topics

1. Whether lack of consent triggers Additional Protocol I when a state in conflict with a non-state actor is bombarding a non-state actor on the territory of a state which has not consented to such an armed conflict?

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bullets and riot control gas) and, therefore, one should be cautious about lowering the threshold.

<sup>20</sup> See D. Armitage, *Civil Wars: A History* (New Haven: Yale University Press, 2017) at 220-222. The new DOD *Manual on the Laws of War* suggests that civil wars could lead to recognition of belligerency which could in turn trigger the laws of neutrality or if it is the state engaged in the conflict to the application of the laws of international armed conflict. 17.1.1.1 *NIAC and Civil War*. ‘Civil war is a classic example of a non-international armed conflict. For example, a non-international armed conflict could involve the open rebellion of segments of a nation’s armed forces (sometimes called dissident armed forces) against the incumbent regime, each claiming to be the legitimate government... In some cases of civil war, the insurgent party has been recognized as a belligerent, and, at least in some respects, the law of international armed conflict would be applied by the States choosing to recognize the insurgent party as a belligerent.’ The footnote in the original reads: *See, e.g.,* LIEBER CODE art. 150 (“Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government”). See also D. Luban, ‘Military Necessity and the Cultures of Military Law’, 26 *Leiden Journal of International Law* (2013) 315-49 at 324; M. Sassòli, The Convergence of the International Humanitarian Law of Non-International and International Armed Conflicts - The Dark Side of a Good Idea, in G. Biaggini, O. Diggelmann, and C. Kaufmann (ed.s), *Polis und Kosmopolis -Festschrift für Daniel Thürer* (Baden-Baden: Nomos, 2015) 679-89.

2. Does Additional Protocol apply to a state fighting abroad against an armed group in an armed conflict taking place on the territory of a party to Additional Protocol II? The language of ‘in the territory of a High Contracting Party’ and ‘its armed forces’ suggests to some that when you go abroad the Protocol does not apply as a matter of law, while for others it is enough that that the conflict takes place in a territory of a party to the Protocol and the other states fighting in that armed conflict are bound by the Protocol as a matter of law.

3. When an armed group has control of territory and fulfils the other requirements of Additional Protocol II do we require a higher level of violence (perhaps evidenced by sustained and concerted operations) than we would for Common Article 3 before the Protocol is applicable? If we do require a higher threshold should we avoid the language of civil war because this has a considerable amount of historical baggage?

## When do international armed conflicts end?\*

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Since the Round Table is celebrating the Additional Protocols I have decided to focus this presentation on the specific provision in the First Additional Protocol which deals with its end of application. I will examine the question with respect to the end of application of the First Additional Protocol and the Geneva Conventions since the article I am dealing with also covers the Geneva Conventions - and in line with a tendency which seems to be perceptible, I will try to address first of all the issues that are covered by Article 3 of the First Additional Protocol so the things about which the First Additional Protocol talks and then in the second part also a point which is not mentioned by the First Additional Protocol but which may also bring about the end of an international armed conflict.

Now the Provision I am referring to is Article 3, *alinea* (b) of the First Additional Protocol and there the Protocol establishes three thresholds for the end of the application for both Conventions and Protocol. The first one, for the territories of parties to the conflict, is the general close of military operations. So, the Geneva Conventions and Protocols cease to apply in the territories of the parties at the general close of military operations. So the first question there is: what does the general close of military operations mean exactly?

The second threshold concerns situations of belligerent occupation. Here the First Additional Protocol says that the Conventions and the Protocols cease to apply at the termination of the occupation. So, here again the question arises: when does a belligerent occupation end?

The third threshold refers to the application of IHL to detained people, POWs, civilian internees and the like – the article states that the provisions protecting detained persons continue to apply until their liberation, their repatriation, etc. This is a threshold which may very well be very far from the end of an international armed conflict but I will not deal with that in this presentation. So the two thresholds mentioned in Article 3, *alinea* (b), the first, as I mentioned, is the general close of military operations and the question is: what does this notion mean and what are its relations with more traditional ways of ending a NIAC? Usually, if you look at the military manuals you have the affirmation that an international armed conflict ends

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\* This text has not been revised by the author and it is based on the transcript of the author's intervention, as well as on the talking points, made during the Round Table.

with a peace treaty, for example, or a general cease-fire, armistice agreement and the like.

Let us turn to some examples first – I am referring back to the US-led coalition intervention in Iraq in 2003 already mentioned by our president. After the intervention started in March in 2003 Baghdad fell into the hands of the coalition sometime in mid-April, then on 1<sup>st</sup> May 2003 President Bush declared that all major combat operations had come to an end so does this mean that the international armed conflict also comes to an end due to such a declaration or as a result of such a declaration? As it was already explained nobody actually claimed that the declaration by President Bush brought an end to the international armed conflict. It merely, possibly, represents the pivoting point between situations of active hostilities and the beginning of the belligerent occupation but no State, to the best of my knowledge, has ever claimed that this international armed conflict as such came to an end due to this specific declaration.

Turning to the 1998-2003 international armed conflict between the DRC and Uganda, the question arose whether several cease-fire agreements which were concluded between the two parties, the most prominent of which being the Lusaka cease-fire agreement of July 1999, had an impact on the existence of an armed conflict. Here again the existence as such of the formal element of a cease-fire agreement was not considered as influencing the international armed conflict since hostilities continued after the conclusion of the agreement. So, if you look at, for example, the 2005 judgement by the ICJ the duration of the conflict was considered to be between 1998 and the final withdrawal of Ugandan forces in the summer of 2003.

The last example is the conflict between Iran and Iraq in the 1980s. So, the conflict started in 1980; hostilities ceased in 1982; there was a cease-fire concluded between the two States in September 1982 but there was never any peace treaty. Here again, does the absence of a peace treaty mean that the international armed conflict still continues to exist? To my mind, no-one has submitted that IHL rules remain applicable between the two States after the cease-fire agreement which was concluded in September of 1998.

Now, if we turn to international case-law we find the *locus classicus* that everyone refers to when they are discussing the end of an international conflict namely the Tadic decision of 1995 where the Appeals Chamber has said, and I am quoting: “International humanitarian law applies from the initiation of such armed conflict and the extent beyond the cessation of hostilities until a general conclusion of peace is reached.” So, here the language varies somewhat – the ICTY does not talk about the general close of military operations but introduces a new term – general conclusion of peace. The question comes up as to whether the two terms are equivalent or

not. Actually, in a more recent decision, (the Gotovina case) the ICTY dealt with the end of application, the end of the existence of an international armed conflict, and in its judgement in 2011 it basically considered the two notions as being equivalent so we treated them as equivalent. It examined whether there was, and again I am quoting, “during the indictment period the international armed conflict had found a sufficiently general definitive and effective termination so as to end the applicability of the law of armed conflict.” Of course, we can debate on what “general, definitive and effective determination” means but the ICTY seems to point out here to the reality of the fact on the ground and not to the existence of any formal agreement be it a cease-fire agreement or an armistice agreement or a peace treaty.

It is interesting to note that, beside the defence of one particular person accused, both the prosecutor and the defence of Gotovina and Markac accepted that the end of the conflict was brought about in November of 1995 after the conclusion of the Erdut Agreement which was an agreement between Croatia and the Serbian Republic of Krajina. What does all this material indicate? Well, first of all, we can see that there is tension between the formal elements, that is, cease-fires, peace treaties and the like, and the principle of effectivity so the reality of the fact on the ground. The general closing of operations is certainly more than the end of active hostilities, as the Iraq example of 2003 indicates, but what exactly is its relation to the existence of a general cease-fire agreement or a peace treaty, for example? Well, the general closure of military operations may very well come before the peace treaty or even without any kind of peace treaty ever signed - the Iran/Iraq 1980s precedent indicates that. It might very well come after a cease-fire agreement or a peace agreement if there is a continuation of hostilities and the agreement is violated, and then it may seem synonymous if the cease-fire is respected. My submission here is what is essential in identifying the end of a NIAC, in this case, is whether there is continuation of hostilities or not, so, the reality of the fact on the ground. The problem, of course, is that we will always evaluate *a posteriori* whether there is a general close of military operations. The last day of military operations from which the general close starts can only be appreciated after some time has passed. This is probably why parties, for example, prosecutors or lawyers when they come across such cases prefer to refer to some kind of formal document defining the definite dates of the end of an international armed conflict.

Now, I'm turning over to my second threshold mentioned in Article 3(b) of the First Additional Protocol: the end of occupation. Here there is an interesting point to be made and this concerns the relationship between Article 3 *alinea* (b) of the First Additional Protocol and Article 6 para.3 of the Fourth Geneva Convention. Article 6 of the Fourth Geneva Convention

also mentions explicitly thresholds for the end of application of the Convention. Actually, these thresholds are different to the ones set out in Article 3 of the First Additional Protocol. So, if you look at Article 6 of the Fourth Geneva Convention, with respect to occupation, the Article sets out two different thresholds. The general rule is that the Fourth Geneva Convention will cease to apply one year after the general close of military operations. Then there are some articles which are specifically mentioned in Article 6, most of them relating to the section directly applicable to occupation which are reputed to continue to apply until the end of the occupation. And this actually was the great change which was made by Article 3 of the First Additional Protocol in that it abolishes the threshold of the one year after the general close of the military occupation.

Now the question here is what about States which are not party to the First Additional Protocol? I would submit that the rule also applies to them – if we look at the preparatory works of Article 3 we find out that there was an overwhelming consensus with respect to the fact that the application of the Protocol and the Conventions should end at the end of occupation and the one-year rule should be abolished. It is interesting to note that the first proposition by the ICRC in the draft which was submitted to the States only referred to the First Additional Protocol so the idea of the ICRC was that they were going to keep the two set out in Article 6 of the Fourth Geneva Convention and that the more general threshold of the end of occupation was only going to refer to the First Additional Protocol and it was after the demand of the States themselves that the scope of the article was extended and that the threshold of the end of occupation was generalized and thus covered also the Fourth Geneva Convention. The article was adopted by consensus in all the steps of the procedure, so I would submit that States in this respect have agreed with the rule which is inserted in Article 3. Therefore, even if they chose not to ratify the First Additional Protocol because of other problems relating to its scope of application this does not mean that they have not accepted the first specific rule we find in Article 3, *alinea* (b).

My last point would be one way of ending an international armed conflict which is not mentioned in Article 3 and this is the changing nature of an armed conflict from international to non-international, what we would call as the internalization of an international armed conflict. So, the idea here is that an international armed conflict ends not because there is no conflict at all but because what used to be an opposition between two States has ceased to be and the remaining hostilities only concern a state and a non-state actor and thus can only be classified as a non-international armed conflict. A very good example of that is again the intervention of the US-led coalition in Afghanistan in 2001 and the consent, following the establishment of the Afghan interim authority through the Bonn

Agreement, later on the Loya Jirga (Grand Council), held in June 2002, and the appointment of Karzai as the president of Afghan transitional administration – both interim governments – to invite the foreign troops to stay in the territory of Afghanistan.

So, the question here is, at which point does the consent of a government put an end to the international armed conflict and transform it into a non-international armed conflict? In respect to the conflict I am talking about the ICRC, for example, that considers that the first invitation, the one that was launched by the interim authority established by the Bonn Agreement as not being a valid consent because the authorities could not be considered as representing the Afghan State. However, the transitional administration established by the Loya Jirga was sufficiently representative of the administration and thus could give a valid consent and thus could put an end to the international armed conflict and transform the conflict into a non-international armed conflict. Naturally, one must be very, very careful when examining the validity of this consent. Afghanistan is, again, a very nice precedent in this respect if we think of the USSR's intervention in 1979. The puppet government, which was put in place a few days after the USSR's forces intervened in Afghanistan, invited the USSR's forces to stay in Afghanistan. Then the ICRC has spent the whole decade trying to convince Moscow to apply the Geneva Conventions only to get the reply that there is no international armed conflict between Moscow and Afghanistan since Moscow had been invited to Afghanistan by the Afghan Government.

## **Additional Protocol II and threshold of application**

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As it is well known, Additional Protocol II (AP II) does not apply to all and every armed conflict of a non-international character: rather it sets a threshold of application, below which internal armed conflicts remain merely subject to the provisions of Common Article 3 (CA 3) to the Geneva Conventions (GCs). The definition of the threshold of application of AP II, however, does not solve all problems: inasmuch as the content of AP II corresponds to customary international law (CIL) the problem subsists, whether or to which extent CIL rules are conditioned by the same threshold of application. The present contribution will, therefore, be divided into two parts: in the first part, I will endeavor to define the threshold of application of Additional Protocol II (AP II); in the second part, I will try to tentatively answer the question on whether and to what extent the precise identification of this threshold really matters, when we consider the situation under the lens of CIL.

### **1. The threshold of application of Additional Protocol II**

To correctly understand the threshold under Article 1, AP II, it is necessary to briefly recall its history, which is strictly connected with the history of CA 3<sup>1</sup>. In fact, since the moment in which CA 3 was adopted in 1949, the inadequacy of this norm was perceived, and the need was felt to supplement it with further regulation.

The history of the elaboration of the two additional protocols was long and complicated. But when the decision was taken to elaborate two instruments, instead of one protocol covering both international and non-international armed conflicts, the idea was initially to integrate, or rather to supplement CA 3, without modifying its scope of application.

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<sup>1</sup> See S.S. Junod (Y. Sandoz, C. Swinarski, B. Zimmermann ed.s.), *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, ICRC, Geneva, 1987, General introduction; see also, for a brief historical account, S. Junod, "Additional Protocol II: History and Scope", in 33 *Am. U. L. Rev.* 29 (1983).

The problem with CA 3 was, however, the lack of a definition of the armed conflicts to which it applied. For States it was essential, when broadening the scope of the provisions applicable in non-international armed conflicts (NIACs), to clearly define and delimit the concept. The definition thus became the main bone of contention. In 1972 the ICRC issued a proposal for a draft additional protocol whose intent would be to supplement CA 3 with regard to all armed conflicts to which this provision applied: therefore, in defining NIACs, the ICRC draft intended to offer a definition that would also be valid in assessing the scope of CA 3. The draft provided: “The present Protocol, which elaborates and supplements Article 3 common to the four Geneva Conventions of August 12, 1949 (hereinafter referred to as Common Article 3), shall apply to all armed conflicts not of an international character referred to in Common Article 3 and, in particular, in all situations where, in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority”<sup>2</sup>.

The majority of States, however, opted for a different approach, which would separate the protocol from CA 3, so that each of the two instruments would be governed by an autonomous scope of application. This idea was accepted by the ICRC and modified its draft accordingly in 1973<sup>3</sup>. This latter draft would be the starting basis for the negotiations leading to the elaboration of the text currently in force: this was the result of important changes and, in particular, of a severe curtailment of the original text<sup>4</sup>.

Now, as is well known, Article 1 of the Protocol, para. 1, contains a reference to CA 3, the definition of an upper threshold and, in addition, a set of objective criteria<sup>5</sup>; while para. 2 refers to the definition of a lower threshold. The reference specifies that, although the purpose of the instrument is to “develop and supplement” CA 3, it does not “modify its existing conditions of application”. This, in fact, means that the definition of NIACs under AP II concerns a restricted category of NIACs, and it does

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<sup>2</sup> See *Human Rights in Armed Conflicts. Respect for Human Rights in Armed Conflicts, Report of the Secretary General*, UN Doc. A/8781, 20 September 1972, at para. 230.

<sup>3</sup> See ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949. Commentary*, Geneva, October 1973, at 130 and ff.

<sup>4</sup> See S.-S. Junod (Y. Sandoz, C. Swinarski, B. Zimmermann ed.s.), note 1 above, at para. 4402 and ff.

<sup>5</sup> “1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

not limit the applicability of CA 3 to a broader category of NIACs. Therefore, while CA 3 applies to all NIACs, AP II only applies to those NIACs that fulfil the requirements set in this instrument.

Coming to the thresholds and, in connection with the above statement, it makes sense to start with considering the lower threshold: para. 2 states that the Protocol: “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

Interestingly, while this definition was expressed using practically the same words in the 1973 ICRC draft, the last specification, “as not being armed conflicts”, was not present in that text but was added later on. This addition is a clear indication of the conviction of States, which is shared by the ICRC, that the aforementioned situations are to be considered not only below the threshold of AP II’s NIACs, but rather below the threshold of the concept of armed conflict itself, i.e. below the threshold of *any NIAC*.

Admittedly, from a formal point of view, due to the clause contained at the beginning of para.1, this specification remains not applicable *per se* to CA 3. At the same time, it cannot be overlooked that it points to a broadly shared view in the international community, according to which the situations envisaged by para. 2 are not armed conflicts and, therefore, are not subject to IHL, not even to CA 3. This view seems to be confirmed by recent practice, in particular, by the case law of international criminal tribunals and by the ICC Statute and other instruments and is nowadays shared by the majority of commentators. To conclude on this point, Art. 1, para. 2, from a substantial point of view, has had a bearing on the interpretation of CA 3<sup>6</sup>.

As for the upper threshold, this consists of international armed conflicts to which AP I and the GCs, are applicable<sup>7</sup>. Even this upper threshold does not introduce any modification with regard to the conditions for the applicability of CA 3, as both instruments merely apply to NIACs, i.e. to conflicts that are taking place not between States, but between a State on one the side and non-state actors on the other side, or between non-state actors. What really matters for the definition of the scope of AP II is what is in the middle, i.e. the objective conditions required for the applicability

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<sup>6</sup> See, inter alia, ICRC, *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Commentary*, 2017, Article 3, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2F5AA9B07AB61934C12563CD002D6B25&action=openDocument>; and already M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for the Victims of Armed Conflicts. Commentary on the Two Protocols Additional to the Geneva Conventions of 1949*, The Hague/Boston/London, Nijhoff, 1982, at 623-629.

<sup>7</sup> In addition, also national liberation conflicts are excluded, inasmuch as they are covered by Art. 1, Additional Protocol I.

of the Protocol, setting a high standard, which is well above the lower threshold under para. 2.

Such conditions are as follows:

1. exclusion of conflicts only involving non-state actors. Armed conflicts between two or more organized armed groups are certainly NIACs, subject to CA 3, if the other conditions are met, but they are clearly excluded from the scope of AP II;
2. inclusion of only those armed conflicts involving on the one side the *armed forces* of a State (not necessarily its “regular” armed forces), and on the other side dissident armed forces or other *organized armed groups*;
3. these organized armed groups shall operate “under *responsible command*”<sup>8</sup>, which adds to the element of organization (what is clear is that a high level of organization is required, but it is clearer from what follows: anyway, a loose organization would not be sufficient); and they shall respect a further essential criterion
  - they shall exercise *control over* a part of the *territory* of the State against which they are fighting: not “any” kind of control, but a control which is such
    - i. “as to enable them to carry out *sustained and concerted* military operations and
    - ii. to implement th[e] Protocol”<sup>9</sup>;
4. the above requirements demonstrate what can be considered a further element that would limit the applicability of AP II: if we deem that there can be transnational NIACs<sup>10</sup>, AP II can only apply to fundamentally internal NIACs, as they shall be conflicts between a State and a non-state actor controlling part of *that* State’s territory. This does not prevent the conflict in question from possibly spilling over into the territory of adjacent States, but a purely transnational conflict, for example, between a State and an organized armed group controlling part of another State’s territory, would be excluded from the scope of application of the Protocol<sup>11</sup>.

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<sup>8</sup> Italics are added.

<sup>9</sup> Italics are added.

<sup>10</sup> For different views on this debated issue see, e.g. *Scope of Application of International Humanitarian Law, Proceedings of the Bruges Colloquium*, 13<sup>th</sup> Bruges Colloquium, 18-19 October 2012, in *Collegium*, Autumn 2013, in particular the contributions of T. Ferraro and R. Bartels; Y. Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge, CUP., 2014, at 24 and ff.

<sup>11</sup> I am not referring to a case of participation, aside the territorial sovereign, of third States, in a NIAC between a State and a non-state actor controlling part of the latter State’s territory (such as the armed conflict between the multinational coalition and the Taliban in Afghanistan after 2002): in such a case we may consider that the foreign armed forces are

As it is clear, and commonly shared, the Protocol sets high standards; these standards require a rather high level of organization of the armed group or groups and a rather high level of effectiveness of their action, as they shall control a portion of territory and the population living in it. Such elements are connected with a rather high level of intensity of the fighting (“sustained and concerted military operations”). One of the main reasons adduced by States to require such high standards was the conviction that only armed groups respecting those conditions would be able to “implement the Protocol”, i.e. to respect IHL<sup>12</sup>.

What is clear, and commonly shared, is that these requirements set high standards that, although present in many of the NIAC situations we know today, cannot be deemed to characterize each and every NIAC: and, therefore, there are NIACs that are not covered by AP II, while remaining covered by CA 3.

## 2. Customary law and the relevance of AP II’s threshold

I come to my second point: to what extent does this threshold really matter today?

A first answer is quite obvious: as a matter of treaty law, this threshold is determinative in deciding whether, in a specific circumstance of a NIAC taking place within the territory of a State party to the Protocol<sup>13</sup>, this instrument is or is not applicable<sup>14</sup>.

The answer may, however, be rather different if we consider the situation under the perspective of CIL.

It would be difficult to conclude that the entire text of AP II corresponds to CIL. There are different opinions on the extent of CIL applicable in NIACs, ranging from the generous construction of the drafters of the ICRC’s Study on Customary International Humanitarian Law, considering a large portion of customary rules equally applicable in IACs ad NIACs<sup>15</sup>,

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associated to the territorial sovereign’s (“its”) armed forces. Therefore, AP II would be applicable to those hostilities, insofar as the States in question are bound by the Protocol and the other conditions are met. See S. Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, in 91 *IRRC* 69 (2011), at 80. See also A. Clapham, “The Definition of Armed Conflict and the Additional Protocols of 1977”, in this volume.

<sup>12</sup> See on the point M. Bothe, K.J. Partsch, W.A. Solf, fn. 6 above, at 605-608.

<sup>13</sup> Or, in a case involving a State party to the Protocol outside its territory, in the hypothesis considered above, in fn. 11.

<sup>14</sup> On the reasons why treaty law matters, see A. Clapham, fn. 11 above.

<sup>15</sup> See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, *Rules*, Cambridge, CUP, 2005.

to more restrictive views<sup>16</sup>. However, there seems to be ample convergence on the fact that a relevant part of AP II's fundamental precepts, and among them the basic rules enunciated in Article 13 and relating to the conduct of hostilities, entailing the prohibition to attack the civilian population and individual civilians, are part of CIL. Furthermore, even related rules that, nonetheless, are not expressly enunciated in the text of the Protocol, such as the prohibition of indiscriminate attacks, are commonly considered to be part of CIL<sup>17</sup>. As for customary rules, their operation, as it would seem to be testified by practice, is not restricted by AP II's threshold of application. These rules are deemed applicable even outside this framework. In particular, the ICRC's Study "did not distinguish between the two categories of non-international armed conflict because it was found that States did not make such a distinction in practice"<sup>18</sup>.

Therefore, what counts the most in practice, more than identifying the requirements of AP II, is identifying the threshold for those situations to which CIL applies. This latter threshold has been identified by international judicial decisions and by treaties (other than the Geneva Conventions and Protocols): in particular, by the case law of international criminal tribunals (ICTs), specifically the International Criminal Tribunal for the Former Yugoslavia (ICTY), and, later, by the Statute and the case law of the International Criminal Court (ICC). This international judicial and treaty practice does not deal with the whole spectrum of CIL, but with an important part of it, i.e. the identification of serious violations of IHL (war crimes) under CIL. This explains why the delimitation of NIACs' contours traced by the tribunals for the purpose of identifying those serious violations of IHL that can be committed in NIACs is highly relevant.

In this case, the threshold is simpler and wider than that set by AP II. It is expressed by the *Tadic* dictum, according to which, as far as NIACs are concerned, "an armed conflict exists whenever there is (...) protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"<sup>19</sup>.

The *Tadic* dictum has been reproduced, with only a slight, and probably mistaken, modification of language, in Article 8.2.(f), ICC Statute<sup>20</sup>, and it

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<sup>16</sup> See, e.g., Y. Dinstein, fn. 10 above, at 205 and ff.

<sup>17</sup> See *ibid.*, at 213 and ff.; J.-M. Henckaerts and L. Doswald-Beck, fn. 15 above, in particular rules 1, 7, 11.

<sup>18</sup> J. Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", in 91 *IRRC* 189 (2011), at 191.

<sup>19</sup> ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić a/k/a "Dule"*, *Decision on the defence motion for interlocutory appeal on jurisdiction*, 2 October 1995, para. 70.

<sup>20</sup> "Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between

has been specified by the subsequent case law of the Court, in line with the indicators previously developed by the ICTY. The requirements are:

1. Organization of the armed groups: however, the level of organization required is not necessarily as high as imposed by Article 1, AP II;
2. No control over part of the territory of the State is specifically required;
3. Also NIACs exclusively involving non-state actors are considered;
4. A certain level of intensity of the violence is necessary, but not necessarily the same level of intensity as required by Protocol II<sup>21</sup>.

It is not entirely clear, either in the ICTY or in the ICC case law, whether the requirement of *duration*, which would seem to be expressed by the formula “protracted armed violence/conflict”, needs to be considered as an element among others proving intensity, as would appear from some judgments, or as an autonomous requirement. It would seem to me that the ICC’s tendency is to view it as an autonomous requirement (e.g. in the *Bemba* judgment), although the reasoning is not always entirely coherent and consistent<sup>22</sup>.

Does this threshold include all NIACs or, in other terms, are there NIACs below this threshold, to which CA 3 would continue to apply, but not the rules on the conduct of hostilities, as would seem to be assessed by the presence in the ICC Statute of two apparent definitions, in Art. 8.2.(f), already mentioned, and in Article 8.2.(d) (applicable to the war crimes listed in Article 8.2.(c))<sup>23</sup>? In my view the ICC case law, up to this moment, does not testify the existence of two different categories of NIACs<sup>24</sup>. In other words, a NIAC (any NIAC) subsists whenever there is armed violence of a certain intensity between a State and organized armed groups or between such groups.

Conventional rules relating to the protection of cultural property, insofar as they are applicable in NIACs, refer to a unified notion of NIAC,

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governmental authorities and organized armed groups or between such groups”. Italics are added. Paragraph 2 (e) refers to “other serious violations” relating to the conduct of hostilities. On the fact that the substitution of the words “protracted armed violence” with “protracted armed conflict” was probably due to a mistake, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge, CUP, 2010, at 171-174.

<sup>21</sup> See, e.g. ICC, TC II, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1183 and ff.

<sup>22</sup> ICC, TC III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to article 74 of the Statute, 21 March 2016, paras 139-140.

<sup>23</sup> “Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. Paragraph 2 (c) refers to serious violations of CA 3.

<sup>24</sup> See, in particular, the *Bemba* judgment (fn. 22 above), at para. 132 and ff.

coinciding with the broader definition valid under CA 3: this is true for Art. 19 of The Hague Convention on Cultural Property and for the Second Protocol<sup>25</sup>. The same applies to the recent IHL conventions relating to weapons, in particular, the Certain Conventional Weapons Convention, as amended in 2001<sup>26</sup>; while the scope of application of the prohibition of use under the Chemical Weapons Convention, the Anti-Personnel Mine Ban Convention and the Cluster Munitions Convention covers all armed conflicts without distinction<sup>27</sup>.

Other elements of State practice, such as some domestic criminal laws, military manuals, national case law, would seem to confirm this tendency<sup>28</sup>. Therefore, and although a deeper research into State practice would be certainly beneficial, one may tentatively conclude that the above definition of a NIAC would seem to be the relevant definition under customary international law, for the purpose of applying both Common Article 3 and the customary law provisions on the conduct of hostilities, and of identifying the related war crimes.

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<sup>25</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (see Article 22). For the text and status of these and of the subsequently quoted treaties see [https://ihl-databases.icrc.org/ihl#view:\\_id1:\\_id2:\\_id250:repeat1:1:labelAnchor](https://ihl-databases.icrc.org/ihl#view:_id1:_id2:_id250:repeat1:1:labelAnchor).

<sup>26</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate Effects, Geneva, 10 October 1980, Amendment article 1, 21 December 2001.

<sup>27</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993, Article 1; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Convention on Cluster Munitions, 30 May 2008. The same is true for the Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017, not yet in force (see <http://disarmament.un.org/treaties/t/tpnw>).

<sup>28</sup> See the elements quoted in the ICRC's *Customary IHL database* (<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>): e.g., some of those quoted in relation to Rule 11 (prohibition of indiscriminate attacks).



## **II. Conduct of hostilities**



## Focus sur le principe de distinction

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Cet intervention se concentrera sur le principe de distinction, qui peut aujourd'hui se résumer comme suit : les parties à un conflit armé doivent faire la distinction entre la population civile et les combattants, de même qu'entre les biens de caractère civil et les objectifs militaires.

Si l'idée d'une distinction dans l'attaque n'est évidemment pas née avec les Protocoles additionnels, ceux-ci ont indéniablement contribué à l'affirmation de ce principe cardinal du droit international humanitaire (DIH) (I), dont le contenu et les modalités d'application doivent être en permanence précisés et affinés afin de s'adapter aux évolutions constantes des conflits armés (II).

En effet, il apparaît essentiel de continuer à promouvoir ce principe et à asseoir sa mise en œuvre, quand bien même nous sommes aujourd'hui confrontés à un ennemi qui utilise les civils comme une arme de guerre et cible volontairement les biens et personnes spécifiquement protégés pour amplifier l'impact médiatique de son action et obtenir, par là, un avantage stratégique sur les armées alliées.

### 1. Un principe cardinal consacré par les textes dès la naissance du DIH

Le préambule de la déclaration de Saint-Petersbourg de 1868 prévoyait déjà ainsi, que « *le seul but légitime que les Etats doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi* ». L'article 25 du Règlement de La Haye de 1907 ensuite renvoyait incidemment à ce principe, en interdisant d'attaquer ou de bombarder, par quelque moyen que ce soit, des villes, villages, habitations ou bâtiments qui ne sont pas défendus.

Les Conventions de Genève de 1949 y font également référence, notamment à travers l'obligation faite au combattant de se distinguer de la population civile par le port d'un uniforme ou d'un signe distinctif aux fins de l'attribution du statut de combattant et de prisonnier de guerre en cas de capture.

L'idée portée par le principe de distinction a ainsi été très tôt consacrée, mais c'est véritablement avec l'adoption des deux Protocoles additionnels que le principe de distinction est érigé en règle fondamentale de la conduite des hostilités.

### *1.1. Les Protocoles additionnels ont contribué à l'affirmation du principe de distinction*

Le premier Protocole érige en effet la protection générale de la population contre les effets des hostilités en règle fondamentale. Son titre IV, consacré à la population civile prévoit, à l'article 48 qu' « en vue d'assurer le respect et la protection de la population civile et des biens de caractère civil, les Parties au conflit doivent en tout temps faire la distinction entre la population civile et les combattants ainsi qu'entre les biens de caractère civil et les objectifs militaires et, par conséquent, ne diriger leurs opérations que contre des objectifs militaires ».

Les attaques contre la population civile et les personnes civiles sont interdites, sauf si les personnes civiles prennent part directement aux hostilités (article 51). Les attaques contre des biens de caractère civil sont également interdites. Elles doivent être strictement limitées aux objectifs militaires (article 52). Afin de protéger la population civile, le combattant doit se distinguer de la population civile (article 44).

Le protocole additionnel II, applicables aux CANI, prévoit également que la population civile et les personnes civiles jouissent d'une protection générale contre les dangers résultant d'opérations militaires et que ni la population civile en tant que telle ni les personnes civiles ne devront faire l'objet d'attaques (article 13).

Si le protocole II est plus succinct, les différences de régime entre conflit armé international (CAI) et conflit armé non international (CANI) au regard du principe de distinction ont progressivement été gommées à travers la réaffirmation de ce principe par d'autres sources conventionnelles et par la jurisprudence.

### *1.2. D'autres sources ont contribué à affermir le principe de distinction et à en préciser les contours à partir de situations concrètes*

S'agissant des sources conventionnelles :

- Le principe est inscrit dans le Protocole additionnel III à la Convention sur les armes classiques, qui a été rendu applicable aux CANI, en application d'un amendement à l'article 1<sup>er</sup> de la Convention, adopté par consensus en 2001 ;
- Et la Convention d'Ottawa sur l'interdiction des mines antipersonnel stipule que la Convention se fonde entre autres « sur le principe selon lequel il faut établir une distinction entre civils et combattants ».

La jurisprudence a par ailleurs constaté la nature coutumière du principe :

- Ainsi, le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a constaté la nature coutumière du principe de distinction et de son application en CAI comme en CANI dans les arrêts *Le Procureur c. Dusko Tadic*, arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence (ibid., par. 435); *Le Procureur c. Milan Martić*, examen de l'acte d'accusation (par. 437 et 552); *Le Procureur c. Zoran Kupreskic et autres*, jugement, par. 441 et 883;
- Tout comme la Commission interaméricaine des droits de l'homme, dans l'affaire relative aux faits survenus à La Tablada en Argentine, par. 64, 443 et 810.

Si les Protocoles additionnels sont venus préciser le principe de distinction, ils ne donnent toutefois pas pour autant toutes les clefs d'analyse nécessaires à sa mise en œuvre. Pourtant, lors des négociations ayant permis l'adoption des Protocoles additionnels, les problématiques actuellement rencontrées par nos forces armées existaient déjà : que faire, par exemple, en cas d'absence de port d'un uniforme dans un conflit armé, ou, s'agissant des CANI, comment traiter les membres des groupes organisés ; la pratique de l'utilisation de boucliers humains, et plus largement les enjeux liés à l'asymétrie entre belligérants étatiques et non étatiques doit-elle remettre en cause l'application sans faille du principe de distinction ?

## **2. Un principe de distinction régulièrement mis à l'épreuve par les évolutions des conflits internationaux**

Les Protocoles additionnels ne répondent pas de manière directe et explicite aux problématiques contemporaines liées à l'irruption de nouvelles formes de conflits, à la multiplication des acteurs intervenants en zone de conflits, ni aux nouvelles méthodes de guerre.

Ainsi, chaque situation nouvelle doit faire l'objet d'un examen au cas par cas, à la lumière des règles énoncées par les textes et la jurisprudence.

### *2.1. L'application du principe de distinction est tout d'abord mise à l'épreuve par l'émergence de nouveaux conflits*

Les opérations cybernétiques soulèvent de nouveaux enjeux et de nouveaux débats. Selon le groupe des experts gouvernementaux (GGE), les principes du DIH doivent s'appliquer aux opérations cybernétiques, ce qui soulève de nombreux défis d'interprétation :

- S'agissant de la notion même d'attaque cyber, les interprétations retenues, plus ou moins extensives, ne sont pas sans conséquence sur l'application des principes cardinaux du DIH, dont le principe de distinction : s'agit-il d'opérations causant des violences aux personnes et aux biens ? L'analyse doit-elle aller plus loin et se fonder sur les effets de ces opérations sur la fonctionnalité des biens, réseaux, systèmes ?
- S'agissant de la définition d'un objectif militaire, les réseaux cybernétiques mettent à mal la distinction entre bien civil et objectif militaire par nature tant les infrastructures servent à la fois aux besoins de la population et à ceux des forces armées. De fait, même des infrastructures civiles essentielles, réputées protégées par le principe de distinction, pourraient être systématiquement visées en application de la notion de « bien à double usage », dès lors qu'elles sont également employées à des fins militaires.
- De la même manière, la difficulté à déterminer l'auteur d'une attaque cybernétique met au défi la capacité des États à respecter pleinement le principe de distinction.

*2.2. L'apparition de nouveaux acteurs (conduites/ statuts/ fonctions) interroge également le principe de distinction à travers la notion de participation directe aux hostilités*

S'il ne fait aucun doute que le principe de distinction, comme les autres principes fondamentaux de conduite des hostilités, s'appliquent en cas de conflits armés tant internationaux que non internationaux, la ligne de démarcation entre combattants et civils est parfois complexe à déterminer.

Certes les Protocoles rappellent de manière très claire qu'il n'existe que deux catégories de personnes au regard du DIH : les civils et les membres des forces armées, régulières ou irrégulières –, mais il ne propose aucune définition dans les Protocoles de la notion de membre de groupe armé organisé, alors que les CANI sont désormais la forme la plus répandue de conflit dans lesquelles les forces armées sont susceptibles d'intervenir. A cette absence de définition s'ajoute le flou lié à la multiplication des acteurs participant désormais aux combats – forces irrégulières, mercenaires, sociétés privées, civils participants ponctuellement à l'action armée ou des groupes ciblés.

Dans ce contexte, la question de la définition de la participation directe aux hostilités et de la contribution effective à l'action militaire devient centrale. En effet, par analogie avec la définition du combattant donnée par l'article 44 paragraphe 3 du Protocole additionnel I qui se fonde davantage sur la fonction que sur l'incorporation, il paraît raisonnable de déduire que

cette même logique doit s'appliquer dans l'exercice d'identification d'un membre de groupe armé. L'appartenance à la branche militaire d'une partie non-étatique à un conflit armé se déduit ainsi des faits et d'une multitude d'indices, établis notamment par le renseignement. Il conviendra ainsi de réunir des constats d'une participation à des activités relevant à proprement parler de la conduite des hostilités – donc à des activités frappant ou pouvant frapper concrètement et directement l'adversaire – et non pas du seul effort de guerre.

Le principe de distinction nous impose ainsi d'être en mesure de distinguer les branches politiques et les branches armées des parties non-étatiques à un conflit. Or certains groupes sont dotés d'une structure particulièrement élaborée et complexe et peuvent comporter, outre une branche armée à proprement parler, des forces presque comparables à des forces de police. Il convient alors de s'interroger sur le fait de savoir si ces « forces » peuvent être légitimement ciblées. Ainsi, par exemple, les membres de la police religieuse employés par « l'État islamique » (EI) peuvent-ils être considérés comme participant directement au conflit qui oppose la coalition à Daech ?

Les clés d'interprétation permettant d'éclairer juridiquement ce type de situation sont à rechercher dans la jurisprudence et la doctrine.

Il en ressort que le fait de prendre part à des actes ou à des activités en rapport avec des actes qui ne sont pas, par leur nature ou par leur but, destinés à frapper concrètement des objectifs militaires ou le personnel ou le matériel des forces armées adverses au moment considéré ne relève pas d'une participation directe aux hostilités. Ainsi, pour reprendre la question précédente, notre analyse nous a-t-elle conduite, au regard de ces critères, à considérer que les membres de la police religieuse de l'Etat islamique ne pouvaient pas être ciblés. Ce n'est que lorsqu'il est établi que ceux-ci participent directement aux hostilités qu'ils peuvent faire l'objet d'une attaque et uniquement pendant la durée de cette participation, mais ils ne peuvent être ciblés du seul fait de leur rattachement à la police religieuse.

*2.3. La notion d'objectif militaire appliquée à l'égard des biens est également plus difficile à cerner dans les conflits contemporains, mais des solutions conformes au DIH peuvent être dégagées.*

S'agissant de l'application du principe de distinction à l'égard des biens, la définition de la notion d'objectif militaire donnée par l'article 52 paragraphe 2 du Protocole additionnel I est également générale et ne fournit pas de solution « clefs en mains » pour chacune des situations qui se présente à nos forces.

Mais cette définition ne laisse pas non plus de place à toutes les interprétations, grâce aux critères de la « contribution effective à l'action militaire<sup>1</sup> » et de « l'avantage militaire précis<sup>2</sup> ». Là encore, au-delà de la simple contribution à l'effort de guerre, le bien en cause doit apporter une contribution effective à l'action militaire. Cette effectivité implique un lien concret<sup>3</sup> et suffisamment direct avec l'action militaire et donc avec la conduite des hostilités à proprement parler.

Ainsi, pour être considéré comme un objectif militaire, un bien à caractère civil ne doit pas seulement permettre à l'adversaire de subvenir à ses besoins militaires en général, notamment d'un point de vue économique. Il doit contribuer concrètement aux actions de combat menées au moment considéré. Il convient en outre de pouvoir identifier un avantage militaire précis avant toute frappe, ce qui permet encore de circonscrire le champ des possibles à cet égard. Cette préoccupation est particulièrement présente s'agissant de l'examen de frappes sur des biens dits « à double usage ». Dans ces cas de figure, la nécessité militaire de les détruire ou de les neutraliser doit être explicitement démontrée précisément en recourant à ces critères. Ainsi, au Levant, certains puits de pétrole ont pu paraître devoir être considérés comme des cibles légitimes à partir du moment où un lien direct a pu être établi entre les ressources en carburant tirées de l'exploitation de ces puits et les actions de combat menées au moment considéré par le groupe armé organisé « État islamique ».

A l'inverse, les autorités françaises considèrent que les activités de propagande ne constituent qu'une forme de participation indirecte aux hostilités et qu'en conséquence les centres de propagande utilisés par Daech ne peuvent être pris pour cible quand bien même ils permettent à la branche armée de Daech de recruter de nouveaux membres et d'inciter à la commission de crimes internationaux.

Ces interrogations illustrent le type de difficultés juridiques auxquelles les États et leurs forces armées sont régulièrement confrontés en matière d'identification des objectifs militaires. Or pour mémoire, en cas de doute sur la contribution effective de la cible potentielle à l'action militaire, les

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<sup>1</sup> Exemples: 1) Les biens militaires par nature (VBIED [Véhicules blindés artisanaux de l'Etat islamique], fabriques d'IED, camps d'entraînement, etc.) sont pourvus d'un caractère stratégique intrinsèque et apportent, par eux-mêmes et en permanence, une contribution effective aux actions de guerre, et ce quel que soit leur usage concret. 2) Les biens militaires par usage, notamment les biens à double usage ne paraissent devoir être attaqués que s'ils présentent un intérêt stratégique, opératif ou tactique avéré.

<sup>2</sup> Rappel: la violence doit être limitée à ce qui est indispensable pour contraindre l'adversaire à se soumettre.

<sup>3</sup> On ne frappe pas le « moral » de l'adversaire par exemple, car il ne s'agit pas d'un bien matériel tangible contribuant à l'effort de guerre. Dans le cas contraire, tout objet susceptible d'affaiblir ce moral, qu'il soit de nature économique, politique, culturelle ou sociale, pourrait par répercussion être lui-même visé.

Protocoles additionnels sont très clairs : la personne ou le bien considéré ne peuvent être ciblés.

#### *2.4. Le développement des armes nouvelles ou les nouveaux moyens ou méthodes de guerre renouvelle encore les questions relatives à la mise en œuvre du principe de distinction*

Le respect du principe de distinction est l'une des conditions de la licéité des armes nouvelles, conformément à l'article 36 du PA I<sup>4</sup> :

- Le rythme élevé du développement des technologies impose d'adopter une approche multidisciplinaire (juridique, mais aussi technique, ou doctrinale) afin de déterminer si une arme nouvelle pourra satisfaire au respect du principe de distinction durant la durée de son service.
- La volonté d'appliquer ce principe doit ainsi conduire un État soucieux du respect de ses engagements internationaux à examiner, notamment, la nature de l'arme (offensive / défensive), sa capacité à identifier une cible, son caractère prédictible ou sa fiabilité dans la durée afin de veiller à la compatibilité des spécifications de l'arme avec ce principe.

La même logique de questionnement devra s'appliquer, dans l'avenir, aux systèmes d'armes létaux autonomes (SALA) :

- La question de la capacité d'une arme autonome à respecter le principe de distinction, notamment dans les situations complexes se posera de manière manifeste, compte tenu du niveau croissant d'autonomie de ces armes.
- S'il n'est pas possible de prédire aujourd'hui le degré d'autonomie de ces armes, la mécanisation croissante des processus de décision associée à leur emploi soulève des questions de droit nouvelles et redoutables : les SALA seront-ils en mesure de distinguer un combattant d'une personne hors de combat ? Ces machines pourront-elles apprécier de manière autonome la « contribution effective à l'action militaire » ou « l'avantage militaire précis » ? Qui sera responsable des violations du DIH commises par ces SALA ?
- À supposer même que l'opérateur humain demeure toujours dans le processus de décision, comme c'est le cas aujourd'hui dans toute

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<sup>4</sup> Dans l'étude, la mise au point, l'acquisition ou l'adoption d'une nouvelle arme, de nouveaux moyens ou d'une nouvelle méthode de guerre, une Haute Partie contractant a l'obligation de déterminer si l'emploi en serait interdit dans certaines circonstances ou en toutes circonstances, par les dispositions du présent Protocole ou par toute autre règle du droit international applicable à cette Haute Partie contractante.

chaîne de commandement et de contrôle (C2), encore faut-il que ce contrôle soit et demeure effectif.

## **Conclusion**

La mise en œuvre du principe de distinction constitue assurément un défi majeur pour les forces armées. Toutefois, les diverses solutions dégagées à l'occasion de situations complexes ou nouvelles ont permis d'illustrer la pertinence toujours actuelle de ce principe dans la conduite des hostilités.

Ce principe permet, en effet, d'appréhender quelques grands principes d'interprétation du DIH :

- interprétation téléologique pour assurer la finalité première du DIH, à savoir la protection des civils
- le doute profite à la protection.

Comme le résumait Jean Pictet en 1983 dans son ouvrage *Développement et principes du droit international humanitaire*, ce principe, tel qu'énoncé par les Protocoles additionnels aux Conventions de Genève, sert de ligne directrice dans les cas non prévus et constitue un sommaire facile à assimiler, indispensable à la diffusion de cette branche du droit international propre aux situations de conflits armés.

# **A closer look at the prohibition of indiscriminate attacks and disproportionate attacks**

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IHL expert

On more than one occasion, the ICRC has stated that it believes current international instruments governing the conduct of hostilities are ‘as pertinent to “new” types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted’.<sup>1</sup> Better protection during armed conflict can, therefore, be achieved through better implementation of already existing legal principles.

However, a challenge arises where the law as it stands is too vague and indeterminate to offer a clear standard of what can be considered lawful or unlawful conduct. In this presentation, I would like to challenge the argument that the existing framework on the conduct of hostilities is adequate, particularly in the area of the prohibition of indiscriminate and disproportionate attacks. In addition to better implementation of the law, it is essential to clarify existing vague norms as well as develop the law in a manner that offers better protection to the civilian population, particularly in light of new technologies and evolving types of conflict.

This presentation will focus on two particular prohibitions within the law on the conduct of hostilities, namely indiscriminate attacks and disproportionate attacks and the relationship between them, highlighting the vagueness of these prohibitions.

## **1. Indiscriminate attacks**

Article 51(4) of Additional Protocol I prohibits ‘indiscriminate attacks’ in the following terms. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

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<sup>1</sup> ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross for the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent’ (2-6 December 2003), available at: <https://casebook.icrc.org/case-study/icrc-ihl-and-challenges-contemporary-armed-conflicts> (last accessed: 25 September 2017).

- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The definition of indiscriminate attacks is an implementation of, and a corollary to, the principle of distinction. Under article 51(4), there are three cases of indiscriminate attacks. First, attacks ‘not directed at a specific military objective’, an example of which is area bombardments according to article 51(5)(a). The second case involves attacks utilising means and methods of warfare which are incapable, by their very nature, of being targeted accurately. The third case involves attacks that employ a method or means of warfare whose effects cannot be contained in time and in space.<sup>2</sup>

With respect to paragraph (b), it is possible that particular means and methods of warfare are capable of being targeted accurately and have effects that can be controlled, but in the specific circumstances may be rendered indiscriminate, for example, due to the altitude from which a weapon is fired, prevailing weather conditions, or the time of day in which the attack is launched.<sup>3</sup>

Additional Protocol II does not contain a specific prohibition or definition of indiscriminate attacks. However, the ICRC study on customary international law notes that the prohibition on indiscriminate attacks is arguably included by inference under article 13(2) (which prohibits making the civilian population the object of attack).<sup>4</sup>

## 2. Proportionality

The principle of proportionality in attack is codified in article 51(5)(b) of Additional Protocol I (and repeated in article 57). According to article 51(5):

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<sup>2</sup> L. Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) *International Review of the Red Cross* no. 316, 35 at 38-44.

<sup>3</sup> J. Weiner, ‘Discrimination, Indiscriminate Attacks, and the Use of Nuclear Weapons’ (2011) *The Lawyers Committee on Nuclear Policy*, available at: [http://lcnp.org/pubs/Weiner\\_Discrimination-Indiscriminate-Attacks.pdf](http://lcnp.org/pubs/Weiner_Discrimination-Indiscriminate-Attacks.pdf) (last accessed 25 September 2017) at 19; Y. Dinstein, *The Conduct Of Hostilities Under The Law Of International Armed Conflict* (Cambridge University Press, 2004), p. 118.

<sup>4</sup> ‘Rule 11. Indiscriminate Attacks’, *ICRC Customary IHL Study*, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11) (last accessed 22 September 2017).

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

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

There is much confusion within doctrine (compounded by inconsistent State practice) with respect to the relationship between disproportionate and indiscriminate attacks. According to one view, disproportionate attacks are one type of indiscriminate attack. Even if an attack is not indiscriminate because it is accurately targeted, and the means and methods used and their effects are controllable, it could still be indiscriminate if it causes disproportionate civilian harm. By the same token, some attacks are inherently indiscriminate, without regard to proportionality.<sup>5</sup> The 1987 Commentary to AP I supports this interpretation.<sup>6</sup>

A second view in doctrine considers that an attack is never indiscriminate unless it is also disproportionate.<sup>7</sup>

Under article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court it is a war crime in international armed conflict to intentionally launch an attack ‘in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects... which would be clearly excessive in relation to the concrete and direct *overall* military advantage anticipated’ (emphasis added).

Additional Protocol II does not contain an explicit reference to the principle of proportionality.<sup>8</sup>

### 3. Critique of the provisions governing disproportionate attacks

The text of article 51(5)(b) which defines disproportionate attacks is vague and indeterminate and, therefore, subjective and open to abuse. Since proportionality is always context-dependent, article 51(5)(b) cannot provide

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<sup>5</sup> J. Gardam, *Necessity, Proportionality, and the Use of Force by States* (Cambridge University Press, 2004), pp. 94-96; Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, p. 429; Weiner, 24-25.

<sup>6</sup> ‘*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*’, para. 1979, available at: <https://ihl-databases.icrc.org/ihl/COM/470-750065?OpenDocument> (last accessed 20 September 2017).

<sup>7</sup> Gardam, p. 96; Weiner, at 26.

<sup>8</sup> ‘Rule 14. Proportionality in Attack’, *ICRC Customary IHL Study*, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14) (last accessed 20 September 2017).

a clear standard of lawful and unlawful conduct. Some of the main questions arising under article 51(5)(b) are:

*a) What is a 'concrete and direct military advantage anticipated'?*

Some States argue that the phrase 'military advantage' refers to the *overall* advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack. This is a reflection of article 8(2)(b)(iv) of the Rome Statute.

This, however, cannot be considered a correct interpretation of article 51(5)(b), as first and foremost it does not accord with the plain meaning of the text, which includes the qualifiers 'concrete' and 'direct' before the term 'military advantage', while omitting 'overall'. Secondly, proportionality under *jus in bello* is measured by reference to the 'immediate aims' of each single military attack, rather than the 'ultimate goals' of the broader military action. Otherwise, there is a danger of conflating proportionality under *jus in bello* with proportionality under *jus ad bellum*, which are separate and distinct concepts.<sup>9</sup>

According to the San Remo Manual, a 'military advantage' may involve a broad range of issues relating to force protection. Since the advantage must be 'military', psychological, moral, economic and social advantages are excluded.<sup>10</sup>

Similarly, the terms 'concrete', 'direct' and 'anticipated' present numerous interpretative difficulties.

*b) What is the meaning of 'may be expected to cause incidental loss of civilian life'?*

According to article 51(5)(b), the 'concrete and direct military advantage anticipated' is to be weighed against the expected and not actual incidental effects on civilians (defined as 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof'). There is, however, no clear definition of what counts as incidental effect on civilians. Is it just the immediate death and injury resulting from an attack, or does it also include indirect or reverberating effects such as death and injury resulting from the destruction of civilian infrastructure?

There is also no clear definition of the term 'excessive'. According to the San Remo manual, 'the fact that collateral damage and incidental injury

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<sup>9</sup> J. Moussa "Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law", 90 (2008) *International Review of the Red Cross* 963, at 976.

<sup>10</sup> M. Schmitt, C. Garraway, Y. Dinstein 'The San Remo Manual on the Law of Non-International Armed Conflict: With Commentary', available at: [www.humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf](http://www.humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf) (last accessed 20 September 2017), p. 7.

are extensive does not necessarily mean that they are excessive'.<sup>11</sup> This is in direct contradiction to the 1987 Commentary which states that 'the Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive'.<sup>12</sup>

The majority of doctrine does not consider unintended or incidental mental harm to civilians as part of the definition of 'injury to civilians', with the implication that mental and psychological harm is excluded from the proportionality analysis.

The vagueness of the prohibition of disproportionate attacks has meant that in practice it lends itself to abuse in order to justify conduct that would otherwise be clearly unlawful.

Two contemporary examples of the difficulties associated with implementing the prohibitions of indiscriminate and disproportionate attacks illustrate this:

(I) *The use of non-nuclear explosive weapons*

Important questions have arisen in the wake of the use of the Mother of All Bombs (the largest conventional weapon ever deployed) against an ISIS cave complex in Afghanistan in 2017. In a blog post, Professor Michael Schmitt and Lt. Cdr. Peter Barker argued that the Mother of All Bombs is a guided weapon and, therefore, does not run afoul of the prohibition of weapons that are by nature incapable of being directed at lawful military objectives. It, therefore, does not constitute an indiscriminate means of combat.<sup>13</sup>

With respect to the principle of proportionality, Schmitt and Barker state that the use of the Mother of All Bombs in remote areas where civilians and civilian objects are absent raises no proportionality concerns. On the other hand, they argue that 'using a MOAB in a populated urban area, for instance, would generally violate the [proportionality] rule except in circumstances where the military advantage sought is enormous'.<sup>14</sup>

On the other hand, the ICRC has stated that even when they are aimed at lawful military targets, explosive weapons with a wide impact area have a

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<sup>11</sup> Schmitt, Garraway and Dinstein, pp. 24, 25.

<sup>12</sup> 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949', para. 1980.

<sup>13</sup> N. Schmitt and P. Barker, 'The Mother of All Bombs': Understanding the Massive Ordnance Air Blast Weapon', available at: [www.justsecurity.org/40022/the-mother-bombs-understanding-massive-ordnance-air-blast-weapon/](http://www.justsecurity.org/40022/the-mother-bombs-understanding-massive-ordnance-air-blast-weapon/) (last accessed 20 September 2017).

<sup>14</sup> *Ibid.* According to the 1987 Commentary, 'the idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with article 48 (Basic rule) and with paragraphs 1 and 2 of the present Article 51', para. 1980.

significant likelihood of indiscriminate effects in densely populated areas. In urban areas, military objectives are often placed among persons and objects protected under IHL. In addition, such attacks are more likely to lead to the destruction of critical infrastructure, which can also have reverberating effects, including large-scale displacement. As such, the use of a MOAB in a densely populated area would violate the prohibition of indiscriminate attacks, and cannot be justified on the grounds of proportionality.

(II) *The use of nuclear weapons*

In its controversial *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the ICJ stated that ‘the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict and, in particular, the principles and rules of humanitarian law’. It then went on to state with a majority of seven votes in favour and seven against, and with the casting vote of the Court’s President that: ‘In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’.<sup>15</sup> This statement has been interpreted as meaning that international law does not prevent a State from violating IHL, where it is acting in an extreme circumstance of self-defence. In other words, this would mean that a State could invoke a *jus ad bellum* consideration to justify violations of IHL, harking back to just war doctrine.

In order to justify the Court’s approach Judge Higgins attempted in her dissenting opinion to explain the Court’s statement by reference to the proportionality principle. She argued that the suffering associated with nuclear weapons (a *jus in bello* consideration) could conceivably meet the test of proportionality when balanced against ‘extreme circumstances’ such as ‘defence against untold suffering or the obliteration of a State or peoples’. An attack is thus ‘proportionate’ if the ‘military advantage’ is one ‘related to the very survival of a State or the avoidance of infliction... of vast and severe suffering on its own population’.<sup>16</sup>

However, such an application of the proportionality principle falls into the trap of conflating proportionality under *jus ad bellum* with proportionality under *jus in bello*. Ultimately, under *jus in bello*, the extent of suffering is to be measured against the ‘concrete and direct military advantage anticipated’ from an attack. No consideration should be given to

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<sup>15</sup> Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), [1996] ICJ Rep. 226, para. 2E, dispositive.

<sup>16</sup> Dissenting Opinion of Judge R. Higgins, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), [1996] ICJ Rep. 226, p. 583.

the overall goals of the military action, whether they are self-defence against unlawful aggression that threatens to obliterate the State, or otherwise. Conversely, under *jus ad bellum*, the proportionality of the attack is to be measured against the overall military goals such as subordinating the enemy, or fending off or repelling an attack. Conflating the two proportionality principles in such a manner transforms proportionality under IHL from a principle of limitation to one that can be invoked to justify a degree of injury and destruction which would otherwise be considered clearly excessive.<sup>17</sup>

## Conclusion

The prohibitions against indiscriminate and disproportionate attacks under *jus in bello* are intended to operate as a limitation on the extent to which the adversary can be injured. The prohibition of disproportionate attacks proscribes conduct normally allowed (targeting a lawful military objective) if the incidental harm is excessive. However, the vagueness of the proportionality principle and the ambiguity of its relationship with the prohibition against indiscriminate attacks has meant that these principles have been stretched and distorted to justify otherwise unlawful conduct. There is, therefore, much need for their further development and refinement.

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<sup>17</sup> See generally, J. Moussa 'Nuclear Weapons and the Separation of *jus ad bellum* and *jus in bello*' in *Nuclear Weapons Under International Law*, G. Nystuen, S. Casey-Maslen and A. G. Bersagel (eds.), Cambridge University Press, 2014, pp. 59-88.

## Considering the principle of precautions

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### Introduction

I would like to thank the organizers of the conference for inviting me to speak. It is a great honor and privilege to be here. Before I start, I would like to give the usual caveat - I am here in my personal capacity. The opinions and ideas in my presentation do not necessarily represent the views of the Israel Defense Forces (IDF) or the Government of Israel.

My point of reference for the discussion regarding precautionary duties under customary international law is the language of Additional Protocol I to the Geneva Conventions (API). While it is widely accepted that custom mandates taking certain precautions in attack, it is important to keep in mind that not all states are parties to API (such as Israel and the US) and that there are some disagreements regarding the exact scope, and phrasing, of the customary rule in comparison to Article 57 of API. Nevertheless, API is a *useful* point of reference, considering the fact that so many militaries are bound by it. I will, therefore, use it as a point of reference during my presentation.

To start, we should recall that in API there are two different obligations with regard to precautions. The first one, "precautions in attacks", refers to "active precautions" that the attacking party needs to take in the conduct of its military operations. The second one, "precautions against the effects of attack", refers to "passive precautions" that the defending party needs to take to protect the civilian population and civilian objects under their control against the effects of the attacks of the other party. In my presentation I will refer only to the first one – the "active" precautions, or "precautions in attacks".

The principle of precautions, under API's Article 57, comprises of these seven components:

1. Constant care to spare civilians and civilian objects;
2. Do everything feasible to verify that the object to be attacked is lawful;
3. Take all feasible precautions in the choice of means and methods;
4. When choosing a target, attack the military objective that will give a similar military advantage but cause the least collateral damage;

5. Refrain from deciding to launch disproportionate attacks;
6. Abort the mission if it becomes apparent that the attack would be unlawful;
7. Provide effective advanced warning, unless circumstances do not permit.

Due to time constraints, I will discuss only the first three. However, before I go into the specific provisions of API regarding precautions, I would like to say a few words regarding the exact role of the principle of precautions in the application of the Law of Armed Conflict (or LOAC) during military operations.

### **The role of “precautions in attack” in the Law of Armed Conflict**

A common way to teach LOAC and its application in combat situations is by dividing LOAC into four main principles, which encompass the essence of the law: military necessity, distinction, proportionality and humanity (or unnecessary suffering). The rules regarding precautions are usually not included here, but are rather raised in a cursory manner. About 15 years ago, I studied LOAC this way here at Sanremo, and a few years later I learned it the same way when I participated in the Graduate Course in the US JAG Legal Center and School in Charlottesville, Virginia. I myself would explain the main essence of LOAC in this same way to commanders and legal advisers in the IDF.

However, in the last few years, since I have had some practical experience in applying LOAC during armed conflict and in giving legal advice to commanders, I have come to the opinion that the rules regarding “precautions in attacks” should have a *stronger role* in our teaching of LOAC. This is because, in practice, I have found these rules to be just as important as the principles of distinction and proportionality, in terms of fulfilling the object and purpose of LOAC, which is to achieve the delicate balance between military necessity and the desire to mitigate civilian harm.

As a result, my suggestion is to teach the rules regarding precautions in attack together with the other four principles mentioned, and to do so in between teaching the principle of distinction and teaching the principle of proportionality. This is because only after the application of the principle of precautions can we properly determine what the collateral damage is expected to be as a result of the attack, and thus conduct a proper proportionality assessment.

## **“Precautions in Attack” - General Comments**

Before I delve into some specific issues, there are several general points I would like to raise regarding the application of the principle in practice.

First, the duty to take precautions is a continuous obligation, which usually applies up until, and sometimes even during, the execution of the attack.

Second, the duty to take precautions relates to those who have the authority and practical capability to take precautions. In this regard, some parties to the Additional Protocol made some declarations and even reservations, stating that some precautions are relevant only from a specific level of command and above<sup>1</sup> - however, I accept the view that there is no reason to interpret the text of API with this qualification. Naturally, there will be cases in which the authority and practical capability to take some precautions will only exist at a specific level of command. However, there are certainly cases in which even soldiers on the ground executing an attack might be required to take some precautionary measures, such as verifying (if feasible) that the attack is executed against a military objective.

Third, the application of the principle is always context dependent. Thus, although the precautionary rules are exactly the same, a change in context may lead to a difference in implementation. For example, there is a big difference between “immediate” targets, like those attacked in response to an immediate threat on the ground, and pre-planned targets, which are planned in advance through a regular targeting process. The difference is not only with regard to the amount of time there is for making a decision; but also, in most cases, with regard to the level of the decision-maker, the availability of professional staff to consult with (such as legal advisers, intelligence officers and engineers), the means reasonably available for conducting the attack, the information the decision-maker can reasonably obtain, and so on.

My last point is that it is important not just to explain LOAC to commanders, but also to establish processes within armies that would help commanders execute their precautionary duties in a reasonable way and with good faith and due diligence.

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<sup>1</sup> Switzerland, for example, made a reservation stating the “provisions of Article 57, paragraph 2, create obligations only for commanding officers at the battalion level and above.” See Adam Roberts and Richard Guelff, *Documents on the Laws of War* 509 (3rd. ed. 2000).

## **“Precautions in attack” - Specific Issues**

Next, I would like to discuss three issues which are crucial for understanding the exact meaning of the principle of precautions:

What does it mean to “take constant care” in the conduct of military operations? What does the requirement to do everything feasible to verify that the object to be attacked is lawful under API?

What are “all feasible precautions” in the choice of means and method?

### *Constant care to spare civilians and civilian objects*

According to Article 57(1): “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. We should note that although the title of Article 57 is “precautions in attacks”, the obligation to take constant care to spare the civilian population appears to apply to all military operations and not only to attacks.

Although the term “constant care” is not defined, the rule is commonly understood as a “general and continuous obligation” to respect the civilian population. A good way to see it is as an obligation for commanders and others involved in military operations to always bear in mind that civilians and civilian objects may be harmed as a result of the operations, and as a result must always be sensitive to the effect the operations may have on the civilian population and the civilian objects, in an attempt to avoid any unnecessary harm. As such, the obligation is “essentially relative in nature” and depends on the circumstances of each specific case.

In this regard we should note the obvious – the duty of “constant care” does not by itself require commanders to give precedence to civilians and civilian objects when it contradicts reasonable military requirements. There is, however, a requirement to be sensitive to the effects of the operations on civilians and to try to mitigate these effects where feasible.

### *Do everything feasible to verify that the object to be attacked is lawful*

According to Article 57(2)(a)(i) “those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects... but are military objects etc.” The wording “shall do everything feasible” is crucial, and is relevant not only with regard to verification but also with regard to other precautions, such as the choice of means and methods. A useful definition, which is widely accepted, is to do what is “practicable or practically

possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>2</sup>

It is important to note that this rule of precaution supplements the principle of distinction. Therefore, while an object might be correctly defined as a “military objective”, it may be further required to verify, as a precaution, that the object to be attacked is lawful. For example, consider a decision to attack a target based on reliable intelligence that the site is currently being used for military training. Where the commander conducting the attack has access to real-time surveillance over the target, he or she will be able to verify the information on which the assessment regarding the target was originally based. In such a case, there would exist a legal requirement to so verify.

Like all other precautions in attack, the obligation to verify is also context dependent. It is important, however, to suggest some factors the commander should consider when determining whether it is feasible to verify a target is a military objective, including:

- The likelihood that there was an error in the original classification of the target and the extent to which specific verification may be expected to clarify uncertainties. It is commonly agreed that absolute certainty that the object to be attacked is a “military objective” is never required, since almost always some kind of doubt will exist. Therefore, the applicable legal standard is that of reasonableness - a reasonable commander should have a reasonable certainty, or reasonable grounds to believe, that the target is a lawful one. With regard to verification, there is no requirement for endless efforts to verify every target to be attacked - since this kind of a standard is simply not practicable during combat situations. However, there is a requirement for a reasonable decision as to what is practicable or practically possible, taking into account, *inter alia*, the level of doubt existing. The more doubt there is, the more reason there will be to require further verification. In this regard, the commander also needs to consider to what extent the specific verification would provide clarification;
- Another important factor might be the need to reconfirm the information and the intelligence as time goes on. The commander must ask himself whether the time that has passed since the intelligence assessment changes the reasonableness of the assessment. Here too everything is context dependent. If, for example, there was a decision to attack a bunker which is being used by the enemy, based on reliable intelligence that assessed that it took

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<sup>2</sup> See, e.g., Article 3(10) of Amended Protocol II and Article 1(5) of Protocol III to the 1980 Convention on Certain Conventional Weapons (CCW).

years to build this bunker, and there is no reason to believe that the bunker is not being used any more for military purposes - it might be reasonable to estimate that months or even years after receiving such intelligence, there is still reasonable certainty to conclude that the target remains a military objective. On the other end, if the commander has intelligence indicating that a senior enemy fighter was at a specific house several days ago, then before carrying out an attack, he would need to assess the reasonableness that this senior fighter is still in the house, and the less certain he is the more he will have to verify that the enemy fighter is still there;

- An additional factor is the time needed for verification and its impact on the success of the attack. Thus, for example, where there is a short window of opportunity to attack someone who was determined to be as a lawful target based on reliable intelligence, it will be reasonable for a commander to refrain from further verification measures if it were to seriously risk the success of the mission.
- Another factor is the level of risk for civilians in case of an erroneous identification of the target. The higher the risk for the civilian population, the more will be required in terms of verification. In the example just mentioned, there probably would be a difference (not only with regard to the application of the principle of proportionality but also with regard to precautions) between a case in which it is estimated that there are some civilians in the house who would be killed or injured as a result of the attack, and between a case in which it is estimated that there are no civilians present.
- The last factor is competing demands regarding the means needed for verification. Thus, for example, if an army is involved in wide scale combat operations, commanders will use Intelligence, Surveillance and Reconnaissance (ISR) assets (like drones) for various tasks including accompanying the ground forces during combat, locating enemy fighters, acquiring intelligence in order to be able to identify more objects as military objectives, and also verifying that some of the objects to be attacked are indeed military objectives. These competing demands with regard to ISR assets must be necessarily taken into account when assessing the feasibility of further verifying whether a target is indeed a military objective.

*Take all feasible precautions in the choice of means and methods*

The next precautionary requirement has to do with the choice of means and methods of attack with a view to avoiding or minimizing collateral damage. There are several means and methods which might be relevant in this regard.

The first is requiring information regarding the target or the collateral damage anticipated. If, for example, there is an inhabited house which is being used for command and control purposes in an ongoing battle, the building would be considered as a “military objective”. Even so, the commander might nevertheless ask for more information about the exact location in the building which is being used for command and control, if he assesses that it is feasible to get such information and that the information would help him to be more discriminate with the targeting and thereby reduce the likelihood of collateral damage. Likewise, if there is a military necessity to attack a large house which has been defined as a “military objective”, and there is uncertainty regarding the amount of collateral damage expected from an attack, a commander might look for ways to get this kind of information in order to be able to better estimate the need for further precautionary measures to reduce the collateral damage anticipated.

In addition, when executing an attack, the timing of the attack might be critical in saving civilian lives. Thus, for example, when attacking a weapons factory, there might be a precautionary requirement to attack when the factory is not operating (if this is feasible), in order to save the lives of civilians present.

As for weaponizing, a commander needs to determine which weapon to use and in what way to use it in order to try and achieve a specific level of damage to a given target. As a result, a decision has to be made regarding the best weapon available to him or her for executing a specific attack, taking into account both the military aim of the attack and the desire to minimize collateral damage. If a force is under fire, for example, the commander would need to consider which weapon he or she can practically use in order to effectively protect the forces while minimizing the risk for civilians. Sometimes the only means feasible for that mission might be the M109 Howitzer, but in other cases there might be a precautionary obligation to use more precise weapons, if such weapons are available and can effectively protect the forces with less collateral damage. In addition, if a commander has snipers in the force, there might be situations in which it would be required to use them under the principle of precautions, in order to be able to achieve the military mission while minimizing collateral damage.

The same considerations arise with regard to missile warfare. Also there is no specific obligation to use only precision guided weapons. There are situations in which it would be feasible for a commander to choose a weapon with greater precision or lesser explosive force, with a view to minimizing collateral damage. In such cases, a decision has also to be made regarding other elements in attack which can help minimize collateral damage, like planning the desired impact point, the angle the bomb enters the house, or even the possibility to use a delayed fuse which would

explode several milliseconds after impact and as a result produce less fragmentation problems and, therefore, hopefully cause less collateral damage.

In all such kinds of considerations, a commander has a legal duty under the principle of precautions to choose the means and methods with a view to mitigating the collateral damage. This applies for means and methods that are feasible to employ, meaning practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Again, the decision is always contextual. However, there are some factors which might be relevant to many scenarios:

The feasibility of requiring more information regarding the target or the presence of civilians or civilians objects - The factors mentioned regarding the feasibility to verify are relevant also here: the level of uncertainty that exists, the expectation to clarify these uncertainties, the time and the means needed for getting such information, and competing demands on the means necessary to clarify such uncertainties.

The likelihood of achieving the military mission – A number of years ago, a well-known attack was conducted by the Israeli Air Force on a house in which all the high-level leaders of a certain terrorist organization were meeting. The decision was made to attack one floor only in order to minimize potential collateral damage. It turned out that the meeting took place on another floor and, therefore, the strike was not successful in taking out the terrorist leaders. Of course, it is important not to consider cases in hindsight. However, if in a case like this a commander reasonably estimates that although there is a good chance the enemy leaders are on a specific floor, the potential for successfully achieving the mission would be much higher if the whole building were destroyed, then there would be no precautionary requirement to only attack a specific floor (as long as other LOAC principles and rules are satisfied).

Force preservation - Force preservation is a legitimate military consideration. If, for example, there are two options for achieving a specific goal - targeting an object or sending ground forces to achieve the same aim, but sending the troops in would pose a much higher risk to them - a commander might reasonably conclude that in this specific context it is not feasible to send in the forces. This view was also adopted by the well-known ICTY's Prosecutor decision in the case of NATO's aircraft operating at a high altitude that was safer for the pilots<sup>3</sup>, although doing so

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<sup>3</sup> See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, United Nations, International Criminal Tribunal for Yugoslavia (Jun. 13, 2000), at [www.icty.org/sid/10052](http://www.icty.org/sid/10052), paras 63-70.

made it difficult for them to see the target and, therefore, could have caused more collateral damage.

Weapons inventory and the possible length and intensity of the conflict - There is no legal requirement to always use precision munitions. A commander who has only a small amount of precision-guided munitions (PGMs) available, for example, might prefer to use them only for the execution of specific attacks, in which they are the most needed. He might also reasonably decide to hold on to some PGMs for a later stage in the conflict, if he expects the conflict to be lengthy and estimates he may need the extra missiles for later stages of the conflict.

## **Conclusion**

To summarize, these are my four main points. The application of the principle of precautions is always context dependent. The same precautionary duty might lead to different expectations in different situations.

The requirement to give “constant care” means the decision-makers always need to be sensitive to the effects of their activities on the civilian population and civilian objects, and to consider what can be done to mitigate any unnecessary effects thereon.

The terms “all feasible precautions” and “everything feasible” are terms of art in LOAC and key elements in understanding the duties under the principle of precautions in attack, and should be understood as “what is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

It is very important to establish processes within armies that would help commanders execute their LOAC duties in a reasonable way and with good faith and due diligence.

### **III. Fundamental guarantees and the treatment of persons deprived of their liberty**



# Content and customary nature of Article 75 of Additional Protocol I

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## 1. Introduction

Article 75 is one of the longest in the 1977 Additional Protocol I to the 1949 Geneva Conventions. It ensures that no person in the power of a party to an international armed conflict is outside the protection of international humanitarian law. It lays down a minimum standard of protection, providing a ‘safety net’ for all those who are not entitled to more favourable treatment under the Geneva Conventions or Additional Protocol I. On the fortieth anniversary of the 1977 Additional Protocols, it is worth analysing the provisions of Article 75 and assessing whether they have achieved the status of customary international law.

## 2. Personal Scope of Application of Article 75

Article 75 lists the fundamental guarantees that must be granted to all persons who are ‘in the power of a party to the conflict’ and do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I, ‘in so far as they are affected’ by the conflict. In fact, all persons who are in a territory under the control of one of the belligerent States can be considered ‘in the power of a party to the conflict’. However, those persons are covered by Article 75 only to the extent that they are affected by the conflict. Actually, all those who are in the belligerents’ territory or in occupied territory are affected by the conflict in some way or another. The drafters’ intention, however, was probably to restrict the scope of Article 75 to persons who are affected by belligerents’ acts connected with the conflict. According to this interpretation, for example, persons accused of murder as an ordinary criminal offence in the framework of the belligerents’ normal administration of justice would not be covered by Article 75 and, consequently, could not invoke the judicial guarantees laid down in this article.<sup>1</sup>

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<sup>1</sup> See: Claude Pilloud, Jean Pictet, ‘Article 75 – Fundamental Guarantees’ in Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional*

That said, the question arises: who is entitled to the fundamental guarantees set forth in Article 75, as he or she does not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I? Article 45, para. 3 of Additional Protocol I gives some indication in this regard. It stipulates that ‘any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75’. This means that the minimum guarantees provided for in Article 75 apply to all persons who have participated in the hostilities and have fallen into the hands of the enemy, without being entitled to prisoner-of-war-status. In other words, the protection of Article 75 must be accorded to the so-called ‘unlawful combatants’, that is to say mercenaries, spies, civilians taking a direct part in hostilities and members of militias belonging to a party to the conflict who do not comply with the requirements of Article 4 (A) (2) of the Third Geneva Convention or Article 44, para. 3. of Additional Protocol I.<sup>2</sup>

As to the nationality of the beneficiaries of the protection, belligerent States are required to grant the fundamental guarantees set forth in Article 75 not only to enemy nationals, but also to their own nationals who have acted in favour of the enemy, such as the deserters who have joined the adverse forces or the collaborators who have passed information to the other side. Actually, the minimum humanitarian standard laid down in Article 75 is particularly relevant in the case where a civil war is connected with an international armed conflict and the nationals of the State where the civil war is raging are fighting on both sides as happened, for example, in Italy after the armistice of 8 September 1943.<sup>3</sup>

The protection of Article 75 must also be granted to nationals of neutral States and nationals of co-belligerent States who are in the power of a party to the conflict with which the State of their nationality has normal diplomatic relations, since such persons are not covered by the Fourth Geneva Convention. In fact, under Article 4 of the Fourth Geneva Convention, nationals of neutral States and nationals of co-belligerent States fall within the scope of this Convention only when the State of their nationality does not have normal diplomatic relations with the belligerent State in whose hands they are.

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*Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Nijhoff, 1987), 866 f.; Michael Bothe, Karl Josef Partsch, Waldemar A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd ed. reprint revised by Michael Bothe, Leiden/Boston: Nijhoff, 2013), 516 f.

<sup>2</sup> On the unlawful combatants, see Knut Dörmann, ‘Combatants, Unlawful’ (2015) *Max Planck Encyclopedia of Public International Law*.

<sup>3</sup> Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 517.

### 3. Guarantees provided for in Article 75

Persons protected under Article 75 must be treated humanely in all circumstances, without any adverse distinction. Their persons, honour, convictions, and religious practices must be respected (para. 1). Several acts are listed which are prohibited 'at any time and in any place whatsoever' (para. 2). They include:

- violence to the life, health, or physical or mental well-being of persons, such as murder, torture or mutilation;
- outrages upon personal dignity, such as humiliating and degrading treatment;
- taking of hostages;
- collective punishments.

These provisions are clearly inspired by the text of Common Article 3 of the Geneva Conventions and Article 4, paras 1 and 2, of Additional Protocol II. In fact, Article 75 was drafted after and on the model of Articles 4 and 6 of Additional Protocol II, although by a different committee.<sup>4</sup>

Article 75, however, does not end here. It also lays down minimum guarantees for persons who are deprived of their liberty for actions related to the conflict and for those who are subject to criminal prosecution for offences connected with the conflict. Under para. 3, persons arrested, detained or interned for actions related to the conflict must be informed of the reason for these measures promptly and in a language which they understand. Unless the arrest or detention is for criminal offences, they must be released 'with the minimum delay possible'. According to para. 4, a judgment of a court is required before penalties can be imposed for criminal offences related to the conflict. Such court must be impartial and constituted regularly and it must respect 'the generally recognized principles of regular judicial procedure'. This provision is directly inspired by the text of Common Article 3 of the Geneva Conventions and Article 6, para. 2 of Additional Protocol II.

Following the model of Article 6, para.2, of Additional Protocol II, Article 75, para. 4, of Additional Protocol I also contains a non-exhaustive list of generally recognized principles of judicial procedure which must be abided by in proceedings for criminal offences related to the conflict. The principles listed in Article 6 of Additional Protocol II are reproduced almost *verbatim* and some more are added. The list contained in Article 75, para. 4, includes *inter alia*:

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<sup>4</sup> *Ibid.*, 513.

- the principle of legality, that is to say, the principle *nullum crimen, nulla poena sine lege*;
- the obligation to inform the accused of the nature and cause of the charges against him;
- the obligation to grant the accused the necessary rights and means of defence, such as (a) the right to defend oneself or to be assisted by a lawyer of one's own choice, (b) the right to free legal assistance if the interests of justice so require, (c) the right to sufficient time and facilities to prepare the defence, and (d) the right to communicate freely with counsel;
- the presumption of innocence;
- the right of the accused to be tried in his presence;
- the right of the accused not to be compelled to confess guilt or to testify against himself;
- the right of the accused to have the judgement pronounced publicly;
- the right of the convict to be advised of the available remedies and of their time-limits;
- the principle *non bis in idem*.

As to the principle *nullum crimen, nulla poena sine lege*, in Article 75 the word 'lex' comprises not only domestic law, but also international law. According to para.4 (c), no one may be tried for acts that were not criminal offences 'under the national or international law' at the time when they were committed. It ensures that a trial for an act that, at the time of its commission, was not a criminal offence under domestic law is allowed if, at that time, such act was already criminalized by international law.<sup>5</sup>

As for the principle *non bis in idem*, in Article 75 this principle is restricted to prosecutions by the same belligerent State. According to para.4 (h), no one shall be prosecuted or punished by the same party to the conflict for an offence in respect of which a final judgment has already been pronounced. It follows that a subsequent prosecution for the same offence by the adverse party is not forbidden.<sup>6</sup>

Most of the principles of judicial procedure listed in Article 75 are also spelt out in the UN Covenant on Civil and Political Rights of 1966, in Articles 14 and 15 to be precise. However, the principles set forth in Article 14 of the Covenant, such as the presumption of innocence, the right of the accused to be tried in his presence and the prohibition on compelling the

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<sup>5</sup> This provision is consistent with the Nuremberg Principle II, under which 'the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law'. See Pilloud, Pictet, 'Article 75 – Fundamental Guarantees', 881 f.

<sup>6</sup> See Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 522, 745.

accused to testify against himself or to confess guilt, may be derogated from in time of armed conflict, as per Article 4 of the Covenant. No derogation may be made only to the principle *nullum crimen, nulla poena sine lege*, which is enshrined in Article 15 of the Covenant. On the contrary, the provisions of Article 75 of Additional Protocol I are not subject to any possibility of derogation.

The judicial guarantees laid down in Article 75 must be granted to persons accused of ordinary criminal offences as well as to persons accused of international crimes. Para. 7 makes it clear that persons accused of war crimes and crimes against humanity must be accorded the treatment provided by Article 75, as long as they do not benefit from more favourable treatment under the Geneva Conventions or Additional Protocol I. Actually, in the light of the Statutes and the practice of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the International Criminal Court, persons accused of genocide and aggression are also to be granted the minimum guarantees set forth in Article 75.

Persons arrested, detained or interned for actions related to the conflict must benefit from the protection of Article 75 until their final release, repatriation or re-establishment (para. 6). The word 're-establishment' refers to persons who cannot be repatriated or simply released where they are and for whom a State of residence must be found.<sup>7</sup>

Finally, Article 75 takes care to specify that it does not prejudice the application of other rules of international law granting greater protection to persons falling within its scope of application (para.8). Therefore, wherever other rules of international law, including human rights law rules, accord a more favourable treatment to persons covered by Article 75, such rules must be applied and take the place of the minimum protection given by the latter.<sup>8</sup>

#### **4. Customary International Law**

Article 75 embodies and develops the principles contained in Common Article 3, that is to say, the principle of humane treatment and its corollaries, namely the prohibitions on violence to life and person, taking of hostages, outrages upon personal dignity, and passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.

Actually, the rules contained in Common Article 3 were formulated to apply to non-international armed conflicts. However, in the 1986

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<sup>7</sup> Pilloud, Pictet, 'Article 75 – Fundamental Guarantees', 886.

<sup>8</sup> See Bothe, Partsch, Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 523 f.

*Nicaragua* judgement, the International Court of Justice authoritatively held that such rules also constitute ‘a minimum yardstick’ applicable to international armed conflicts.<sup>9</sup> This view was also expressed by the International Criminal Tribunal for the Former Yugoslavia in the 1995 *Tadić* jurisdiction decision<sup>10</sup> and in subsequent decisions, such as the *Delalić* appeal judgement.<sup>11</sup>

Nowadays, the principle of humane treatment and its corollaries are generally regarded as the core principles to be applied in any conflict, whether it is of an internal or international character. From all this, one can infer the customary character of the provisions of Article 75 on humane treatment.

With particular regard to the principles of judicial procedure listed in Article 75, most of them are also enshrined in the UN Covenant on Civil and Political Rights, the European Convention on Human Rights and other human rights treaties, the Statutes of the ICTY and ICTR and the ICC Statute. Furthermore, they are part of the domestic law of most States.

In the 2005 ICRC Study on customary international humanitarian law, the fundamental guarantees laid down in Article 75, including the right to fair trial and the principle *nullum crimen, nulla poena sine lege*, are classified as norms of customary international law applicable in both international and non-international conflicts, to all civilians in the power of a party to the conflict and who do not take a direct part in hostilities, as well as to all persons *hors de combat*.<sup>12</sup>

As to the international case law confirming the customary character of the minimum guarantees set forth in Article 75, in 1998, in the *Delalić* trial judgement, the ICTY cautiously stated that the provisions of Article 75 ‘are clearly based upon the prohibitions contained in Common Article 3 and may also constitute customary international law’.<sup>13</sup>

The view that the rules contained in Article 75 are part of customary international law was firmly expressed by the Eritrea Ethiopia Claims Commission, in the partial awards rendered in 2004 on the claims relating

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<sup>9</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ.Reports 1986, 14, 114, para. 218.

<sup>10</sup> ICTY Appeals Chamber, *Prosecutor v. Dusko Tadić a/k/a ‘Dule’*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, para. 102.

<sup>11</sup> ICTY Appeals Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka ‘Pavo’), Hazim Delić and Esad Landžo (aka ‘Zenga’) (‘CELEBICI Case’)*, Judgment, 20 Feb 2001, para. 147.

<sup>12</sup> Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, Cambridge University Press, 2005), 299 ff.

<sup>13</sup> ICTY Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as ‘Pavo’, Hazim Delić, Esad Landžo also known as ‘Zenga’*, Judgment, 16 Nov. 1998, para. 314.

to civilians brought by Eritrea and Ethiopia with respect to the armed conflict that took place between them from 1998 to 2000. The Claims Commission emphasized the fundamental humanitarian nature of those rules and their correspondence with generally accepted human rights principles.<sup>14</sup>

The Commission's finding that the provisions of Article 75 are part of customary international law was extremely important, as those provisions did not apply to the conflict as treaty law, because Eritrea is not a party to Additional Protocol I. The Commission held that Eritrea breached the customary rules embodied in Article 75, detaining Ethiopians in prisons, without charge or trial and therefore without according them the minimum procedural rights due to persons in the power of a party to the conflict.<sup>15</sup>

The separate opinion of Judge Simma appended to the 2005 judgement of the International Court of Justice in the case, *Democratic Republic of the Congo v. Uganda*, is also worth mentioning. Judge Simma stated unequivocally that 'the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law'.<sup>16</sup>

Moreover, when assessing whether a treaty provision has become a customary rule, the practice of States not parties to the treaty is particularly relevant. Consistent practice of non-party States is an important positive evidence of the customary character of the provision in question. With regard to the rules contained in Article 75, the practice of Israel and the United States is to be considered carefully. Indeed, they are 'States whose interests are specially affected', to use the words of the International Court of Justice in the *North Sea Continental Shelf* cases.<sup>17</sup>

As to Israel, the decision of the Israeli Supreme Court of 2006 in the *Targeted killings* case is worth mentioning. The Court referred to Article 75, when considering the protection to be granted to terrorists and suspected terrorists, who qualify as unlawful combatants under the Israeli Law on the imprisonment of unlawful combatants.<sup>18</sup> This law was enacted in 2002 and is still in force. 'Unlawful combatants' are defined as persons who participated in hostilities against Israel, whether directly or indirectly,

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<sup>14</sup> EECC, Partial Award, *Civilians' Claims, Eritrea's Claims 15, 16, 23 & 27-32*, The Hague, 17 Dec. 2004, para.30. EECC, Partial Award, *Civilians' Claims, Ethiopia's Claim 5*, The Hague, 17 Dec. 2004, para. 29.

<sup>15</sup> EECC, Partial Award, *Civilians' Claims, Ethiopia's Claim 5*, para. 75.

<sup>16</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, Separate Opinion of Judge Simma, ICJ Reports 2005, 334, 344, para. 28.

<sup>17</sup> *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3, 43, para. 74.

<sup>18</sup> Incarceration of Unlawful Combatants Law, 5762-2002, available at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/7A09C457F76A452BC12575C30049A7BD>.

or are members of a force committing hostilities against Israel, who are not entitled to the prisoners-of-war status under the Third Geneva Convention (Article 2).<sup>19</sup> The Israeli Supreme Court held that ‘unlawful combatants are not beyond the law’; ‘they... are entitled to protection, even if most minimal, by customary international law’.<sup>20</sup> The Court mentioned as an example the case where they are detained or brought to justice and it referred to Article 75, which it considered as reflective of customary international law.<sup>21</sup>

As regards the United States, the question of the application of the fundamental guarantees enshrined in Article 75 arose with respect to persons captured in the context of the so-called ‘war on terror’ and detained in the US military prison at Guantanamo Bay. The US Supreme Court expressly referred to Article 75 in the decision rendered in 2006 in the *Hamdan* case. Hamdan was a Yemeni national detained in Guantanamo, who was being tried before a military commission created pursuant to an executive order issued by President G.W. Bush in November 2001.<sup>22</sup> The US Supreme Court unanimously held that such military commission did not meet the requirements to be considered ‘a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples under Common Article 3 of the Geneva Conventions.’<sup>23</sup> A majority of four judges made it clear that those guarantees include at least the minimum guarantees that are recognized by customary international law and it specified that ‘many of these are described in Article 75’.<sup>24</sup> The same majority of four judges found that the military commission procedures were not consistent with at least two principles that

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<sup>19</sup> Hundreds of Palestinians suspected of terrorism have been detained under the Israeli Law on the imprisonment of unlawful combatants since its enactment. This law, however, has been severely critiqued as not affording basic legal guarantees. In particular, in 2016 the Committee against torture urged Israel to repeal it. It expressed concern that detainees under the law at issue ‘may be deprived of basic legal safeguards as, *inter alia*, they can be held in detention without charge indefinitely on the basis of secret evidence that is not made available to the detainees or his/her lawyer’ (Committee against Torture, *Concluding Observations on the Fifth Periodic Report of Israel*, 3 June 2016, CAT/C/ISR/CO/5, para. 22).

<sup>20</sup> Israeli Supreme Court (as High Court of Justice), *Public Committee against Torture in Israel and others v. Government of Israel and others (Targeted Killings)*, H CJ 769/02, 13 December 2006, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf), para. 25.

<sup>21</sup> *Ibid.*

<sup>22</sup> See Russell A. Miller, ‘Hamdan Case’ (2008) *Max Planck Encyclopedia of Public International Law*.

<sup>23</sup> Supreme Court of the United States, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 05-184, 29 June 2006, 548 US 557 (2006), 631 f, 635.

<sup>24</sup> *Ibid.*, 633.

are spelt out in Article 75 and are embodied in customary international law, namely, the principle that the accused has the right to be tried in his presence and the principle that he must be privy to the evidence against him.<sup>25</sup>

In March 2011, the Obama Administration issued a statement on Article 75. In a fact sheet on the Guantanamo detention facility and the detainee policy, the White House reaffirmed the US long-standing support for Article 75, it declared that the current US military policies and practices were consistent with the requirements of this article and, most importantly, it stated that ‘the US Government will... choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict’.<sup>26</sup> Three months later, in June 2011, answering a question submitted by Senator R.G. Lugar, the then legal adviser of the Department of State, Harold Koh, clarified the meaning of this statement. He said that ‘the US will choose to abide by the principles set forth in Article 75 applicable to detainees in international armed conflicts out of a sense of legal obligation’.<sup>27</sup> He also added that the statement was to be interpreted as ‘a significant contribution to the crystallization of the principles contained in Article 75 as rules of customary international law applicable in international armed conflict’.<sup>28</sup>

The Law of War Manual, which was issued by the Department of Defense in 2015 and updated in 2016, incorporates the principles laid down in Article 75 and expressly refers to the Obama Administration’s statement of 2011.<sup>29</sup> However, the importance of this statement, in so far as it assumes that the rules contained in Article 75 are not yet part of customary international law, should not be overestimated. The phrase ‘out of a sense of legal obligation’ may well conceal the intention of the United States Government to avoid being accused of having breached some of those rules.

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<sup>25</sup> *Ibid.*, 634.

<sup>26</sup> The White House, *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, 7 March 2011, available at <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

<sup>27</sup> ‘Responses of Legal Adviser Harold Koh to Questions submitted by Senator Richard G. Lugar’ in *Libya and War Powers: Hearing before the Committee on Foreign Relations, United States Senate*, 28 June 2011, available at: [https://fas.org/irp/congress/2011\\_hr/libya.pdf](https://fas.org/irp/congress/2011_hr/libya.pdf), 53, 57.

<sup>28</sup> *Ibid.*

<sup>29</sup> US Department of Defense, *Law of War Manual*, June 2015 (Updated Dec. 2016), 512, para. 8.1.4.2.

## 5. Conclusion

Given the overall practice and case law mentioned above, it is submitted that nowadays the provisions of Article 75 reflects customary international law.<sup>30</sup> Therefore, they bind all States, whether parties or not to Additional Protocol I. About twenty States are not yet parties to this Protocol, including Eritrea, Iran, India, Israel, Pakistan, Turkey and the United States. By virtue of customary international law, however, whenever involved in an international armed conflict, such States are obliged to accord the fundamental guarantees set forth in Article 75 to persons fulfilling the requirements therein.

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<sup>30</sup> This view is shared by a significant number of scholars. See among others: Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *International Review of the Red Cross* 375, 377; Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case' (2007) 89 *International Review of the Red Cross* 373, 387; Dörmann, 'Combatants, Unlawful', para.30; Anicée Van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century* (Oxford: Oxford University Press, 2011), 56; Laura M. Olson, 'Status and Treatment of Those Who Do Not Fulfil the Conditions for Status as Prisoners of War' in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (Oxford: Oxford University Press, 2015), 911, 926; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed., Cambridge: Cambridge University Press, 2016), 47.

# **How are persons deprived of their liberty in relation to non-international armed conflicts protected under Additional Protocol II?**

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## **1. Introductory remarks**

It is a great pleasure for me to be on this panel today with two distinguished colleagues. In order to commemorate the 40<sup>th</sup> anniversary of the Additional Protocols, I would like to shed some light on the question of how Additional Protocol II (APII) protects persons deprived of their liberty in relation to non-international armed conflicts. I must say that it is a privilege for me to speak in front of such a distinguished audience particularly since I have noticed that some of the experts that negotiated APII 40 years ago are among the participants of this Round Table.

I suppose you are all aware of the great importance of the subject of detainee protection, in particular, for the ICRC. Detainee protection is at the core of our humanitarian work. Let me emphasize this point by the following figures. Between 2011 and 2016, the number of detainees the ICRC visited rose from 540.000 to almost 1 million.<sup>1</sup> While I trust that most of you know that the ICRC visits detainees, it may be less known that the ICRC visits detainees in various contexts and the majority of persons visited are not detained in relation to an armed conflict. Indeed, it continues to be a great challenge for the ICRC to be granted access to detainees in non-international armed conflicts, who are often considered ‘security detainees’ or ‘terrorists’. Still, the visits that the ICRC conducts provide us with unique insights into the often severe humanitarian consequences of detention. Regardless of which actor is depriving persons of their liberty or where they are held, all too often the ICRC finds that detainees are subject to extra-judicial killing, enforced disappearance, or torture and other forms of ill-treatment.

Likewise, the ICRC frequently observes that detainees are held in inadequate conditions of detention, lacking, for example, adequate food, water, clothing, accommodation, hygienic installations, or health care; are not properly registered; or are deprived of meaningful contact with the

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<sup>1</sup> The steady increase in the number of persons the ICRC visits in detention is seen in the ICRC’s annual reports 2011-2016.

outside world. In light of this reality, the substance of the fundamental guarantees found in articles 4 and 5 of APII continues to be of greatest importance.

What I would like to do in the coming 15 minutes are three things: First, given that we commemorate the 40<sup>th</sup> anniversary of the Additional Protocols this year, I will start by reiterating the importance of the fundamental guarantees found in articles 4 and 5 of APII. Second, I will zoom in on article 5 and look, in particular, at the question of how this provision balances – and here I quote the 1986 ICRC commentary - ‘humanitarian ideals’ and ‘realistic considerations’. And third, I will also look at what APII does not contain, namely grounds and procedures for internment and rules on detainee transfers. In this context, I will also say a few words on the multilateral process on strengthening IHL protecting persons deprived of their liberty, which the ICRC has been facilitating for the past 5 years.

## **2. The importance of protections under APII**

Let us start by looking at article 4 of APII. This provision contains fundamental guarantees, which apply to persons who do not or no longer take part in hostilities, meaning civilians as well as fighters that are *hors de combat*. The chapeau of the article makes clear that these guarantees apply to persons deprived of liberty in relation to an armed conflict. As articles 4 and 5 state explicitly, this includes not only persons held in relation to penal processes but also persons who are interned, meaning held for security reasons.

To understand the significance of this article and in particular its first two paragraphs, we need to consider them in their historic context. Prior to the development of APII, IHL applicable in NIAC was primarily article 3 common to the fourth Geneva Convention, which is – as we all know – of greatest importance but also of greatest brevity. Thus, by adopting APII States significantly advanced humanitarian protections as compared to Common Article 3. States made explicit that, for example, corporal punishment, collective punishment, rape, enforced prostitution or any form of indecent assault were absolutely prohibited. While a number of these provisions were based on rules applicable in IAC, with regard to NIAC these guarantees in fact constituted ‘new law’.<sup>2</sup>

The importance of APII for the protection of detainees becomes even more evident if we look at articles 5 and 6, which more narrowly deal with

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<sup>2</sup> Bothe, Partsh, Solf, *New Rules for Victims of Armed Conflict*, Martinus Nijhoff Publishers, 2013.

conditions of detention and with penal prosecutions. Except for the requirement that the wounded and sick shall be cared for, and the general prohibition of unfair trials, Common Article 3 contained none of the detailed regulations that States decided to include in articles 5 and 6. The rules that we find in articles 5 and 6 also went beyond human rights law. While States adopted the International Covenant on Civil Rights (CCPR) at the same time that negotiations of the protocols were ongoing, the Covenant does not explicitly prohibit derogation from the humane treatment provisions in its article 10 and from fair trial guarantees in article 14. While the understanding of which norms can be derogated from has arguably changed, at the time that was not the case. Moreover, as compared to the Covenant, which only provides very broadly that ‘all persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity’, States considered it necessary to define protective and fairly detailed rules on humane conditions of detention during non-international armed conflict.

If we look at APII from today’s perspective, a first and important point is that the Protocol continues to be the only international law treaty that spells out essential standards for conditions of detention in NIAC. However, unlike in 1977 when a number of fundamental guarantees as listed in the Protocol could be considered new law and only applicable when APII applies, today the substance of the Protocol applies beyond the instrument’s scope of application. At least in the ICRC’s reading of customary IHL, the essence of most of the fundamental guarantees for persons deprived of their liberty as found in articles 4, 5 and 6, APII may be said to have developed into customary IHL, meaning that they apply independent of whether the territorial State is party to APII.

### **3. Conditions of Detention: Striking a balance between ‘realistic considerations and humanitarian ideals’**

If we look at the norms protecting persons deprived of their liberty more closely, the norms show evidence of very careful but also of very difficult negotiations. One issue that reportedly sparked ‘lengthy discussions’ during the negotiations was how to reconcile ‘humanitarian needs’ and ‘realistic considerations’ when defining the obligations under article 5.<sup>3</sup> Concretely, States faced important difficulties in defining adequate conditions of detention while, at the same time, taking into account the realities of armed conflict and diversity among its parties. The result is that with regard to the protection of detainees under APII, we find some norms that are absolute

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<sup>3</sup> ICRC commentary of 1986, para. 4565.

and have to be respected and provided for in all circumstances and others that are to be provided within the limits of the capabilities of the detaining authority.<sup>4</sup>

There is no doubt that the prohibitions listed in article 4 paras 1 and 2 are absolute. Acts such as torture, rape, or collective punishment are ‘prohibited at any time and in any place whatsoever’.<sup>5</sup> They cannot depend on the capabilities of the parties. Likewise, States decided that the requirements of article 5 para. 1 have to be respected ‘as a minimum’ with regard to all persons deprived of their liberty. These provisions include, for example, the provision of medical care or of food and water and accommodation. Again, these standards are required in rather absolute terms.<sup>6</sup> In contrast, the standards listed in article 5(2), which include important guarantees such as communication with the outside world, are to be provided ‘within the limits of ... [the] capabilities’ of parties to armed conflicts. It is true that the lists of absolute norms and those that are to be provided according to capabilities do not always make sense. I do not want to go into details on this but rather look at why this difference is drawn.

This goes back to at least two key concerns among States. The first one was that a number of States considered that, in light of the varying socio-economic situations among States, not all States will be able to provide all suggested standards to their full extent. A number of States emphasized that ‘most non-international armed conflicts occurred in developing countries in which living conditions were poor’,<sup>7</sup> and that if States are ‘unable to provide [such standards] even in normal circumstances’ it would be ‘miraculous to find such conditions’ in times of armed conflict.<sup>8</sup>

The second concern leading to formulating norms that take into account the capabilities of the parties was that a number of States did not believe that non-state parties to armed conflicts would be able to provide for sophisticated conditions of detention. They emphasized that a number of armed groups have ‘only rudimentary facilities at [their] disposal’ and that it might be difficult for them ‘to achieve the standards of hygiene, health, and so forth, described in the paragraph’.<sup>9</sup> Indeed, the drafters were very aware that ‘inequality between the parties to the conflicts increased the

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<sup>4</sup> ICRC commentary of 1986, para. 4565.

<sup>5</sup> Article 4(2) APII.

<sup>6</sup> However, as the ICRC commentary points out with regard to article 5(1)(a), which requires that ‘persons referred to in this paragraph shall, *to the same extent as the local civilian population*, be provided with food and drinking water’ (emphasis added): <sup>[SEP]</sup> ‘The obligation of the detaining authority remains an absolute one, but its <sup>[SEP]</sup> content varies, depending on the living conditions prevailing in the area’. ICRC commentary of 1986, para. 4573.

<sup>7</sup> Mexico, p. 338.

<sup>8</sup> Iraq, p. 341; see also Iran, p. 339.

<sup>9</sup> Canada, 337.

difficulty of establishing standards'.<sup>10</sup> Despite these challenges, there were also States that believed that conditions of detention provided in NIAC should not fall behind those provided in IAC.<sup>11</sup>

While as a result of these considerations some of the standards found in article 5 were not considered absolute in nature, it is nonetheless clear that a party to an armed conflict cannot deny these basic protections arbitrarily.<sup>12</sup> As the ICRC stressed during the negotiations, 'whatever the living conditions prevailing in the territory in which the armed conflict was taking place, prisoners should not be treated less well than those who detained them'.<sup>13</sup> Indeed, in discussions led by the ICRC regarding conditions of detention, a number of States and non-state forces emphasize that the least that they are able to provide for detainees are conditions similar to those enjoyed by the detaining forces. While this can be extremely low and arguably inhumane, this is a standard for which no force could claim that it is not able to provide.

#### **4. What is not in Additional Protocol II?**

When looking at how Additional Protocol II protects persons deprived of their liberty, it is not only important to look at what the Protocol provides for but also what it does not provide for. In this respect, at least two points should be highlighted.

First, APII does not address grounds and procedures for internment. The provisions on the treatment of persons deprived of their liberty apply to detainees and internees and thereby recognize that in times of armed conflict, persons may be deprived of their liberty not only in relation to penal prosecution but also based on security concerns. However, the Protocol does not provide rules similar to the internment regime found for either POWs under GCIII or for civilian internees under GCIV. One of the most obvious reasons for this omission is that States would not have agreed to any rules that define grounds and procedures according to which non-state parties to armed conflicts could intern state armed forces. While this concern remains for many States,<sup>14</sup> it leaves an important gap in the laws of NIAC. IHL of NIAC does not define grounds for internment; details on how a decision of internment needs to be reviewed; what minimum procedural guarantees apply; or when a person has to be released. In practice, this means that in a number of contexts internees are held without

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<sup>10</sup> Spain, p. 425

<sup>11</sup> Ukraine, 329.

<sup>12</sup> Bothe, 742.

<sup>13</sup> ICRC, 336.

<sup>14</sup> See CANI+ discussions.

adequate protection, which frequently leads to arbitrary detention without necessary procedural safeguards. Such detention causes deep anguish, anxiety and distress among internees and their families, and in some cases leads to significant psychological consequences.

A second contemporary concern that APII does not address is the question of detainee transfers, meaning rules regulating under what conditions parties to a NIAC can transfer a persons from their power into the power of another authority. The drafters of APII, presumably, did not consider this issue because, at the time, NIACs were normally fought between the territorial State and a non-state armed group. However, in a number of armed conflicts today, coalitions of States, or other multinational forces, fight jointly against one or more armed groups in a host State's territory. In this context, the transfer of persons into the hands of a power that is likely to disrespect the transferred person's most fundamental rights is a very severe humanitarian concern.

## **5. Initiatives to strengthen detainee protection in NIAC beyond APII**

Against this background and in particular with regard to the gaps left in APII, I would like to conclude my remarks with a few words on the work that States and the ICRC have conducted over the past 5 years to strengthen IHL protecting persons deprived of their liberty, in particular, in relation to NIAC. As many of you will be aware, based on Resolution 1 adopted at the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent (RCRC), between 2012 and 2015 the ICRC conducted a major research and consultation process on how to strengthen IHL protecting persons deprived of their liberty. States largely confirmed the ICRC's finding that with regard to detainee protection in NIAC, IHL needs strengthening in at least four areas: first, conditions of detention; second, the protection of vulnerable groups; third, grounds and procedures for internment; and fourth, detainee transfers. Thus, at the 32<sup>nd</sup> RCRC Conference in 2015, members recommended further work on the subject 'with the goal of producing one or more concrete and implementable but non-legally binding outcomes to strengthen IHL protections for persons deprived of their liberty in relation to armed conflict, particularly in relation to NIAC'.<sup>15</sup> Members of the Conference recognized that this topic 'is a priority'.<sup>16</sup> However, at the Conference States could not agree on how further work would be conducted and instead requested that at the outset of further work, States and the ICRC would agree on modalities of further work. Finding

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<sup>15</sup> 32nd RCRC Conference, Resolution 1, 2015, para. 8.

<sup>16</sup> Para. 5.

modalities of work is sadly what has occupied me and many colleagues in Geneva over the past almost two years. Despite a significant effort by various States and the ICRC, it has not yet been possible to agree on such modalities, which currently prevents States and the ICRC from working collectively on strengthening detainee protection based on the Conference mandate. At this point, I can only say that we continue to do our best in on-going consultations with States to find an acceptable way forward in order to build on, and complement, the important protections that we find in APII.

## **Détention lors d'un conflit armé : quelle relation entre droit international humanitaire et droit international des droits de l'homme ?**

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L'invitation que nous honorons aujourd'hui célèbre le 40<sup>ème</sup> anniversaire des Protocoles additionnels aux Conventions de Genève.

Quarante ans, est une force. Combien de fois n'ai-je pas entendu cet étrange reproche à l'encontre du droit international humanitaire : pourquoi obéissons-nous encore à des conventions qui datent d'il y a si longtemps ? Les Protocoles de 1977 permettent aisément de montrer combien ce préjugé est faux. La source principale du droit international humanitaire tel que nous l'appliquons aujourd'hui reste – pour reprendre une expression que Jean Pictet appliquait aux Conventions de Genève et que nous reprendrons volontiers au sujet des Protocoles – des *textes bouillonnant de sève et palpitants de chaleur humaine*.

Mais la force de cet anniversaire réside aussi dans ce que les principales mutations des conflits armés se sont justement déroulées ces quarante dernières années. Comme l'écrivait Victor Hugo, l'un des privilèges de la vieillesse, c'est d'avoir, outre son âge, tous les âges, et nous savons aujourd'hui – à l'aune de crises mondialisées où les flux de combattants, d'armes, de drogue, de technologies innervent les zones grises des cartes, où des groupes armés se considèrent comme des Etats (Daesh) et des Etats agissent à travers des groupes armés – (nous savons aujourd'hui) où se trouvent dans les Protocoles les points qui cristallisent les défis juridiques et opérationnels.

La privation de liberté en conflit armé non international est l'un d'eux et ce moyen de coercition est devenu l'un des domaines privilégiés de l'intégration du droit aux opérations militaires, je dirais même « des droits » pour convier à notre réflexion non seulement les Protocoles mais aussi le droit des droits de l'homme qui, en ce qui concerne la France et via la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, s'applique aux opérations militaires en dehors même de son territoire. C'est le cas au Sahel de l'opération Barkhane que conduit la France contre les groupes armés organisés dans le cadre d'un conflit armé non international depuis 2013 et sous le mandat de la résolution 2364. Je souhaitais ainsi lire ce 40<sup>ème</sup> anniversaire à travers le prisme de l'opération Barkhane qui symbolise les efforts qu'un Etat

membre de la CESDH peut réaliser pour se conformer au droit des conflits armés et au droit des droits de l'homme, dans leurs complémentarités comme, parfois dans les débats qui animent leurs interprétations.

A ce sujet, et pour reprendre encore les mots de Jean Pictet dans son recueil *Le droit international humanitaire et la protection des victimes de la guerre : Le droit international humanitaire et le droit des droits de l'homme* ont une même ambition : la nécessité de protéger la personne humaine contre ceux qui veulent l'écraser. Il ajoute : cette idée a néanmoins donné naissance à deux efforts distincts qui se sont développés sur des voies parallèles : limiter les maux de la guerre et défendre l'homme contre l'arbitraire. En conflit armé non international, ce parallélisme ne signifie pas indépendance et autonomie de chacun de ces corps de règles. La capture, la rétention et le transfert d'un individu dans le cadre du conflit ne peut qu'être lue au regard des articles 2, 3 et 5 de la CEDH.

Je souhaitais examiner à présent, avec trois exemples concrets de l'opération Barkhane, l'une des manières de faire dialoguer les textes sans remettre en cause leur ambition première, la protection, ni poser à l'action militaire des conditions dirimantes.

Le premier des exemples concerne les fondements juridiques de la privation de liberté en conflit armé non international. Au Sahel, la France a négocié un environnement juridique destiné à renforcer la base légale de la capture d'individus liés au conflit malien. Les accords intergouvernementaux conclus avec les différents Etats de la zone, et tout particulièrement le Mali, comprennent une clause liée aux personnes privées de liberté. Elle mentionne explicitement l'interdiction de tout mauvais traitement, les conditions de transfert de ces personnes aux autorités locales et un droit de visite dans les prisons maliennes. Ensuite, les instructions données aux troupes sur le terrain encadrent et limitent la privation de liberté. La capture d'un individu ne peut intervenir que sous deux conditions :

- elle reste exceptionnelle et ne se produit que si les forces de sécurité locales ne sont pas en mesure de le faire, pour des raisons techniques ou d'éloignement géographique par exemple. Le respect de la souveraineté reste notre priorité, nous intervenons en effet dans un conflit interne avec l'accord des autorités locales.
- La capture ne peut concerner que des individus représentant une menace pour les forces françaises ou leurs alliés, c'est-à-dire qu'ils sont capturés pour d'impérieuses raisons de sécurité liées au conflit en cours. Dans la majorité des cas, il s'agit d'individus capturés lors d'une action de combat, les armes à la main, une embuscade contre les forces françaises par exemple. Nos chefs d'éléments tactiques, les capitaines qui commandent sur le terrain ont par ailleurs pour

instruction de libérer immédiatement tout individu qui ne remplirait pas les conditions que j'ai évoquées.

Ainsi, ces procédures rigoureuses ont permis aux forces françaises de capturer des acteurs clef du conflit malien. Ces pratiques opérationnelles font écho à la résolution de 2015 du CICR sur la privation de liberté en conflit armé non international : les Etats ont, dans toutes les formes de conflit armé, à la fois le pouvoir de placer en détention et l'obligation de fournir protection et assistance et de respecter les garanties juridiques. Les deux exemples qui suivent traitent des garanties et protections.

En effet, le second exemple concerne la rétention administrative des individus capturés. Sur ce sujet, plusieurs éléments de contexte doivent être exposés. Des centaines, voire des milliers de kilomètres séparent les différents centres opérationnels des forces françaises au Sahel, parfois dans des zones où le retour de l'Etat n'est pas encore effectif ; par ailleurs, les actions de combats s'étalent sur plusieurs jours, des semaines parfois, pendant lesquelles tous les moyens sont mis œuvre pour lutter contre les groupes armés organisés. Ainsi, un individu capturé par les forces françaises peut, pour ces raisons opérationnelles, ne pas être immédiatement remis aux autorités locales et rester temporairement en rétention administrative aux mains des forces françaises. Cette période de privation de liberté est la plus courte possible. Elle est encadrée par des garanties de protection de l'individu : le personnel en charge de ces individus est spécifiquement formé à cette tâche, en particulier sur l'interdiction de tout mauvais traitement. Les hommes sont séparés des femmes, les individus retenus peuvent pratiquer leur religion et bénéficient d'un entretien à huis clos avec le CICR ainsi que d'une visite médicale systématique à leur arrivée et à leur départ. Lorsqu'ils ont été blessés pendant les combats, ils font l'objet de soins jusqu'à la consolidation de leurs blessures, c'est-à-dire que nous nous réservons le droit de les garder en soin tant que leurs blessures ne présentent plus de risques de réouverture ou d'infection. Ces garanties permettent d'assurer une protection de ces individus conforme au droit international humanitaire et au droit des droits de l'homme.

Le troisième exemple concerne le transfert et le suivi des personnes capturées. Dans cette phase, le droit des droits de l'homme, avec le principe de non refoulement, nous permet d'aller plus loin que le droit international humanitaire. Les forces françaises s'intéressent donc au processus de judiciarisation mise en œuvre localement. En effet, nous nous considérons responsables de l'individu privé de liberté dès sa capture ; c'est-à-dire dès que des mesures de coercition liées à la privation de liberté lui ont été appliquées. Cette responsabilité court de ce moment-là jusqu'au moment du verdict du procès qui sera intenté par les autorités judiciaires locales. Le

transfert des personnes capturées aux autorités judiciaires locales n'est cependant pas systématique. Les mineurs sont directement transférés dans des centres locaux adaptés et suivent un programme de réinsertion qui comprend des activités sportives et des modules de suivi psychosocial avant de retrouver leurs familles. Ensuite, en application du principe de non refoulement et dès que nécessaire, les forces françaises cherchent à obtenir des garanties de bon traitement par voie diplomatique. Le transfert des individus capturés s'effectue dans des lieux de détention qui ont fait l'objet d'une visite préalable, pour nous assurer des conditions de vie. Parallèlement et dans le cadre d'actions d'appui au développement, nous multiplions les initiatives en vue d'améliorer ces conditions avec le don de médicaments, l'envoi de médecins militaires en cas de problème sanitaire ou encore, par exemple, la réhabilitation, en ce moment même, du forage de la prison de Koulikoro à Bamako qui permettra aux détenus d'accéder à nouveau à l'eau courante.

Les lieux où sont transférés les individus capturés par l'opération Barkhane font ensuite l'objet de visites mensuelles de représentants français, dont un conseiller juridique spécialisé en droit international humanitaire et en droit des droits de l'homme. Ces officiers s'entretiennent avec chaque individu, ainsi qu'avec les autorités pénitentiaires. Ces visites sont complétées d'une discussion approfondie avec le Procureur du lieu afin de faire le point sur l'avancée du processus judiciaire. Les individus capturés sont transférés avec l'ensemble de leurs biens et leur matériel militaire, ce qui facilite l'enquête. Dans les faits, ce suivi mensuel des personnes transférées montre aux autorités locales l'importance que les forces françaises accordent au respect des droits de l'homme.

Ces trois exemples montrent quelle complémentarité peut être donnée au droit international humanitaire et au droit des droits de l'homme dans la conduite, sur le terrain, d'actions résultant dans la privation de liberté d'individus.



## **IV. Sexual and gender-based violence in armed conflict**



# **How do the Additional Protocols address the issue of sexual and gender-based violence in armed conflicts?**

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## **1. Terminology**

Before I begin my remarks, I need to make three preliminary points. First, ‘gender’ is not the same as ‘women’. Although definitions of gender vary, a useful one can be found in the programme for this roundtable. It reads: ‘Gender is often described as the culturally constructed and prescribed behaviour of men and women, specifically the roles, attitudes and values ascribed to them on the basis of their sex.’<sup>1</sup>

Likewise, although there is no universally accepted definition of gender-based violence, that term can be understood as referring to violence that is directed at an individual because of his or her gender or that affects one gender disproportionately.<sup>2</sup> Thus, gender-based violence is not the same as violence against women and the two phrases should not be used interchangeably.

Second, gender-based violence is not the same as sexual violence. Gender-based violence need not be of a sexual nature. Sometimes, when the phrase ‘sexual and gender-based violence is used’, the two are conflated

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<sup>1</sup> Programme. See also UN, Office of the Special Adviser on Gender Issues and Advancement of Women, Gender Mainstreaming, Concepts and Definitions, ‘Gender: refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.’ [www.un.org/womenwatch/osagi/gendermainstreaming.htm](http://www.un.org/womenwatch/osagi/gendermainstreaming.htm).

<sup>2</sup> Adapted from Committee on the Elimination of Discrimination against Women, General Recommendation 19, para. 6, A/47/38 (1993). See also Committee on the Elimination of Discrimination against Women, General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, CEDAW/C/CG/35, 14 July 2017.

and the only violence considered is sexual violence. That leads to an incomplete picture.

Third, sexual violence is not limited to rape alone. It includes such things as sexual slavery, enforced prostitution, and enforced sterilization.

It is important to be clear on these issues of language because in numerous reports, the terms are conflated, thus skewing the issue and omitting important parts of the picture. Words matter.

## **2. Male and female experiences of armed conflict**

The socially constructed roles of men and women means that men and women experience armed conflicts in different ways. Men make up most of the armed forces of states as well as most of the military wings of armed groups. In some societies, women are still seen as caregivers and in need of protection – a stereotype – and this is reflected, to an extent, in the language of the Additional Protocols. For example, the notion of the wounded and sick in Additional Protocol I includes ‘expectant mothers’,<sup>3</sup> and that Protocol refers to women as ‘the object of special respect’.<sup>4</sup> The language of Additional Protocol I is a reflection of the period during which it was drafted.

Women and men, girls and boys, all experience gender-based violence in armed conflicts. With the caveat that numbers can be difficult to ascertain and are often not disaggregated by sex, and speaking in broad brush terms – a point I will come back to at the end – in some armed conflicts, males, particularly males of military age, are killed in sex-selective massacres or disappear. They are often killed or disappear because they are males of military age and thus they have to be prevented from taking part in the hostilities. For example, in a number of armed conflicts, males have been separated from females and the males of the group have been summarily executed.

Females are disproportionately subjected to sexual violence, including rape, enforced prostitution, sexual slavery and other forms of sexual violence.

In a number of conflicts, children have been forcibly recruited into the armed forces or the armed group. Their subsequent experience is also gendered: ‘boys may be required to become child soldiers and girls are

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<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (Additional Protocol I), Article 8(a).

<sup>4</sup> Additional Protocol I, Article 76.

likely to have to perform domestic tasks and become subject to sexual violence.<sup>5</sup>

These are just some examples of the gendered experiences of armed conflict.

### **3. The role of the Additional Protocols in addressing sexual and gender-based violence**

The Additional Protocols address the issue of sexual and gender-based violence in different ways.

#### *3.1 Sex-selective massacres*

Massacres, sex-selective or otherwise, and summary executions are prohibited by the law of armed conflict. Both Additional Protocol I and Additional Protocol II explicitly prohibit violence to life, in particular, murder.<sup>6</sup>

#### *3.2 Disappearances*

By contrast, the Additional Protocols do not explicitly mention the term enforced disappearances. An enforced disappearance is essentially ‘the arrest, detention, abduction or any other form of deprivation of liberty by... [a Party to the conflict] followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.’<sup>7</sup> However, taken together, a number of provisions implicitly prohibit that practice.

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<sup>5</sup> C. Chinkin, ‘Gender and Armed Conflict’, in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2015) 675, 676.

<sup>6</sup> Additional Protocol I, Article 75(2)(a); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (Additional Protocol II), Article 4(2)(a).

<sup>7</sup> Adapted from Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. The state actor requirement of the Convention definition has been adapted to refer to the Party to the conflict. On the equivalent issue in the Convention against Torture’s definition of torture, see *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T, ICTY Trial Judgment, 22 February 2001, paras 465-497.

We have already seen that the Additional Protocols prohibit violence to life. They also require humane treatment and prohibit torture and degrading treatment. Importantly for present purposes, Article 33 of Additional Protocol I requires parties to armed conflicts to record certain information about persons who have been detained. Information concerning persons reported missing by a Party is to be transmitted to that Party directly or through the Central Tracing Agency or other listed actor.<sup>8</sup> Parties are also required to search for persons who have been reported missing by the adverse Party ‘as soon as circumstances permit, and at the latest from the end of active hostilities’.<sup>9</sup> Article 32 of Additional Protocol I provides that these obligations, among others, are ‘prompted mainly by the right of families to know the fate of their relatives.’ Taken together, these provisions can be said to implicitly prohibit enforced disappearances. The Geneva Conventions contain additional reporting obligations.<sup>10</sup>

For its part, Additional Protocol II does not contain similar reporting obligations. However, the Protocol does require humane treatment and obliges the Detaining Power, within the limits of its capabilities, to allow detainees to send and receive letters and cards,<sup>11</sup> through which the individual has contact with the outside world. And reporting obligations arise through customary international law.<sup>12</sup>

### *3.3 Recruitment of children*

Insofar as recruitment is concerned, both Additional Protocols prohibit the recruitment of children under the age of 15 into the armed forces, and in the case of Additional Protocol II, also into an armed group.<sup>13</sup> Additional Protocol I also provides that the Parties are to take all feasible measures to prevent children under the age of 15 from taking a direct part in hostilities. Additional Protocol II provides for greater protection for children, providing that children under the age of 15 shall not be allowed to take part in hostilities – the prohibition is not limited to taking a direct part in hostilities.

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<sup>8</sup> Article 33(3).

<sup>9</sup> Article 33(1).

<sup>10</sup> See, for example, Convention (III) relative to the Treatment of Prisoners of War (1949), Article 122; Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), Article 136.

<sup>11</sup> Article 5(2)(b).

<sup>12</sup> Customary International Humanitarian Law, Rule 123.

<sup>13</sup> Additional Protocol I, Article 77(2); Additional Protocol II, Article 4(3)(c).

### 3.4 Sexual violence

In terms of sexual violence, Article 76(1) of Additional Protocol I provides that ‘Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.’ The Protocol thus makes explicit reference to certain forms of sexual violence and provides that women are to be protected against these acts. Article 75 also prohibits ‘enforced prostitution and any form of indecent assault’, not limiting the prohibition to a particular sex. Article 76 also contains a broader protection for women in that it makes women the object of ‘special respect’.

Additional Protocol I also provides implicit protection against sexual violence. Article 75(1) provides for the general obligation of humane treatment which, therefore, includes a prohibition on sexual violence. Article 75(2) prohibits specifically ‘violence to the life, health, or physical or mental well-being of persons’ and, in particular, torture and mutilation. We know that rape and other forms of sexual violence can constitute torture.<sup>14</sup> Likewise, certain forms of sexual violence can amount to mutilation. Article 75(2) goes on to prohibit ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’ and includes, as mentioned, enforced prostitution and indecent assault. Certain forms of sexual violence, such as forced public nudity, have been found by the International Criminal Tribunal for the former Yugoslavia to constitute outrages upon personal dignity.<sup>15</sup>

For its part, Article 4 of Additional Protocol II sets out the general standard of humane treatment and prohibits many of the same acts.

Thus, in order to understand the protections against sexual violence, we have to look beyond the explicit references to rape or indecent assault alone.

Indeed, there are other provisions of the Protocols which contribute to the protections against sexual violence. In particular, Article 75(5) of Additional Protocol I provides that ‘women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men’s quarters’ and ‘they shall be under the immediate supervision of women.’ Additional Protocol II is to similar effect.<sup>16</sup> The provisions seek, among other things, to protect women from sexual violence.

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<sup>14</sup> See *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23 and IT-96-23/1-A, ICTY Appeal Judgment, 12 June 2002, para. 150.

<sup>15</sup> See, for example, *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T, ICTY Trial Judgment, 22 February 2001, paras 766-774.

<sup>16</sup> Article 5(2)(a).

#### 4. Conclusions

That brief overview provides a snapshot of how the Additional Protocols address sexual and gender-based violence. A few broader points emerge by way of conclusion.

First, although we are analysing the contribution of the Additional Protocols, they must be read together with the Geneva Conventions which they supplement, and customary international law. They should not be read in isolation.

Second, the Additional Protocols provide explicit protections against sexual and gender-based violence. We have seen, for example, mention of indecent assault and rape.

That said, third, many of the protections afforded by the Additional Protocols are framed in gender-neutral terms. Thus, we need to look beyond solely the explicit protections of the Protocols and we must pay particular attention to the neutral, general language. It is not enough simply to search for references to women or to rape. That only provides part of the picture. Broader protection and references to humane treatment, for example, are also important.

Fourth, intersectional gender-based violence often takes place, that is to say, gender often intersects with another characteristic, for example, age, in respect of massacres of military aged men, or ethnicity, in respect of sexual violence against women of a particular ethnicity. And it is intersectional sexual and gender-based violence that we often see in practice.

Fifth and finally, there remain a few blind spots in practice. Because of the broad brush approach that I mentioned earlier, aspects of sexual and gender-based violence tend to be overlooked either in the Additional Protocols or in practice.

Insofar as women and girls are concerned, much of the focus tends to be on sexual violence and there is less focus on other aspects of women's experience in armed conflicts.

I have already noted that men comprise most of the armed forces. What happens when women are part of the armed forces and are captured and detained? Additional Protocol I and the Third Geneva Convention require women to be held in separate quarters from those of men and placed under the immediate supervision of women. However, in Additional Protocol II, that is subject to the capabilities of the Detaining Power.<sup>17</sup> The International Committee of the Red Cross draft of the provision made it an absolute obligation and not capability-dependent but that was altered during the 1974-77 Diplomatic Conference.<sup>18</sup> In practice conditions of detention of

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<sup>17</sup> Article 5(2).

<sup>18</sup> Draft Protocol Additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Article 8(2)(d), in *Official*

female detainees are frequently inadequate. As there tend to be fewer women detainees than male detainees, they tend to be housed in detention facilities that are designed to house men alone, raising issues around safety and privacy.<sup>19</sup> Places of detention of female detainees also tend to be smaller, leading to overcrowding and unhygienic conditions.<sup>20</sup> And their medical and health needs are not always met.

Insofar as men and boys are concerned, the reverse is true. They are often not seen as victims of sexual violence. For example, it is notable that Additional Protocol I contains the prohibition on rape in Article 76 with specific reference to the protection of women and not in the Article 75 fundamental guarantees clause. To be clear, as I have already indicated, rape does fall within that provision, with its reference to humane treatment and the prohibition on torture. But it confirms that we have to look beyond the explicit language used and interpret the neutral language of the Additional Protocols in a way that provides protection and meets the needs of all persons concerned.

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*Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Volume I, Part 3, 35.*

<sup>19</sup> *Addressing the Needs of Women affected by Armed Conflict* (ICRC, March 2004) 119.

<sup>20</sup> *Women facing War* (ICRC, October 2001) 179.

## Ntaganda: re-alignment of a paradigm

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### Introduction

On June 15, 2017, the Appeals Chamber of the International Criminal Court issued a significant judgment, in the proceeding in Prosecutor v. Ntaganda.<sup>1</sup> It concerned count 6, rape, and count 9, sexual slavery, under Article 8(2)(e)(vi) of the Rome Statute.<sup>2</sup> The Appeals Judgment comes after several Defence challenges<sup>3</sup> to the Court's jurisdiction over these war crimes of sexual violence - a seemingly foreclosed matter of *ratione materiae* given their express enumeration<sup>4</sup> in the Statute. The notoriety

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<sup>1</sup> *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr. Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9," No. ICC-01/04-02/06 OA5, 15 June 2017 (hereinafter, "Appeals Judgment").

<sup>2</sup> The Rome Statute A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>3</sup> The Defence challenges resulted in several decisions. At the confirmation stage, Pre-Trial Chamber II rendered: Ntaganda, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014 (hereinafter Confirmation Decision) [www.icc-cpi.int/CourtRecords/CR2014\\_04750.PDF](http://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF); At the Trial stage, Trial Chamber VI rendered, Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892, 9 October 2015; In response to an interlocutory appeal at the trial stage, the Appeals Chamber handed down, Judgment on the appeal of Mr. Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1225, 22 March 2016; In response to appellate decision, Trial Chamber VI handed down, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of counts 6 and 9, 2 ICC-01/04-02/06-1707, 4 January 2017. The Appeals Judgment constitutes the final decision in regard to the Defence's challenge to the Court's jurisdiction.

<sup>4</sup> Article 8 of the Rome Statute governs war crimes. Sub-section (2)(e)(vi) proscribes: (2)(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(...)

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

surrounding the judgment resides in the factual basis of the charges.<sup>5</sup> Mr. Ntaganda, allegedly, is responsible for rapes and sexual slavery committed by members of his armed forces against children who were members of that very armed force. Thrice the Defence contested the Court's ability to lodge the charges against the accused, once at the confirmation stage and twice at the trial stage.<sup>6</sup> The fourth challenge rendered the Appeals Judgment. At the heart of the legal enquiry is whether the Rome Statute's jurisdictional reach extends to intra-party or "same side" war crimes for sexual violence, in a non-international armed conflict.

The normative paradigm holds that war crimes prohibit acts committed against protected persons in situations of international armed conflict (IAC) and committed against civilians and persons *hors de combat* in non-international armed conflict (NIAC).<sup>7</sup>

Manfred Lachs' 1945 definition<sup>8</sup> of IAC war crimes paid heed to shielding enemy citizens, citizens of a neutral states and stateless civilians from harm. The Geneva Convention regime of 1949's expressly conferred protected status on a broader class of persons. Protection therein is owed to wounded and shipwrecked combatants,<sup>9</sup> prisoners of war,<sup>10</sup> civilian

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<sup>5</sup> Evidence in paragraph 82 of the Confirmation Decision in support of Counts 6 and 9 states: "Abelanga, a UPC/FPLC soldier, raped a girl under the age of 15 years who was his bodyguard from November 2002 until at least March-May 2003. Around mid-August – beginning of September 2002, young girls, including under the age of 15 years, were raped in Mandro camp. They were "domestic servants" and they "combined cooking and love services." Another girl, aged 13 years, was recruited by the UPC/FPLC and continuously raped by Kisembo, a UPC/FPLC soldier, until he was killed in Mongbwalu."

<sup>6</sup> See, discussion *infra*. Section I.

<sup>7</sup> Customary Rule 87 of the ICRC Study affirms that humane treatment is a core international humanitarian law (hereinafter, IHL) concept. See, International Committee of the Red Cross (ICRC), *Customary Humanitarian Law, 2005*, Vol. I, p. 306. (ICRC Study) available at [www.refworld.org/docid/5305e3de4.html](http://www.refworld.org/docid/5305e3de4.html).

Humane treatment is owed to protected persons and to persons *hors de combat*. International criminal jurisprudence has held such designation or status to be the parameters of the prohibitions of war crimes to persons. See, Prosecutor v. Sesay, Kallon, Gbao, Judgment, SCSL-04-15- T, 2 March 2009, para. 1451.

<sup>8</sup> Manfred Lach's definition is: "A war crime is any act of violence qualified as a crime, committed during and in connection with a war and facilitating its commission, the act being directed at a belligerent state, its interests, or its citizens, against a neutral state, its interests, its citizens as well as against stateless civilians, unless it is justified under the law of warfare.", M. Lach, *War Crimes: An Attempt To Define The Issues* (Stevens and Sons) 1945, p. 100.

<sup>9</sup> Customary Rule 111 states: "Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property." ICRC Study, Vol I, p. 403.

<sup>10</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Article 25-32 (hereinafter, Third Geneva Convention) available at: [www.refworld.org/docid/3ae6b36c8.html](http://www.refworld.org/docid/3ae6b36c8.html).

populations in the hands of a Party of which they are not nationals *and* non-combatants such as accompanying civilians, and medical and religious personnel.<sup>11</sup> IAC war crimes protection also extends to UN forces.<sup>12</sup> Special protection is afforded children, whether they are recruited, engaged in hostilities or become prisoners of war.<sup>13</sup> Protected person status under IAC, has been judicially interpreted to include citizens of the same country who differ in their allegiance.<sup>14</sup>

In NIAC, provisions such as Common Article 3 or Additional Protocol II's Article 4 cover fighters who have put down their arms or are otherwise *hors de combat*. Children, even if associated with armed conflict,<sup>15</sup> and civilians without regard to national affiliation are protected.<sup>16</sup>

Some side NIAC wars crimes of sexual violence did not originate with the Ntaganda case; however, the Ntaganda chambers have turned out incisive jurisprudence. This brief article reviews the Ntaganda litigation. The first section examines the positions of the parties, the rulings of the chambers, and scholarly commentaries with regard to the preliminary Ntaganda decisions. The second section garners a closer look at the Appeals Judgment and the attendant scholarly commentaries. The third section proffers a complementary legal analysis under the framework of international law to bolster that of the Appeals Judgment. It attempts to critically identify the protection, if any, offered to child soldiers who are same side victims of war crimes of sexual violence during NIAC. In the fourth section, the author suggests that policy reasons might also augur for a nuanced re-alignment of the normative war crimes paradigm.

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<sup>11</sup> ICRC Customary Rule 25 states: Medical Personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. ICRC Study, Vol. I, p.79.

<sup>12</sup> ICRC Customary Rule 33 states: Directing an attack against personnel and objects involved in peacekeeping missions in accordance with the Charter of the United Nations as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. ICRC Study, Vol. I, p. 112.

<sup>13</sup> ICRC Customary Rule 136 states that, children must not be recruited into armed forces or armed groups. ICRC Study, Vol. I, p.482. However, Article 77 of Additional Protocol I recognizes that children always enjoy special protection, even when recruited and if captured. See, discussion *infra*, Section III.

<sup>14</sup> In a significant ruling, the Tadić Appeals Chamber overturned an acquittal for war crimes in an international armed conflict committed against persons of the same nationality. It opined that even when perpetrators and victims share a nationality, Geneva Convention IV safeguarded those civilians who do not enjoy "the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State" that held them. Prosecutor v. Duško Tadić, Judgment, Case No.: -94-1-A, 15 July 1999, paras 168-170. See also, Prosecutor v. Prlić et al. Judgment, IT-04-74-T, 29 May 2013, paras 608-610.

<sup>15</sup> *Supra*, at fn. 13.

<sup>16</sup> ICRC Customary Rule 87: "Civilians and persons hors de combat must be treated humanely". See, Geneva Conventions of 1949, common Article 3.

## 1. Preliminary Decisions

### *a. Pre-Trial Confirmation Decision*

Even though the Ntaganda litigation ostensibly addressed subject matter jurisdiction, essentially, it asked “who” owed protection to child soldiers for same side sexual abuse not alleged as part of the war crimes of conscription, enlistment or active participation in hostilities.

At the confirmation stage, the Ntaganda Defence argued before Pre-Trial Chamber II, that counts 6 and count 9 could not be confirmed<sup>17</sup> since the prohibitions of rape and sexual slavery under Article 8(2)(e)(vi) of the Rome Statute were not enforceable against members of one’s own forces.<sup>18</sup> Moreover, the Defense contested the Prosecution’s reliance on Article 4(3)(d) of Additional Protocol II<sup>19</sup> by asserting that child soldiers who participated in hostilities only enjoyed special protection from sexual violence upon capture. Interestingly, the Defense’s use of participation in hostilities seemed to be synonymous with a child soldier’s status as a member of the armed group rather than as a time-bound moment of actively participating in hostilities. The Defense underscored that the alleged sexual conduct does not breach any rule of international customary law and, thus, if confirmed, Counts 6 and 9 would violate the principle of legality.<sup>20</sup>

To address the submission, Pre-Trial Chamber II examined Common Article 3’s guarantee of humane treatment for persons *hors de combat* and Article 4(1-2) of Additional Protocol II’s similar safeguards for persons who do *not* take a direct part or who have ceased to take direct part in hostilities.<sup>21</sup> It relied upon Article 4(3) of Additional Protocol II to refute the premise that a child’s “mere membership” in an armed group could be equated with “determinative proof of direct/active participation in hostilities”.<sup>22</sup> Conflation of mere membership with active participation in hostilities undermines the protection child soldiers retain when not engaged in hostilities. Pre-Trial Chamber II rejected the Defence argument, reasoning that:

[C]hildren under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities. That said, the Chamber

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<sup>17</sup> Conclusions écrites de la Défense de Bosco Ntaganda suite à l’Audience de confirmation des charges, 14 April 2014, ICC-01/04-02/06-292-Red2, paras 250-263.

<sup>18</sup> In particular, the Defence submitted that, “international humanitarian law does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict”. *See*, Confirmation Decision, para. 76.

<sup>19</sup> Document Containing the Charges, *Ntaganda* (ICC-01/04-02/06), 10 January 2014, para. 107.

<sup>20</sup> Consolidated Defence Submissions, ICC-01/04-02/06-1256, para. 39.

<sup>21</sup> Confirmation Decision, para. 77.

<sup>22</sup> *Ibid.*, para. 78.

clarifies that those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature, including rape.<sup>23</sup>

Pre-Trial Chamber II opined that IHL protected child soldiers from rapes and sexual slavery when they were not partaking in hostilities since these acts could not be committed contemporaneously to their participation in hostilities. It found these IHL protections “reflected” in Article 8(2)(e)(vi). Accordingly, the Court was not “barred from exercising jurisdiction” over the rapes and sexual slavery committed against child soldiers by Ntaganda’s forces.<sup>24</sup> It confirmed Counts 6 and 9.

One scholar commented that the Confirmation Decision’s “swift conclusion” differentiating participation from non-participation in hostilities in regard to the commission of sexual abuses<sup>25</sup> requires further analysis. Rodenhäuser contrasts IHL’s protection of civilians to that of child soldiers, noting that the latter are legitimate targets as members of an armed group even when not participating in hostilities. He sincerely queries, even given the continuing criminality-from recruitment to participation in hostilities-whether IHL affords any child soldiers protection other than that ascribed to any combatant or fighter. Members of armed groups, irrespective of age may be targeted, captured and detained.

The overarching inquiry, according to Rodenhäuser, resides in recognizing an implicitly expansive reading of civilian or of *hors de combat* status at the time of the intra-party sexual abuse against child soldiers. Armed groups do not have *carte blanche* to commit ill treatment upon children who form part of their group, even if those children exercise a continuous combat function or engage in hostilities. Whether under Common Article 3 or Article 8(2)(e)(vi) of the Rome Statute, Rodenhäuser first suggests that children who factually do not exercise continuous combat function even though subjected to the continuous illegality of recruitment remain under the protection of IHL. They retain their civilian character. Moreover, in terms of child soldiers who do have a continuous or even mixed combat function, he offers that the better view, irrespective of the enemy’s ability to target child soldiers, would be for children to be seen by their armed groups as civilians who are owed special protection. Moreover, Rodenhäuser would understand the protection granted under *hors de combat* to apply to child soldiers who are sexually assaulted, intra-party,

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<sup>23</sup> *Ibid.*, para. 79.

<sup>24</sup> *Ibid.*, para. 80.

<sup>25</sup> The following discussion is based upon the article by Tilman Rodenhäuser, Squaring the Circle? Prosecuting Sexual Violence against Child Soldiers by their ‘Own Forces’, *Journal of International Criminal Justice*, Volume 14, Issue 1, 1 March 2016, Pages 171-193, <https://doi.org/10.1093/jicj/mqw006>.

regardless of their civilian or continuous combat status as long as the conduct occurs in the context of an armed conflict. Such sexual violence, accomplished by coercion at the hands of the perpetrator, places the child soldier within the *hors de combat* scope of protection.

Thus, Rodenhäuser favors the Confirmation Decision's recognition of Article 8(2)(e)(vi) jurisdiction over intra-party war crimes, although he disparages Pre-Trial Chamber II's rushed reasoning<sup>26</sup> based on an inability to commit sexual violence while participating in hostilities.

Another scholarly comment<sup>27</sup> appraises the Confirmation Decision's rulings as a significant jurisprudential development. Grey welcomes that Ntaganda directly addresses the intra-party rapes against child soldiers unlike the more diffuse characterization of victims by the Special Court for Sierra Leone cases, notably the Prosecutor v. Charles Taylor.<sup>28</sup> Grey gleans that the Ntaganda analysis is consistent with the little recognized Taylor jurisprudence of war crimes. Both courts "similarly assessed" that the victims who were not taking part in hostilities when assaulted were protected.<sup>29</sup> Grey might have preferred that Pre-Trial Chamber II rely upon the Prosecutor's submissions based on Article 4(3)(d) of AP II. She considers the provision as an exceptional extension of the special protection against sexual violence to children even if they partook in hostilities and, subsequently, were captured.<sup>30</sup>

While Grey agrees with the outcome, she nevertheless contests the Pre-Trial Chamber II's simplification of sexual violence as illogical, when it reasoned that child soldiers are protected because the rapes and sexual slavery do not occur when the children participate in hostilities. Unlike singular acts of rape, sexual slavery is a continuous crime that endures as long as the perpetrators' powers of ownership are exercised. The crime does not cease when children engage in hostilities, or resume thereafter, nor for that matter when the child is "manning checkpoints, guarding or carrying messages".<sup>31</sup> Grey's critique reveals a flaw in Pre-Trial Chamber II's legal grasp of sexual slavery. Its continuing nature is analogous to the continuing criminality of conscription and enlistment of child soldiers.<sup>32</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> See, Rosemary Grey, (2014) Sexual Violence against Child Soldiers, International Feminist Journal of Politics, 16:4, 601-621, <https://doi.org/10.1080/14616742.2014.955964>.

<sup>28</sup> Grey notes that victims are never accurately described as child soldiers, even though the evidence concerning Akiatu Tholley, who was sexually enslaved by the armed group, confirms that she was conscripted and used in hostilities. *Ibid.*, p. 611.

<sup>29</sup> *Ibid.*, 612.

<sup>30</sup> *Ibid.*, 606. See, *infra*, discussion in Section III.

<sup>31</sup> *Ibid.*, 614.

<sup>32</sup> Grey's observation bears expansion. Sexual slavery, or enslavement, is a continuing crime. Sexual slavery might be evidenced by the infliction of physical rapes, pregnancies, mutilations, psychological sexual threats and constraints. The *actus reus* of sexual slavery

Rodenhäuser and Grey approve of the outcome of the Confirmation Decision, yet each cautiously parse its nebulous reasoning, whether in relation to the protection that characterizes children not engaged in hostilities or in terms of the complexity of the crime of sexual slavery.

*b. Trial Decisions*

Once before Trial Chamber IV, the Defence re-litigated the validity of the Court's jurisdiction over Counts 6 and 9.<sup>33</sup> The Trial Chamber denied the application,<sup>34</sup> stating that it was a substantive matter to be determined by proof at trial. The Defence, subsequently, appealed.<sup>35</sup> The first appeals judgment on Counts 6 and 9 reversed the Trial Chamber's denial and remanded the Trial Chamber to examine the application concerning jurisdiction. The Appeals Chamber further requested the Trial Chamber to verify that the application conformed to the Article 19(4) provision that governs challenges to jurisdiction and admissibility.<sup>36</sup> The Trial Chamber's ensuing decision ruled that procedurally the jurisdiction challenge was raised timely, since it was prior to the commencement of trial.<sup>37</sup> It, therefore, allowed the jurisdictional challenge noting that in conformity with Article 19(4) exceptional circumstances—judicial economy and justice—existed.<sup>38</sup>

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might occur at any time when a person is exercising any or all the powers attaching to ownership over the enslaved person. Slavery ceases only when the exercise of powers attaching to the rights of ownership is withdrawn. It is a legal impossibility to posit that a child soldier whose sexual enslavement, that has a nexus to an armed conflict, ceases to be enslaved while actively engaged in hostilities. Said otherwise, sexual slavery is a continuous offense that cannot be neatly halted when a person simultaneously participates in hostilities or even when she has a continuous combat function. The legal determinate of protection, non-participation in hostilities, is not assessed correctly in terms of slavery and seems incongruent with the purpose of international humanitarian law. *See, infra*, discussion Section III.

<sup>33</sup> Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges, ICC-01/04-02/06-804.1 September 2015.

<sup>34</sup> Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-892. 9 October 2015. (Hereinafter, "Trial Decision").

<sup>35</sup> Appeal on behalf of Mr. Ntaganda against Trial Chamber VI's "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-892', ICC-01/04-02/06-909. 19 October 2015.

<sup>36</sup> Judgment on the appeal of Mr. Bosco Ntaganda against the 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1225 (Hereinafter, "First Appeal Judgment"), para. 40.

<sup>37</sup> Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, No.: ICC-01/04-02/06, 4 January 2017, para. 18 (Hereinafter, "Second Trial Decision").

<sup>38</sup> *Ibid.*, paras 24-26.

In terms of its substantive examination, whether the Court had jurisdiction over intra-party or “same side” war crimes, Trial Chamber IV responded to the Defence,<sup>39</sup> the Prosecutor<sup>40</sup> and the Legal Representatives of the Victims’ arguments.<sup>41</sup> First, it notified the parties that it would examine the issues in light of IAC and NIAC since the chamber could re-characterize<sup>42</sup> the classification of the armed conflict by the end of the trial. Secondly, and strikingly, the chamber viewed the Rome Statute’s construction of war crimes under Article 8 as providing jurisdiction for: grave breaches of the Geneva Conventions; other serious violations of the laws and customs of war in IAC; serious violations under Common Article 3; and, other serious violations of the laws and customs of war for NIAC.<sup>43</sup> Plainly, the chamber reasoned that the Rome Statute’s breadth of war crimes foresaw the possibility of prosecution of rape and sexual slavery within a context other than one bound to the chapeaux requirements of the grave breaches regime or of Common Article 3.<sup>44</sup> Accordingly, the Article 8(2)(e)(vi) would necessitate neither a particular victim status nor a distinct perpetrator status.<sup>45</sup>

The chamber, thirdly, interpreted Article 8(2)(e)(vi)’s chapeau requirement of “established framework of international law” as referring to

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<sup>39</sup> The Defence contested the Court’s jurisdiction stating that: 1) Article 8(2)(e)(vi) of the Statute, the basis of Counts 6 and 9, is subject to the requirements of international humanitarian law; 2) Neither Common Article 3 nor the Geneva Conventions admit war crimes committed by armed forces against their own members; 3) Victims of Counts 6 and 9 are characterized as members of an armed forces; 4) Membership in an armed force is incompatible with ‘taking no active part in hostilities’; and 5) international law does not recognize an exception for child soldiers. *Ibid.*, para. 27.

<sup>40</sup> The Prosecution submitted that the Court had jurisdiction over Article 8(2)(e)(vi) and that *hors de combat* status requirements of Common Article 3 should not be imported into Article 8(2)(e)(vi). The Prosecution offered, alternatively, that if Article 8(2)(e)(vi) were to come under Common Article 3’s protection, that the sexual violence was committed while the victims were not actively participating in hostilities and that, anyway, the children were recruited illegally as soldiers. Moreover, it argued that sexual violence is prohibited ‘without exception’ under the framework of international law and that, in general, neither international humanitarian law, nor Common Article 3 requires victims or perpetrators have different affiliation. *Ibid.*, para. 27.

<sup>41</sup> The Legal Representative of the Victims (LRV) cautioned that same side war crimes are recognized under international humanitarian law and that Common Article 3 was irrelevant in determining the scope of protection of child soldiers who are not considered as regular members of armed forces. The LVR emphasized that children affected by armed conflict are unconditionally protected under international law. Furthermore, children, even as members of armed groups can be understood as not taking active part in hostilities. *Ibid.*, paras 32 and 33.

<sup>42</sup> *Ibid.*, para. 34.

<sup>43</sup> *Ibid.*, para. 40.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, paras 40 and 44.

the uncontested customary international humanitarian law prohibitions<sup>46</sup> of rape and sexual slavery in IAC and NIAC. It pointed out that:

While most of the express prohibitions of rape and sexual slavery under international humanitarian law appear in contexts protecting civilians and persons hors de combat in the power of a party to the conflict, the Chamber does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct.<sup>47</sup>

After invoking the aims of the Martens Clause to uphold the principles of humanitarian law and recognizing that the Fundamental Guarantees countenance no exception to humane treatment by any Party, the chamber articulated the incompatibility of sexual violence with the goals of military necessity or military advantage.<sup>48</sup> The chamber distinguished the legitimate targeting of a person, even a child soldier, during armed conflict, from the unjustifiable infliction of sexual violence against that person irrespective of the allegiance of the perpetrator.<sup>49</sup> The chamber's understanding of the established framework of international law was broader than the HL norms as forwarded by the Defence. As such, the chamber flatly refused, as vexing, the Defence's position that a child soldiers' participation in hostilities would be incompatible with conferring humanitarian protection.

Trial Chamber IV also underscored the *jus cogens* status of sexual slavery under international law. By a majority, the bench likewise recognized rape as having obtained *jus cogens* status.<sup>50</sup> When committed within the context of armed conflict, both peremptory norms can be characterized as war crimes.<sup>51</sup>

Moreover, the chamber found support in the Fundamental Guarantees of Article 75 in Additional Protocol I, interpreting it to apply to both the opposing party of the victim and the victim's party.<sup>52</sup> It also found, as a general principle of law, that compounded criminality does not absolve an offender. The chamber stated:

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<sup>46</sup> The Trial Chamber contends that such international customary law has been formed and recognized by instruments such as the Lieber Code, the 1949 Geneva Conventions and the Additional Protocol to the Geneva Conventions, international criminal jurisprudence of the ICTY and publications of learned scholars such as T. Meron and C. Bassiouni. *Ibid.*, para. 46.

<sup>47</sup> *Ibid.*, para. 47.

<sup>48</sup> *Ibid.*, para. 48.

<sup>49</sup> *Ibid.*, paras 49-50. For emerging discussions about when child soldiers who are not directly or actively participating in hostilities can be targeted, as well as the occurrence of sexual violence perpetrated during hostilities, see Réne Provost, *Targeting Child Soldiers*, EJIL TALK, (Jan. 12, 2016), [www.ejiltalk.org/targeting-child-soldiers/](http://www.ejiltalk.org/targeting-child-soldiers/).

<sup>50</sup> *Ibid.*, paras 51.

<sup>51</sup> *Ibid.*, paras 52.

<sup>52</sup> *Ibid.*, para. 111.

It is further a recognised principle that one cannot benefit from one's own unlawful conduct. [B]y committing a serious violation of international humanitarian law by incorporating, as alleged by the Prosecution, children under the age of 15 into an armed group, the protection of those children under that same body of law against sexual violence by members of that same armed group would cease as a result of the prior unlawful conduct.<sup>53</sup>

Consequently, Trial Chamber IV confirmed its jurisdiction over Counts 6 and 9 and ruled that same side victims are not *per se* excluded from the safeguards of rape and sexual slavery as enumerated in Article 8(2)(e)(vi).<sup>54</sup> The Defence promptly filed its notice of interlocutory appeal in regard to the Second Decision.<sup>55</sup>

One academic commentator viewed the Second Decision as an expansive and not fully reasoned interpretation of Article 8(2)(e)(vi).<sup>56</sup> McDermott found unconvincing the chamber's proposition that war crimes did not necessarily have to be committed against protected persons. The flawed reasoning, she notes, was premised on examples under Article 8(2)(e) that relied upon treacherous killing of an enemy combatant or the hors de combat status of a fighter victim. McDermott queries whether the article's reach should encompass intra-party infliction of acts such as humiliating treatment, in spite of her acknowledgement of the Court's sincere concerns about sexual violence.

McDermott views the ICRC's updated commentary to Common Article 3 that urges all parties to an armed conflict to grant humane treatment to their own forces, as an impetus to the reasoning behind the Second Decision. Nonetheless, she anticipates future reactions and consequences for this expanded interpretation of Article 8 of the Rome Statute.<sup>57</sup>

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<sup>53</sup> *Ibid.*, para. 53. The chamber cited in support rulings from the International Court of Justice that forbade States to recognize and maintain illegal situations in breach of their international obligations, (*see*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 21 June 1971). It also invoked international law principles that disallowed any agreements that would adversely affect or restrict the rights of prisoners of war under the Third Geneva Convention or would disregard the special protection of children under Article 4(3)(d) of Additional Protocol II, even if captured after participating in hostilities.

<sup>54</sup> *Ibid.* para. 54.

<sup>55</sup> Appeal on behalf of Mr. Ntaganda against Trial Chamber VI's 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707, 10 January 2017, ICC-01/04-02/06-1710 (OA 5).

<sup>56</sup> Yvonne McDermott, ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator, 5 January 2017. <https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>.

<sup>57</sup> *Ibid.*

Another commentator took issue with the Second Decision's interpretation of Article 75 of Additional Protocol I.<sup>58</sup> Heller cautioned against the use of an international armed conflict provision to determine a non-international armed conflict issue, especially given that, in his view, Article 4 of Additional Protocol II refrains from expanding protection beyond civilians and persons *hors de combat*.<sup>59</sup> For him, NIAC protection only safeguards civilians and persons *hors de combat* including fighters who have laid down their arms, not active fighters. Also, Heller refuted the Trial Chamber's resort to the Martens Clause as ill-conceived judicial activism and norm creation.<sup>60</sup>

While McDermott finds the Second Decision well-intentioned but problematic, Heller strongly disagrees with an outcome he deems contrary to IHL.

## 2. The Ntaganda Appeals Judgment

The Defence's second recourse to the Appeals Chamber squarely raised the issue of whether Trial Chamber IV erred in its legal conclusions in the Second Decision. The Defence primarily advanced that female child soldiers in question were neither protected persons nor were they *hors de combat*. Therefore, they could not be considered "victims" under Article 8(2)(e)(vi)'s proscription of other serious violations of the laws and customs of war in NIAC. The Appeals Chamber independently set about to determine whether Article 8(2)(e)(vi) required that victims have a protected status and to interpret the phrase "established framework of international law".

The Appeals Chamber assessed the plain meaning of Article 8(2)(e)(vi). It was drafted, the Appeals Chamber found, to distinctively outlaw wartime rape and sexual slavery without an express or limiting pre-requisite that victims must be protected persons à la the Geneva Conventions or be persons who were *hors de combat*.<sup>61</sup> In other words, there was no status requirement of the victim. Indeed, if the victims of Article 8(2)(e)(vi) did have a protected status that overlapped with Article 8 (2) (b) (xxii) and (e) (vi), such redundancy was not necessarily unintended or fatal to the pursuit

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<sup>58</sup> Kevin Jon Heller, ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>.

<sup>59</sup> Grey and the Prosecutor's submissions at the Pre-Trial would oppose Heller's narrow perspective of Article 4(3) of APII. See, *supra*, discussion in Section I. a.

<sup>60</sup> *Ibid.*

<sup>61</sup> Appeals Judgment, para. 48.

of the crimes.<sup>62</sup> Therefore, the Appeals Chamber concluded that the *Second Decision's* ruling that there was no status requirement under Article 8(2)(e)(vi) was not erroneous.<sup>63</sup>

Next, the Appeals Chamber sought to determine whether the phrase, of “established framework of international law” introduced other requirements into Article 8(2)(e)(vi) that would render the *Second Decision* erroneous. As a preliminary manner, the Appeals Chamber interpreted the established framework of international law as permitting recourse to customary and conventional international law, in particular IHL.<sup>64</sup> In general, the established framework of international law mandated that victims had to be protected persons under the Geneva regime or *hors de combat* in line with Common Article 3. The Appeals Chamber recognized that IHL sought to safeguard vulnerable persons, typically enemy combatants or enemy civilian as set forth in the Third and Fourth Geneva Conventions.<sup>65</sup> Furthermore, it underscored that the First and Second Geneva Conventions made compulsory the protection of the wounded and shipwrecked in all circumstances, irrespective of party affiliation.<sup>66</sup> Case law in the aftermath of World War II that aimed at pursuing crimes committed against Allied nationals exemplified the paradigm of protection accrued to enemy nationals. The Appeals Chamber’s reading of the Geneva Conventions and the case law failed to detect any general rule in IHL that stipulated that intra-party victims must be excluded from the safeguards of the prohibitions.<sup>67</sup>

As pertains to victims of rape and sexual slavery, the Appeals Chamber found no conceivable reason to justify such criminal conduct<sup>68</sup> irrespective if the person, otherwise, may be legally targeted in armed combat.<sup>69</sup> Furthermore, the established framework of international law did not “reframe” rape or sexual slavery as war crimes by stipulating that proof of protected person status or of *hors de combat* circumstances exist. In other words, the Appeals Chamber found with regard to the established framework of international law, that members of an armed force or group are not *per se* or categorically excluded from the protection of war crimes of rape and sexual violence when committed by members of the same armed forces or group.

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<sup>62</sup> *Ibid.*, paras 49-50.

<sup>63</sup> *Ibid.*, para. 51.

<sup>64</sup> *Ibid.*, para. 53.

<sup>65</sup> *Ibid.*, paras 57-58.

<sup>66</sup> *Ibid.*, para. 59.

<sup>67</sup> *Ibid.*, paras 62-63.

<sup>68</sup> *Ibid.*, paras 64-65.

<sup>69</sup> *Ibid.*

Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed forces, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery<sup>70</sup>.

It is the absence of any pre-requisite status of the victim that actually aligns with the established framework of international law.<sup>71</sup>

The only requirement under Article 8(2)(e) is a nexus to an armed conflict. The Appeals Chamber opined that this nexus sufficiently and appropriately delineates war crimes from ordinary crimes.<sup>72</sup> Hence delving into any examination of whether the victims were actively participating in hostilities or were protected persons is rendered moot. The Appeals Judgment ultimately upheld the *Second Decision* and found no legal error in the Trial Chamber's rulings. It affirmed that the Court exercised jurisdiction over Counts 6 and 9.<sup>73</sup>

To date, scholarly commentary on the Appeals Judgment has been scarce. Scholars, practitioners and courts, both national and international, will undoubtedly contemplate the holding and provide their assessment. One commentator has asserted that the outcome is unlawful.<sup>74</sup> Heller finds that the decision requires Ntaganda to answer to conduct that does not violate a positive rule of IHL for non-international armed conflict. He agrees that the First and Second Geneva Conventions protect the wounded and shipwreck from inhumane acts, including rape and sexual slavery irrespective of the party perpetrating such conduct. He finds no contestation for protecting any person when *hors de combat*.

However, he distinctly challenges the Appeals Judgment's position that IHL "generally" protects civilians and *hors de combat* combatants. Heller avers that IHL protection applies "only to those two categories" of individuals and that plain treaty interpretation of Article 8(2)(e) is limited to those specific rules. The Appeals Judgment, he argues, subverts a long-standing norm, namely that a war crime "must violate a rule of IHL". Furthermore, he notes that the burden to prove the existence of a rule that demonstrates a violation of IHL remains with the Prosecutor, not the Defence.<sup>75</sup> Nor, in his opinion, does the Appeals Judgment's reliance on Article 75 of Additional Protocol I, which governs IAC support the Courts logic and nor does any activist reliance on the Martens Clause.

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<sup>70</sup> *Ibid.*, para. 65.

<sup>71</sup> *Ibid.*, paras 66-67.

<sup>72</sup> *Ibid.*, para. 68.

<sup>73</sup> *Ibid.*, 69-71.

<sup>74</sup> Kevin Jon Heller, ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>.

<sup>75</sup> *Ibid.*

Essentially, Heller reiterates the Defence position that the Geneva Conventions and Common Article 3 status requirements govern the application of the protective mechanism of humanitarian law.<sup>76</sup> Heller makes no reference to Article 4(3) of APII that addresses special protection of children in relation to Article 4 safeguards from sexual violence.

Another commentator agrees with the outcome of the Appeals Judgment.<sup>77</sup> Luigi Prospero, however, objects to the circumscribed rationale of the Appeals Chamber. He asserts that the chamber should have relied upon a more strident invocation of Article 21 (3)'s recognition of human rights law as an interpretive source to proscribe sexual violence and upon the Rome Statute's teleological aim in regard to children as reflected in Article 8(2)(e). Prospero especially deems it imperative that the Court exercise jurisdiction over rape and sexual slavery of child soldiers when those crimes originate from the perpetrators' prior unlawful conduct. Here, Prospero echoes the Trial Chamber's Second Decision. He directly takes issue with Heller's stance that IHL does not "generally and categorically prohibit" pursuit of rape and sexual slavery. Moreover, without recalling the references to the Martens Clause, he points to the "evolutionary nature" of the Rome Statute exemplified by its adherence to the interpretation of international human rights law. Thus, it is justifiable, according to Prospero, that such interpretation finds resonance in Article 8(2)(e)(vi).

### 3. A Complementary Analysis

This author agrees with the outcome of the Appeals Judgment in Ntaganda. Similar to Prospero's critique of looking at a broader legal basis, it is offered that the Appeals Judgment could have referred to other relevant legal precepts when determining the content of the "established framework of international law. This might have better honed the legal incompatibility of sexual violence and the special protection owed to children under IHL. In particular, little detected proscriptions of intra-party sexual violence, as framed in provisions of API and APII and in the Third Geneva Convention, could have strengthened the reasoning the Appeals Judgment.

To illustrate, even though the Appeals Chamber looks at Article 75 of Additional Protocol I, it overlooks the Article 77 of Additional Protocol I. Article 77(1) addresses the special respect owed children, including

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<sup>76</sup> *Ibid.*

<sup>77</sup> Luigi Prospero, The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in Ntaganda <http://opiniojuris.org/2017/06/27/33178/>.

protection from sexual violence, committed by any Party to an IAC.<sup>78</sup> Article 77's provisions develop "both the Fourth Geneva Convention and other rules of international law".<sup>79</sup> Significantly, the *Pictet Commentary* interpretation of Article 77 is that:

The article not subject to any restrictions as regards its scope of application; it therefore applies to *all* children who are in the territory of States at war, whether or not they are affected by the conflict.<sup>80</sup>

Article 77(1) states, and therefore intends, that all children '*shall* be the object of special respect and *shall* be protected against *any* form of indecent assault'. The ICRC commentary to Rule 93 clarifies that 'any form of indecent assault' performs a residual function<sup>81</sup> to cover sexualized conduct that contravenes humane treatment, such as rape and sexual slavery. The ICRC commentary also cites to Article 77 as upholding this principle in regard to children.<sup>82</sup> Any other form of indecent assault, likewise, must be read in context with outrages upon personal dignity, enforced prostitution and other sexual assault conduct prohibited in Article 75(2)(b) and Article 76(1).<sup>83</sup>

Article 77(1) obligation is mandatory. As constructed, the obligation requires the protection of children from indecent assault by members of their own party or the opposing party. Article 77(3) requires that when children who have taken part in hostilities fall into the hands of an adverse party, that such adverse party must *continue* to afford them special protection, whether detained as POWs or not.<sup>84</sup> The obligation to provide special respect and protection from indecent assault is continuous and not diminished by the fighter status or the civilian status of the child, even while in the hands of their own party. The plain reading of the provision safeguards any child who takes part in hostilities 'against any form of

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<sup>78</sup> Article 77(1) of Additional Protocol I to the Geneva Conventions of 12 August 1949 reads: Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

<sup>79</sup> Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 3176, para. 899.

<sup>80</sup> *Ibid.*, para. 3177.

<sup>81</sup> ICRC CIHL Study, Rule 93. Vol. I., p.324.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* See, Patricia Visser Sellers and Indira Rosenthal, '*Rape and Sexual Violence*', THE GENEVA CONVENTIONS IN CONTEXT: A COMMENTARY, Profs. Clapham, Geeta and Sassoli, eds. Oxford University Press (2015), pp. 356-357.

<sup>84</sup> Article 77(3) of Additional Protocol I to the Geneva Conventions of 12 August 1949 reads: If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall *continue to benefit from the special protection* accorded by this Article, whether or not they are prisoners of war. Emphasis added.

indecent assault’ including intra-party sexual violence.<sup>85</sup> It further safeguards them from sexual assault committed when detained by adversaries.

The Appeals Chamber could have cited to Article 77 as reflective of a specific rule of IHL that proscribes sexual violence against all children irrespective of their affiliation or their engagement in an IAC. Article 77 does not, on its face, condition its enforcement on any grounds other than age. Parties are specially directed to include child soldiers within this protection. Article 77 proscription of any form of sexual violence against all children could be indicative of a customary norm of international law, irrespective of the characterization of the conflict.<sup>86</sup>

Article 77 of API applies to IAC. That is uncontested. Heller rejected the Trial Chamber’s reliance on Article 75 of AP I based on its IAC jurisdictional requirement. Grey refuted Article 77’s applicability, an analysis that relied upon commentary that predated the ICRC CIHL study linking sexual violence and Article 77(1) to children.<sup>87</sup> Grey also failed to grasp the meaning that “*continued*” protection implies that it is owed by the adversary in the eventuality of capture, and also owed previously to children by their own party. The protection is ongoing. While the direct applicability of Article 77 is dependent upon the ultimate characterization of the armed conflict, the principle that each party bears responsibility for any form of indecent assault against children must be recognized as broader than the jurisdictional pre-requisites. With this understanding, the Appeals Chambers might have countered the dismissive reasoning in the *Prosecutor. v. Augustine Gbao et al* case handed down by the Special Court for Sierra Leone,<sup>88</sup> by contemplating the customary rule enunciated in Article 77. This author advances that the compounded customary norms of the proscription of sexual violence and Article 77’s proscription of sexual violence against any child by any party should have informed the discussion of “established framework of international law” in the Appeals Judgment. Moreover, this customary rule of IAC resonates in NIAC under Article 4(3) of Additional Protocol II.<sup>89</sup>

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<sup>85</sup> See, Patricia Viseur Sellers and Indira Rosenthal, ‘*Rape and Sexual Violence*’, *supra*, ftnt.83, pp. 356-357.

<sup>86</sup> ICRC CIHL Study, Rule 93. Vol. I., p.323; See, Patricia Sellers, *Child Soldiers - Protected beyond Gender? An International Criminal Law Perspective*, UNIVERSITY OF OXFORD PODCASTS (Nov. 26, 2013), <http://podcasts.ox.ac.uk/child-soldiers-protected-beyond-gender-international-criminal-law-perspective-0>.

<sup>87</sup> Grey, *supra*, ftnt.27, pp. 605-606.

<sup>88</sup> Appeals Judgment, para. 63.

<sup>89</sup> Article 4(3) of Additional Protocol II reads in part:

3. Children shall be provided with the care and aid they require, and in particular: d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite

Since the submission by the Prosecutor at the pre-trial stage, Article 4(3) has drawn little judicial notice even though it parallels the Article 77(3) interdiction. As previously stated, Pre-Trial Chamber II relied upon Article 4(3)(c) of Additional Protocol II to refute the premise that a child's mere membership in an armed group be equated with determinative proof of direct/active participation in hostilities.<sup>90</sup> The special protection afforded children under Article 4(3) logically incorporates and further specifies the sexual violence and slavery prohibitions contained in Article 2(e) and (c).<sup>91</sup> Article 4(3)(c) and (d)'s drafting process was contemporaneous to that of Article 77.<sup>92</sup> The "continued" proscription of sexual violence found in Article 77(3) of API for children who participate in hostilities and who are captured, also, is reflected in Article 4(3). The wording differs slightly. Article 4(3)(d) states that the "special protection shall remain applicable" in regard to children who engage in hostilities and are captured. The Commentary to Article 4(d) of APII notably is entitled, "Sub-paragraph (d) - Continued protection in the case that sub-paragraph (c) is not Applied."<sup>93</sup> Sub-paragraph (c) refers to the illicit recruitment of children in armed groups. The continued protection in sub-paragraph (d) exists for children who, in spite of the sub-paragraph (c) prohibition of recruitment, partake in hostilities and are captured.

Grey offers that Article 4(3)(d) creates an exception to the general protections in Article 4(2) of AP II, which apply only to "persons who do not take a direct part or who have ceased to take part in hostilities."<sup>94</sup> The exception Grey envisions is limited to children engaged in hostilities. The commentary to Article 4(3)(d), however, suggests more expansive coverage that extends to all recruited children, especially those under 15 years of age. It reads: "It should be recalled that the aim of this provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will continue to enjoy privileged rights in case the age limit of

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the provisions of sub-paragraph c) and are captured. Protocol Additional To The Geneva Conventions Of 12 August 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts (Protocol II), of 8 June 1977, Article 4(3). [www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.35\\_AP-II-EN.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.35_AP-II-EN.pdf). The author acknowledges Giuliana Saldarriaga Velásquez, Oxford University Masters Candidate, for her insights on Article 4(3) of APII.

<sup>90</sup> *Supra*, Section I.

<sup>91</sup> Article 4(2) reads in part:

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms.

<sup>92</sup> Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 1380, para.4558.

<sup>93</sup> *Ibid.*

<sup>94</sup> Grey *supra*, ftnt.27, p. 608.

fifteen years laid down in subparagraph (c) is not respected. In this case, making provisions for the consequences, if any, of possible violations, tends to strengthen the protection”.<sup>95</sup>

A coherent reading of Article 4(3)(d)’s purpose would be to protect child soldiers, of all ages, including those engaged in hostilities. The special protection is in vigor during recruitment according to 4(3)(c). Such protection *shall remain* whenever an adversary captures child soldiers. There is a continuum of protection. This reading inevitably entails the protection of child soldiers from intra-party sexual violence, similar to the special protection of Article 77 of API.

The norm that children are to always be spared sexual violence is found in the entirety of Article 4(3). Its mandatory application evinces a rule. Its applicability to same side perpetrators is a cogent interpretation of the special protection offered child soldiers under sub-paragraph (c) or the interpretation of the inter-action of sub-paragraphs (c) and (d). This author suggests that the Appeals Judgment could have considered a closer reading of Article 4(3) and the relevant commentary to inform its observations of the established framework of international law in regard to Article 8(2)(e)(vi).

Furthermore, the Trial and Appeals Chamber enunciated a restrictive view of the Third Geneva Convention in terms of intra-party harm. A more astute interpretation of the Third Geneva Convention might have found the reiteration of a norm in the seldom cited to Pictet Commentary to Article 25 (4)(c). That provision obliges a Detaining Party to separate prisoners of war according to gender in order to avoid the Detaining Party’s responsibility, *inter alia*, for prisoners of war committing intra-party sexual violence.<sup>96</sup> The requirement for sex-segregated accommodation in Article 25 paragraph 4 of GC III, Pictet notes, was intended to ensure that male POWs could not access female POW quarters to commit sexual abuse. Although the Detaining Power would be liable for such prohibited acts, clearly the underlying policy of this Geneva rule is to safeguard detained combatants from intra-party sexual violence, irrespective of age. To that extent, the First, Second and Third Geneva Conventions disallow intra-party sexual violence. This precept should have been folded into the Appeals Judgment’s understanding of the “established framework of international law”.

A complementary reading of Article 77 of API, Article 4(3) of APII and Article 25(4)(c) of the Third Geneva Convention could have convincingly pointed to a customary norm to prohibit intra-party sexual violence especially for children, including child soldiers. Combined

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<sup>95</sup> Pictet, Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, p. 1380, para.4559.

<sup>96</sup> Pictet Commentary GC III on Art. 25 (Quarters), at 195.

with the updated ICRC Commentary, the Appeals Judgment might have articulated a positive rule rather than the absence of a contrary rule that eschews the intra-party protection of child soldiers from sexual violence. Read together, the instruments are coherent and quite logical in their posture that children and child soldiers must be as protected from sexual violence in NIAC as they are in IAC, even without having to lay down their arms.

#### **4. Re-Alignment of a Paradigm**

Ntaganda does not shatter, rather it re-aligns, the normative war crimes paradigm that prohibits intra-party sexual violence. It illuminates the extent of protection afforded children, especially those associated with armed groups or armed forces. Perhaps, Ntaganda also warrants the articulation of policy rationales to re-enforce such realignment.

Perhaps, the Ntaganda rulings should be strictly construed as only applying to children. Crimes concerning the recruitment of children, whether specified as enlistment or conscription, stand as the customary exception to the paradigm of opposite-side harms. If there were a “silent” peremptory norm it would be the recruitment of children and their use in hostilities. No modern justification pardons the transgressions of child-related crimes under international humanitarian law. The Ntaganda facts reveal how the compounded peremptory harms of rape and of slavery accompany the infliction of war crimes related to child soldiers. Ntaganda does not sidestep nor evade registering the entirety of the criminal conduct. Absent Ntaganda, redress of crimes must be severed and pursued in separate jurisdictions. Rape and slavery, would then constitute military disciplinary matters, isolated and removed from their contextualization of recruitment crimes concerning child soldiers. Judicial bifurcation readily deforms and belittles the complex nature of the harms inflicted upon child soldiers. The Appeals Judgment takes aim at the overlap of intra-party war crimes, in real time, by keeping in sight the compounded suffering of the victims and the multiple acts of the perpetrators.

Another manner to contemplate the Appeals Judgment resides in its provision of special protection for all children, irrespective of their illicit status as members of the armed group. In IAC, Article 77(1) protects children from sexual violence by all parties under all circumstances. In NIAC, under Article 4(3) children are protected from sexual violence even when they have not laid down their arms and when they are captured. Absent the ruling of Ntaganda, children who are members of armed groups or who are participating in hostilities can be subjected to sexual violence

without recourse to protection from such conduct as a war crime, even though their illicit recruitment and use in hostilities is predicated on a nexus to armed conflict. Obviously, they stand in an unequal position, read an adversely discriminatory position, *vis a vis* other children. This situation is particularly aggravating regarding child soldiers, given the Lubanga jurisprudence that found child soldiers legally incapable of consenting to their recruitment.<sup>97</sup> Under other Rome Statute they are likewise genuinely unable to consent to sexual violence and under international customary law they are legally estopped from consenting to any form of slavery. Child soldiers are subjected to complex layers of criminality through none of their own volition. Ostensibly, child soldiers are adversely affected, compared to other children in NIAC and IAC situations, when their subjugation to intra-party sexual violence is not redressed.

There is another determinate other than age - the *jus cogens* nature of wartime slavery and rape. Irrespective of the Ntaganda Appeals Judgment the violations of peremptory norms invoke *erga omnes* obligations that inure to each state of the international community. The pursuit of enslavers remains an obligation regardless of the status of the victims or their relationship to the perpetrators. If slavery and wartime rape are impermissible in all circumstances, then inserting qualifiers upon the victims or perpetrators legally circumscribes the circumstances. As Trial Chamber IV seems to have inferred, privileging the doctrine of military necessity or military advantage would effectively disallow redress of sexual slavery and undermine obligations related to the peremptory norm. Moreover, serious war crimes, such as the grave breaches are, themselves, peremptory norms. Allowing a narrow reading of the Geneva mechanisms to result in the selective enforcement of peremptory norms is disconcerting. Is there a hierarchy of peremptory norms? Is the *jus cogens* status and the attendant *erga omnes* obligations of rape and slavery of less value than the *jus cogens* status of other war crimes?

## 5. Conclusion

Re-alignment of the normative war crime paradigm treads on hallowed legal grounds. Identification, articulation, crystallization, codification, enforcement of each prohibition treks a seemingly fragile path until yielding to a steadily durable paved road of redress. The Ntaganda Appeals Judgment's recognition of jurisdiction for rape and

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<sup>97</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-01/06, 14 March 2012, paras 613-618.

slavery committed against child soldiers by members of their own forces has undertaken the journey. The Appeals Judgment based on Article 8(2)(e)(vi) of the Rome Statute binds the Court and possibly will persuade other internationalized jurisdictions. Its response to the inquiry of “who” owes protection to child soldiers for crimes of sexual violence is none other than the perpetrators.

## **Violences sexistes: le cas du maintien de la paix**

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Chef de bureau de l'Inspection générale des armées,  
Armée de l'air française

La question des violences sexuelles commises par les casques bleus lors d'opérations de maintien de la paix (OMP) est ancienne, mais toujours d'actualité. Il ne s'agit pas là spécifiquement d'une question de droit international humanitaire (DIH), puisque les Nations Unies (NU) n'interviennent pas toujours en situation de conflit armé. Mais certaines problématiques juridiques se posent, qui expliquent notamment pour partie la persistance de ce phénomène. Pourquoi ces violences sont-elles si importantes et médiatisées dans le cadre des Nations Unies ? Quelles en sont les causes et les conséquences ? Les Nations Unies sont-elles en mesure d'enfin mettre un terme à ce fléau ? Ce sont à ces quelques questions que mon intervention va tenter de répondre.

### **Un fléau ancien et récurrent**

Les violences sexuelles ont malheureusement un caractère universel et intemporel, surtout dans les zones en proie à des troubles et tensions internes ou des conflits armés. Elles peuvent être commises par les combattants ou les civils, ou utilisées par les parties comme une « arme de guerre ». Dans le cas des Nations Unies (NU), ce sont les soldats du maintien de la paix qui commettent parfois ces exactions à l'encontre des populations civiles. Les NU sont confrontées à cette problématique depuis des décennies, et notamment depuis le développement des OMP dans les années 1990. On peut citer pour mémoire les viols commis par les casques bleus au Cambodge, au Kosovo, en République démocratique du Congo (RDC), au Mozambique, en Érythrée ou en Somalie. Au début des années 2000, des cas sont également relevés en Guinée, au Libéria, en Sierra Leone, *etc.* Mais ce sont les affaires en RDC en 2003 qui entraînent pour les NU une prise de conscience de la gravité du problème, et qui conduisent à mettre en place une politique de « tolérance zéro ».

Les grands principes de cette politique sont édictés dans le bulletin du Secrétaire Général (*SG Bulletin*) du 22 mars 2003<sup>1</sup>, et la stratégie de lutte

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<sup>1</sup> Circulaire du Secrétaire général, *Dispositions spéciales visant à prévenir l'exploitation et les abus sexuels*, ST/SGB/2003/13, 22 mars 2003. [www.un.org/fr/documents/view\\_doc.asp?symbol=ST/SGB/2003/13](http://www.un.org/fr/documents/view_doc.asp?symbol=ST/SGB/2003/13).

est déclinée dans « rapport Zeid » de 2005<sup>2</sup>, qui recommande d'associer les pays fournissant des contingents et des forces de police, les autres États Membres et le système des NU dans son ensemble à une profonde réforme des normes devant régir la conduite et la discipline des forces de maintien de la paix. C'est à ce moment aussi qu'est créée au sein des NU la qualification spécifique d'« exploitation<sup>3</sup> et abus sexuels<sup>4</sup> » (*sexual exploitation and abuse*, SEA), actes qui constituent des « fautes graves passibles de sanctions disciplinaires, pouvant aller jusqu'au renvoi sans préavis ». Les actions des NU se poursuivent avec la création en 2007 de la *Conduct and Discipline Unit* (CDU) au sein du Département des Opérations de Maintien de la Paix (DOMP) à New York, et la déclinaison sur le terrain en *Conduct and Discipline Teams* (CDT), chargées de réprimer les comportements fautifs.

De façon globale, depuis 2003, les NU ont réaffirmé dans un grand nombre de résolutions du Conseil de sécurité leur volonté de lutter sans relâche contre les violences sexuelles<sup>5</sup>, et les politiques et normes internes se sont accumulées. Malgré cela, les allégations de SEA ont perduré, au Burundi (2004), au Soudan (2005), en Haïti et au Liberia (2006), en Côte d'Ivoire (2007). Le tournant se produit en 2013-2015 avec les affaires concernant les troupes françaises de l'opération Sangaris, en République Centrafricaine (RCA). Ces allégations de viols visaient des soldats d'une force n'étant pas sous le commandement des NU, mais qui agissaient sous mandat des Nations Unies. Elles ont dès lors eu un retentissement particulièrement important. D'une part, il s'agissait d'un pays membre du P5, particulièrement influant au sein des NU et très impliqué dans les opérations de maintien de la paix. D'autre part, le fait de mettre en cause un Etat ne participant pas à une OMP onusienne était une première pour l'ONU. Enfin, cette affaire a été révélée de façon très particulière et sa gestion a été chaotique, ce qui a mis en exergue les dysfonctionnements internes de l'Organisation dans la lutte contre le SEA.

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<sup>2</sup> Rapport du prince Zeid, « Stratégie globale visant à éliminer l'exploitation et les abus sexuels dans les opérations de maintien de la paix des Nations Unies », transmise par lettre A/59/710 du 24 mars 2005. [www.un.org/fr/documents/view\\_doc.asp?symbol=A/59/710](http://www.un.org/fr/documents/view_doc.asp?symbol=A/59/710).

<sup>3</sup> Selon le *SG Bulletin*, « le fait d'abuser ou de tenter d'abuser d'un état de vulnérabilité, d'un rapport de force inégal ou de rapports de confiance à des fins sexuelles, y compris mais non exclusivement en vue d'en tirer un avantage pécuniaire, social ou politique ».

<sup>4</sup> Selon le *SG Bulletin*, « toute atteinte sexuelle commise avec force, contrainte ou à la faveur d'un rapport inégal, la menace d'une telle atteinte constituant aussi l'abus sexuel ».

<sup>5</sup> Résolutions spécifiquement consacrées aux violences sexuelles : SCR 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013) et 2272 (2016) ; résolutions consacrées aux femmes, à la paix et la sécurité : SCR 1325 (2000), 1889 (2009), 2122 (2013) ; résolutions relatives à la protection des civils : SCR 1674 (2005) et 1894 (2009), ou à celle des enfants : SCR 1261 (1999), 1612 (2005), 1882 (2009), 1998 (2011) et 2143 (2014).

L'« affaire Sangaris » a constitué un choc, et même si toutes les allégations ne sont pas avérées, elle a conduit l'ONU à se remettre en question et à revoir totalement son modèle, comme on le verra par la suite. Mais il faut noter qu'après cette date, les allégations ont continué, avec d'autres nations contributrices. Le rapport du Secrétaire général de 2016 sur le sujet mentionne en effet 69 cas d'allégations de SEA en 2015, concernant 10 OMP. Celui de 2017<sup>6</sup> rapporte 103 cas pour l'année 2016, concernant 9 OMP et 4 missions politiques spéciales. Le chiffre se monte même à 165 si l'on ajoute les cas relatifs aux Agences, Fonds et Programmes des NU (42) et aux forces non onusiennes<sup>7</sup> (20). Près de 15 ans après la mise en place de la politique de « tolérance zéro », on pourrait être tenté d'être pessimiste, en considérant que l'Organisation n'est pas à même de lutter contre ce fléau. Les *media* critiquent régulièrement l'incapacité des Nations Unies à éradiquer les violences sexuelles commises par les casques bleus, et mettent souvent en avant l'impunité dont ces derniers jouissent<sup>8</sup>.

### **Les causes multiples des violences sexuelles commises par les casques bleus**

De façon générale, les violences sexuelles sont malheureusement des actes récurrents, dont la commission est favorisée par le contexte dégradé des conflits armés. Certains psychiatres parlent de « l'effet Lucifer », pour expliquer les mécanismes inconscients de la violence, le décrochage du sens moral qui peut conduire à commettre les pires atrocités, et la difficulté à discerner le mal au moment où on l'accomplit<sup>9</sup>. Le cadre spécifique des situations de crise humanitaire ou de conflits armés renforce ce risque de décrochage. En effet, la confrontation quotidienne des soldats avec les horreurs commises (crimes internationaux notamment) peut leur faire perdre leurs repères voire la raison. Le sentiment de supériorité conféré par le port d'une arme, renforcé par les phénomènes de groupe, voire par le racisme, vient s'ajouter à ces tensions psychologiques, et peuvent conduire à transformer ces soldats en tortionnaires.

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<sup>6</sup> Rapport du Secrétaire général, « *Special measures for protection from sexual exploitation and abuse: a new approach* », A/71/818, 28 février 2017. [https://conduct.unmissions.org/sites/default/files/a\\_71\\_818\\_1.pdf](https://conduct.unmissions.org/sites/default/files/a_71_818_1.pdf).

<sup>7</sup> Les « *non UN forces under UN mandate* » ont été prises en compte pour la première fois dans le rapport du Secrétaire général A/71/818 de 2017.

<sup>8</sup> Cf. article du 10 août 2017 sur le site d'Al Jazeera, « *Why do some peacekeepers rape? The full report* ». [www.aljazeera.com/indepth/features/2017/08/peacekeepers-rape-full-report-170804134221292.html](http://www.aljazeera.com/indepth/features/2017/08/peacekeepers-rape-full-report-170804134221292.html).

<sup>9</sup> Voir par exemple « L'effet Lucifer. Des bourreaux ordinaires », Patrick Clervoy, CNRS éditions, Paris 2013.

Les violences sexuelles, si elles sont difficilement évitables, sont d'autant plus insupportables qu'elles sont commises par des casques bleus. En effet, la protection des droits de l'homme est une des raisons d'être des Nations Unies, et dans la grande majorité, le mandat des opérations de maintien de la paix est la protection des civils. De ce fait, les agressions commises par des soldats qui sont censés protéger les populations vulnérables et les victimes des crises ou conflits, sont encore plus inacceptables.

Une des raisons qui favorise la commission de tels actes est le manque de moyens des Etats contributeurs. Il faut garder à l'esprit que les principaux Etats qui fournissent des troupes sur le terrain sont des pays qui n'ont pas toujours des moyens financiers conséquents<sup>10</sup>. De ce fait, leurs soldats sont parfois mal payés, et la durée des missions est très longue, car il est extrêmement coûteux d'organiser des relèves fréquentes, nécessitant d'importants moyens aériens. En outre, les investissements sont parfois insuffisants dans le domaine de la condition du personnel (loisirs, moyens modernes de communication pour rester en contact avec les familles, *etc.*), et quand des fonds sont débloqués, on peut parfois assister à des détournements et/ou à de la corruption. Les soldats passent donc des mois dans des zones souvent hostiles, dans des conditions sommaires, ce qui peut expliquer pour une part certaines dérives et la commission d'actes criminels. A noter également qu'il existe une certaine disparité dans la sensibilisation et la formation à la prévention du SEA, même si des progrès importants ont été faits depuis quelques années. En outre, dans certains pays, la prostitution n'est pas pénalisée, et l'âge légal de consentement est assez bas, ce qui rend complexe l'application de la politique onusienne de «tolérance zéro», qui s'applique aux abus sexuels mais aussi à l'exploitation sexuelle, dont la prostitution.

Une autre raison de la persistance de tels abus est la relative impunité des casques bleus. En effet, l'ONU se heurte à la juridiction exclusive des Etats. L'Organisation n'a pas de pouvoir de poursuite ou de sanction autre qu'administratif ou disciplinaire sur les militaires des Etats contributeurs. Elle peut enquêter, réunir et conserver des preuves, mais ne peut pas poursuivre et juger les suspects, alors que les actes incriminés peuvent constituer des infractions en droit interne ou en droit international<sup>11</sup>. En

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<sup>10</sup> Les 10 premiers Etats contributeurs sont l'Ethiopie, l'Inde, le Pakistan, le Bangladesh, le Rwanda, le Népal, l'Egypte, le Burkina Faso, le Sénégal et le Ghana. Pour mémoire, Chine : 12 ; Italie : 23 ; France : 33 ; Grande-Bretagne : 37 ; Russie : 68 ; Canada : 71 ; Etats-Unis : 74.

<sup>11</sup> Les violences sexuelles commises par les Casques bleus pourraient être traitées par la Cour pénale internationale. Mais il faudrait que les crimes atteignent un certain niveau de gravité (article 17 du Statut de Rome) pour que les cas soient recevables. Et surtout que les Etats ne puissent ou ne veulent pas se saisir (principe de complémentarité).

théorie, l'Etat du territoire où les crimes ont eu lieu pourrait poursuivre, du fait de la compétence territoriale et personnelle passive, mais dans les zones où les OMP sont déployées, l'appareil judiciaire n'est souvent plus opérationnel. En outre, les personnels des Nations Unies sont protégés par des accords bilatéraux, les *status of forces agreements* (SOFAs), qui prévoient quasiment toujours une immunité de juridiction. La responsabilité première revient donc aux Etats d'envoi des troupes, les Etats contributeurs. Mais ils sont souvent réticents à agir. Les raisons peuvent être politiques, car il est difficile d'admettre que vos propres soldats commettent des exactions alors que votre pays s'est engagé dans une opération de protection des civils. Il peut également exister des raisons matérielles, car les situations de crise ou de conflit rendent difficile la tenue d'enquêtes (difficultés d'accès, insécurité, manque de moyens sur place, etc.), qui sont en outre très particulières dans le cas des infractions sexuelles (séviçes pas toujours décelables, recueil des preuves et témoignages, etc.). Enfin, des raisons purement juridiques peuvent être un frein à l'action des Etats d'envoi, comme l'absence de compétence extraterritoriale pour diligenter une enquête sur place.

De façon générale, la souveraineté des Etats est un frein pour mettre en œuvre des politiques efficaces dans le système onusien. Afin de pallier le manque de moyens des Etats contributeurs, l'ONU pourrait allouer des budgets supplémentaires. Mais les moyens financiers sont finalement autorisés par les Etats et l'Organisation a peu de marge de manœuvre en la matière. De la même façon, les Nations Unies travaillent depuis 2009 à l'adoption d'une « *convention internationale sur la responsabilité pénale des fonctionnaires de l'Organisation ayant commis des infractions pénales dans le cadre d'opérations de maintien de la paix* », mais ce projet n'a pas encore su réunir l'accord des Etats. Certes, une telle convention ne serait pas applicable aux contingents militaires, mais pourrait constituer un signal favorable et donner à l'Organisation des moyens supplémentaires pour lutter contre l'impunité. Il faudrait pour cela que le soutien d'Etats membres influents soit acquis, ce qui n'est pas le cas.

### **Des affaires récentes révélatrices de graves dysfonctionnements internes**

L'affaire « Sangaris » a été, je l'ai mentionné, un véritable choc pour les NU, non seulement parce que les allégations, même si elles n'étaient pas avérées, concernaient le contingent français d'une opération sous mandat ONU, mais aussi parce qu'elles ont mis en cause l'Organisation elle-même. Afin de faire la lumière sur les faits et comprendre la gestion de l'affaire, un panel d'experts indépendants a été mis en place, et le rapport qu'ils ont

rendu en décembre 2015 (« rapport Deschamps »)<sup>12</sup> met en lumière de « graves dysfonctionnement institutionnels » (« *gross institutional failure* »).

L'action des NU sur le terrain est loin d'être facile. Les missions sont implantées dans des zones de crise ou de conflits, et elles doivent en outre coordonner leur travail avec celui des Etats contributeurs, qui fournissent les contingents, et des organisations non gouvernementales (ONG), qui viennent en aide aux populations civiles. Les missions et les antennes des Agences, Fonds et Programmes<sup>13</sup> sont confrontés aux mêmes problématiques en matière de SEA, et ont la responsabilité de rendre compte des abus commis. Mais la politique de « tolérance zéro » peut conduire à des actions de dénonciation systématique, sans que les informations soient vraiment consolidées. Chaque entité renforce sa légitimité en faisant part d'allégations, ou en relayant celles transmises par des ONG, qui peuvent chercher à se donner de la visibilité en agissant de la sorte. La transmission d'allégations non étayées n'est pas forcément le résultat de mauvaises intentions, mais la « surenchère » à la dénonciation peut conduire à des mises en causes abusives, et à de mauvaises analyses sur le terrain qui fragilisent ensuite la fiabilité des informations, qui seront transmises au niveau supérieur, aux Nations contributrices voire à la presse.

Les affaires en RCA ont mis en exergue le traitement complexe de l'information au sein des Nations Unies : gestion malaisée du phénomène relativement nouveau des lanceurs d'alerte, partage de l'information difficile en interne et vers les Etats membres, équilibre fragile à atteindre entre protection des victimes, politique de confidentialité et efficacité des enquêtes menées (par l'Organisation et par les Etats membres), exercice difficile de communication institutionnelle etc.

Le rapport Deschamps a également pointé une coordination insuffisante dans la gestion des cas de SEA entre les différentes entités des Nations Unies (Secrétariat et Haut-Commissariat aux droits de l'homme, Agences, Fonds et Programmes etc.). Non seulement la circulation de l'information était insuffisante, mais les responsabilités étaient également diluées, chaque niveau n'ayant pas conscience des actions qui dépendaient de lui et des mesures à prendre.

Tous ces dysfonctionnements ont concouru à une prise en charge insuffisante des victimes, de façon indirecte (pas de vérification sérieuse des allégations, ou à l'inverse des interrogations multiples et inefficaces, ne

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<sup>12</sup> « Rapport d'un examen indépendant de l'exploitation et des atteintes sexuelles commises par les forces internationales de maintien de la paix en République centrafricaine », 17 décembre 2015. [www.un.org/News/dh/infocus/cenafrepublic/Independent-Review-Report-Fr.pdf](http://www.un.org/News/dh/infocus/cenafrepublic/Independent-Review-Report-Fr.pdf).

<sup>13</sup> Par exemple Haut-Commissariat aux Droits de l'Homme ou aux Réfugiés, UNICEF, UN Women etc.

faisant que décupler le traumatisme et fausser le processus d'enquête), voire de façon directe (pas de coordination dans l'assistance à fournir, pas de suivi de victimes tout au long du processus *etc.*).

### **Une nouvelle approche mise en œuvre depuis 2016 par les Nations Unies**

Suite au rapport Deschamps, les Nations Unies ont amorcé un tournant en nommant auprès du Secrétaire général une coordinatrice spéciale chargée d'améliorer la réponse au SEA, Jane H. Lute. Avec son équipe<sup>14</sup>, mise en place au printemps 2016, a été initiée une nouvelle façon d'aborder le problème de la lutte contre le SEA. Tout en reconnaissant l'importance des dysfonctionnements révélés par le rapport Deschamps, il a été décidé de dépasser son seul cadre (la République Centrafricaine) et de ne pas retenir intégralement l'ensemble des préconisations, toutes n'étant pas pratiquement viables, et de ne pas traiter tous les cas de SEA via le prisme des violations des droits de l'homme, ce qui est une vision un peu réductrice et peu pragmatique.

Une action énergique a été menée en peu de temps pour imposer une action « *system wide* » dans la lutte contre le SEA, incluant toutes les entités des NU et responsabilisant chaque niveau. Un des objectifs est l'harmonisation des politiques internes et des procédures, afin de lutter de la même façon et plus efficacement contre le SEA, les méthodes étant les mêmes (donc connues de tous) et les outils utilisés garantissant une prise en charge optimale des victimes. Cette « révolution copernicienne » a certes eu pour conséquence de mettre en lumière les dysfonctionnements, mais aussi de mieux cerner ce qui ressortait de la responsabilité onusienne, et ce qui restait de la responsabilité des Etats.

En préalable aux travaux d'harmonisation de la politique onusienne, un véritable travail d'état des lieux a été mené en matière de lutte contre le SEA : « *mapping* » de toutes les politiques existantes afin d'identifier les manquements et « *best practices* »<sup>15</sup>, « *infographic* » visualisant la procédure de *reporting* et de gestion des allégations, création d'une base de données des cadres juridiques des Etats membres, publication d'un glossaire sur le SEA, sondage mené à l'été 2016 auprès de près de 7 000 personnels des NU afin d'évaluer leur connaissance en matière de lutte contre le SEA et de leurs responsabilités au sein de l'Organisation *etc.* Toutes ces actions ont également conduit les différentes entités à travailler ensemble, à partager

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<sup>14</sup> L'auteur de cette intervention a participé aux travaux de la coordinatrice spéciale de juin à décembre 2016, en tant qu'expert militaire.

<sup>15</sup> Ces « *best practices* » sont notamment listées dans le rapport du Secrétaire général A/71/818 du 28 février 2017.

leurs informations et réfléchir à une harmonisation des pratiques, garante d'une meilleure gestion des allégations et d'une prise en compte optimale des victimes.

Les résultats de ce travail préliminaire ont conduit à définir les axes d'une nouvelle politique, endossée par le Secrétaire général A. Guterres et déclinée dans son rapport de février 2017<sup>16</sup>. On peut retenir 4 axes majeurs : la fin de l'impunité, une action centrée sur les victimes, le partenariat avec la société civile et les acteurs extérieurs, et la communication stratégique.

Plus concrètement, les actions actuelles visent à développer une culture de la prévention, passant essentiellement par la formation de tous, à tous les niveaux : mise en place d'outils de formation (e-learning notamment), certification professionnelle obligatoire des contingents, distributions d'outils pédagogiques (« *no excuse card* » par exemple). La prévention passe également par le « *vetting* » et le « *screening* » des personnels onusiens, visant à vérifier les antécédents et valider les candidatures, pour éviter le recrutement ou l'emploi d'individus « à risques ». Enfin, une complète responsabilisation des leaders est recherchée, par la mise à disposition d'un manuel, le recueil de leur engagement personnel dans une « *management letter* », et l'imposition d'un processus d'analyse de risques au sein de leur secteur de responsabilité.

Les NU cherchent également à mettre en place une nouvelle façon d'investiguer les cas de SEA. D'une part, le processus de « *reporting* » interne est consolidé, et la communication est très importante sur la méthode (de quoi rendre compte, à qui, comment etc.), et cela sur tous les théâtres de déploiement. Le *reporting* en temps réel devient la norme, mais il s'appuie sur un processus très normalisé. L'objectif est d'utiliser à terme un formulaire standardisé permettant de recueillir un maximum d'information, de caractériser l'allégation et d'en assurer la crédibilité, tout en recherchant le consentement des victimes pour la transmission de certaines informations. D'autre part, l'objectif des NU est la professionnalisation de ses équipes d'enquête, sur le modèle de celles mises en place pour les tribunaux internationaux *ad hoc* pour l'ex-Yougoslavie<sup>17</sup> ou le Rwanda. La mise en place d'équipes pluridisciplinaires (juristes, enquêteurs, analystes, interprètes, médecins etc.), mixtes sur le plan du genre (« *gender approach* ») et ayant reçu une formation spécifique sur l'investigation des violences sexuelles, a déjà montré toute son efficacité. Enfin, les NU cherchent à favoriser la coopération avec les nations

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<sup>16</sup> Rapport du Secrétaire général, « *Special measures for protection from sexual exploitation and abuse: a new approach* », A/71/818, 28 février 2017. [https://conduct.unmissions.org/sites/default/files/a\\_71\\_818\\_1.pdf](https://conduct.unmissions.org/sites/default/files/a_71_818_1.pdf).

<sup>17</sup> Voir à ce sujet « *Prosecuting conflict-related sexual violence at the ICTY* », edited by Serge Brammertz and Michelle Jarvis, Oxford, 2016.

contributrices en matière d'enquête : mise en place d'« *initial response teams* » (IRT) onusiennes, chargées notamment de préserver les preuves avant l'implication d'enquêteurs nationaux, promotion du déploiement sur le terrain de « *national investigation officers* » (NIO), capables de réagir rapidement *in situ*, et plaider pour la réalisation d'enquêtes « mixtes » entre les NU et les Etats membres.

Le volet répressif des Nations Unies tente aussi de se renforcer. La commission d'actes de SEA peut conduire au rapatriement des personnels impliqués, mais également à la démission des autorités s'il s'avère qu'elles n'ont pas pris les mesures nécessaires. La démission de B. Gaye, qui était à la tête de la MINUSCA lors des affaires de RCA, a été une première et un signe fort. L'axe d'effort porte également sur le volet financier, en essayant de pénaliser les Etats contributeurs dont sont originaires les auteurs d'actes de SEA. Mais cette voie est difficile, car elle implique souvent de modifier les accords bilatéraux entre les NU et les Etats, et elle peut risquer de décourager les contributeurs aux OMP.

La communication dans le domaine de la lutte contre le SEA se renforce et se transforme. On peut à cet égard noter la stratégie de « *naming and shaming* » des Etats concernés, mise en place depuis 2015. Cette publicité sur les cas de SEA a un intérêt, en ce qu'elle responsabilise les Etats dans la prévention et la lutte, afin de ne pas être stigmatisés et accusés sur la place publique. Mais pour être efficace, elle nécessite une fiabilisation des informations et des procédures robustes visant à vérifier la véracité des allégations avant de communiquer à leur sujet. Plus globalement, les NU communiquent beaucoup sur leur nouvelle politique (voir par exemple le nouveau site internet dédié<sup>18</sup> ou certaines vidéos réalisées<sup>19</sup>). Cette stratégie offensive vise à accréditer l'idée que l'Organisation a pris la mesure du problème, et qu'elle le combat efficacement, plus fermement que toute autre organisation d'ailleurs. Cette stratégie a pour corollaire de remettre les Etats face à leurs responsabilités, et s'est traduite dans la presse par une diminution des critiques directes contre l'inaction des NU dans le domaine et un report de ces critiques vers les Etats.

Enfin, le cœur de la nouvelle politique onusienne est la place accordée aux victimes. La mesure emblématique est la mise en place d'un « *victims' rights advocate* »<sup>20</sup>, placé auprès du Secrétaire général, et ayant pour unique tâche le soutien et l'aide aux victimes. Les NU ont également développé un protocole d'assistance, visant à harmoniser les pratiques et à optimiser l'assistance fournie par les missions et agences sur le terrain. Enfin, un fonds d'aide aux victimes a été créé, visant non pas à

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<sup>18</sup> [www.un.org/preventing-sexual-exploitation-and-abuse](http://www.un.org/preventing-sexual-exploitation-and-abuse).

<sup>19</sup> [www.youtube.com/watch?v=c-BSN6U2-dg#action=share](http://www.youtube.com/watch?v=c-BSN6U2-dg#action=share).

<sup>20</sup> Il faut noter que le modèle anglo-saxon est particulièrement inspirant pour les NU dans ce domaine.

l'indemnisation (ce qui aurait pu avoir des effets pervers) mais au financement de toutes les mesures d'aide et de soutien.

### **Une politique qui devrait porter ses fruits malgré les difficultés**

Cette nouvelle approche, dynamique et innovante, notamment en ce qu'elle englobe l'ensemble des entités des NU dans la lutte et qu'elle responsabilise chacun, devrait à terme porter ses fruits et conduire à une baisse des cas de SEA. Il faut toutefois garder à l'esprit qu'il existait sans doute un « *under-reporting* » dans le domaine, et que les nouvelles procédures mises en œuvre risquent dans un premier temps de faire augmenter le nombre d'allégations (ce phénomène peut déjà être remarqué pour l'année 2016, où les allégations des agences, fonds et programmes ont enfin été recensées<sup>21</sup>). Par ailleurs, il ne faut pas surestimer l'adhésion de l'ensemble des entités à l'approche initiée par la coordinatrice spéciale. Des dissensions internes perdurent, notamment en ce qui concerne l'approche par le prisme des droits de l'homme du SEA, l'harmonisation des procédures ou la politique de confidentialité et le partage des informations avec les Etats membres.

Plus généralement, on peut s'interroger sur la pertinence de la notion de SEA elle-même, qualification spécifique adoptée en 2003 et qui peut parfois être trop englobante. En effet, les NU luttent contre le SEA de façon globale, c'est-à-dire qu'elles combattent de la même façon les crimes et violences sexuelles, et les actes liés à la prostitution. D'une part, il s'agit souvent de fait qui n'ont pas le même degré de gravité, les viols étant bien sûr des crimes dans tous les corpus juridiques, mais la prostitution n'étant pas partout pénalement sanctionnée. Cette vision maximaliste est parfois difficilement compréhensible pour certains Etats, ou difficile à faire appliquer sur le terrain. Mais surtout, elle peut conduire à des amalgames douteux, et dilue à mon sens la gravité des actes les plus condamnables.

Par ailleurs, certaines politiques préconisées sur le terrain peuvent parfois être contre-productives. J'en donnerai pour exemple la « politique de non fraternisation » (avec les populations locales), censée prévenir tout risque de dérapage et d'exactions commises par les casques bleus. Cependant, outre le fait qu'il semble difficile d'agir pour le maintien de la paix en restant loin des populations civiles, ce type de politique entraîne un risque de deshumanisation des individus que les militaires sont censés protéger. Cette distance et le décalage par rapport à la réalité du terrain sont à mon sens aussi des facteurs de risques.

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<sup>21</sup> On peut donc actuellement voir que des cas de SEA sont également commis par des personnels et fonctionnaires des Nations Unies, et non pas uniquement par des militaires ou policiers des Etats contributeurs.

Il faut également raison garder et se méfier des solutions qui paraissent idéales, comme la mise en place d'une politique de genre, censée réduire de façon significative les violences sexuelles. Il convient déjà de garder à l'esprit que les violences sexuelles ne sont pas commises uniquement à l'encontre des femmes et que la présence de femmes dans les contingents ne réduira pas forcément la propension des hommes à passer à l'acte. En outre, partir du présupposé que les femmes sont par nature plus magnanimes et bienveillantes que les hommes n'est fondé sur aucune étude sérieuse<sup>22</sup>. La recherche de l'inclusion de plus de femmes dans les contingents des OMP est une nécessité<sup>23</sup>, ne serait-ce que pour des raisons d'équité. La recherche d'une vision moins biaisée des violences sexuelles est également primordiale, et passe par l'inclusion de femmes à tous les échelons de responsabilité. C'est donc un travail sur les mentalités qu'il est important de mener, mais l'éradication du SEA ne passe pas par une féminisation systématique des contingents.

Enfin, les NU devront veiller à éviter l'écueil du « tout SEA », qui conduit à inclure la lutte contre ces comportements dans tous les pans du travail de l'Organisation. En effet, il peut être contreproductif de lier les questions budgétaires ou logistiques à une implication des Etats à lutter contre le SEA. Par ailleurs, on risque de voir le combat contre le SEA devenir une posture, un « mantra » pour les Etats, et en définitive nuire à toute implication réelle et pragmatique des nations contributrices.

Malgré ces difficultés, on ne peut pas nier que le SEA, qui était auparavant le « secret le mieux gardé » de l'Organisation, est devenu un sujet prioritaire, et que tous les moyens ont été mis pour lutter efficacement contre ces actes inacceptables. La nouvelle approche, innovante et pragmatique, devrait donc porter ses fruits et conduire à terme à une baisse des cas de SEA. Elle se démarque en tous cas des tentatives menées au cours des 15 dernières années, en ce qu'elle a commencé par une complète remise en cause interne, et qu'elle se traduit par une action globale et responsabilisante à tous les niveaux.

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<sup>22</sup> Nous pouvons garder à l'esprit les actes de torture commis par les soldats américains, hommes et femmes, dans la prison d'Abu Grahیب (Irak) en 2003.

<sup>23</sup> Sur 105 000 casques bleus, 3 700 militaires et 1 200 policiers sont des femmes.



**V. The protection of medical personnel,  
facilities and transports**



## **Advances in the protection of medical personnel, facilities and transports under the Additional Protocols and interpretative challenges on the fundamental obligations to respect and protect**

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The task assigned to me is to address the advances in the protection of medical personnel, units and transports under the two Additional Protocols. I will take the liberty to also pay attention to the flip side of the equation, namely, where the Additional Protocols have *failed* to advance the protection of medical personnel, units and transports.

In so doing, I will focus on *legal* advances or the lack thereof. It might be needless to say, but nevertheless worthwhile to remind ourselves that more recent trends in the *actual* protection of medical personnel, units and transports on the ground suggest that we might have to speak about retrogressions rather than advances. The ICRC and other humanitarian organizations, the UN and the media have well documented this deplorable trend, which includes an increase in incidents of killing, injuring, kidnapping, harassing, intimidating, robbing, and arresting medical personnel for performing their medical duties; the shelling, looting, forced entry, or other forceful interference with the running of health-care facilities (such as depriving them of electricity and water); and the attacks upon, theft of and interference with medical vehicles, etc.<sup>1</sup>

However, in light of these trends on the battlefield, it would seem as important as ever to remind ourselves of the advances that the Additional Protocols undoubtedly mark in the *legal* protection of medical personnel, units and transports. Indeed, since that protection in the Additional Protocols – much as any other aspect of them – ‘supplements’ the 1949 Geneva Conventions rather than replaces the protections contained in the latter, one could summarily describe *all* protective rules pertaining to medical personnel, units and transports in the Additional Protocols as legal advances. However, I will limit myself to identifying some which, in my view, are particularly significant, first in the area of medical personnel; secondly in the realm of medical units and transports; and thirdly, those

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<sup>1</sup> Cf ICRC Health Care in Danger - The Issue, <http://healthcareindanger.org/the-issue/>.

that derive from the regulation of medical personnel, units and transports under the two Additional Protocols more broadly.

### Advances

A first significant development is the definitional precision and expansion in Additional Protocol I. As far as personnel is concerned, Geneva Conventions I and II contained only rudimentary definitions.<sup>2</sup> In contrast, Additional Protocol I (art. 8 (c)-(k) provides for rather detailed definitions of medical personnel. In addition to an increase in the precision, the definition in Additional Protocol I also marks a significant expansion in as much as it now includes civilian medical personnel of a party to the conflict and hence goes beyond the protection provided in accordance with Geneva Conventions I and II, which only apply to medical personnel serving the armed forces, as well as going beyond article 20 Geneva Convention IV, which applies to the medical personnel of civilian hospitals. Simultaneously, the definition of medical personnel clarifies that persons assigned to the enumerated medical purposes, (eg search for, collection and treatment of the wounded, sick and shipwrecked, or the administration of medical units or to the operation and administration of medical transports) must be so ‘exclusively’, i.e. these must be their sole tasks.<sup>3</sup> The formal status of medical personnel – and the entitlement to the protection that this status entails is, nevertheless, contingent on the assignment of a party to the armed conflict. This is especially relevant for civilian medical personnel. Persons engaged in the medical care of others, while not being members of the armed forces, may not automatically be assumed to also fulfil that task *vis-à-vis* the wounded and sick during armed conflicts.<sup>4</sup> This aspect of the definition – requiring the assignment of a party to the armed conflict - also entails that, although the civilian population and aid societies have the right to collect and care for the wounded and sick on their own initiative<sup>5</sup>, they will not enjoy the protection of ‘medical personnel’ unless there is an official assignment of medical tasks by the competent authority. In its totality, the definition of medical personnel is clear and precise and as such certainly qualifies as an advance.

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<sup>2</sup> Cf art.s 24-26 GC I, 36 GC II.

<sup>3</sup> *ICRC Commentary*, 125, para. 353.

<sup>4</sup> *Ibid.*, para. 354.

<sup>5</sup> Cf. Article 17, para. 1, 2<sup>nd</sup> sentence, AP I; see also Kleffner, *Protection of the Wounded, Sick, and Shipwrecked*, in: D. Fleck (ed), *The Handbook of International Humanitarian Law*, 3<sup>rd</sup> ed., Oxford University Press (2013), p. 328, Section 605.

A further significant advance in relation to medical personnel in Additional Protocol I is its strengthening of the protection of medical duties. While the matter will be addressed in more detail by my fellow panelist, suffice it to say that the relevant provisions of Additional Protocol I and Additional Protocol II<sup>6</sup> are filling an important gap left by the Geneva Conventions.

Turning from persons to objects, Additional Protocol I also contains detailed definitions of medical units, transportation, transports, vehicles, ships and craft, and aircraft, clarifying the distinction between permanent and temporary ones, and – mirroring the definition of medical personnel – it also expands the definition of medical units and transports, to include military *and* civilian ones. Indeed, some of the rules address civilian medical units exclusively, complementing the provisions of Geneva Conventions I and II, and regulating the conditions for granting protection<sup>7</sup> and the discontinuance of such a protection on account of such medical units being used to commit acts harmful to the enemy. The latter by and large replicates the conditions in Geneva Convention I. I will not expand on this latter issue, since the notion of ‘acts harmful to the enemy’ will be addressed by Laurent Gisel shortly.

For situations of belligerent occupation, Additional Protocol I also subjects the requisitioning of civilian medical units to stricter conditions than is foreseen for civilian hospitals in Article 57 of Geneva Convention IV. The latter provides that requisitioning of civilian hospitals is permissible, provided it is done temporarily and it is urgently necessary for the care of the military wounded and sick. Suitable arrangements must be made in due time for the care and treatment of the patients and for the need of the civilian population for hospital accommodation, while prohibiting an occupying power from requisitioning material and stores of civilian hospitals for as long as they are necessary for the needs of the civilian population. In contrast, Article 14 of Additional Protocol I sets forth a duty of the Occupying Power to ensure that the medical needs of the civilian population in an occupied territory continue to be satisfied and there is a general prohibition to requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment. Compliance with that general duty and prohibition

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<sup>6</sup> Article 16 AP I and 10 AP II.

<sup>7</sup> Art. 12 (2) AP I.

is not the only condition for lawful requisitioning in situations of belligerent occupation. Rather, additional conditions must be fulfilled<sup>8</sup>.

As far as medical transports are concerned, a very important area in which Additional Protocol I not only develops or refines pre-existing rules, but establishes genuinely new rules is the area of medical aircraft. As such, it breaks the deadlock that had surrounded several issues and had prevented the drafters of the 1949 Geneva Conventions to address the issue in any detail and which resulted in the very rudimentary regulation in the Geneva Conventions<sup>9</sup>. This in turn proceeded from a very embryonic provision in the 1929 Geneva Convention<sup>10</sup>, and subjected all activity of medical aircraft to the agreement of the belligerent states and – in the case of flights over the territory of neutral states – to the additional agreement of the latter. Additional Protocol I now provides for a set of rules, some of which can be reconciled with the pre-existing rules in the Geneva Conventions (for example, the obligation to mark medical aircraft). However, others are in clear conflict. These conflicting provisions hence replace the relevant provisions of the Geneva Conventions in the relations between Parties to the Protocol. More specifically, Article 25 of Additional Protocol I, specifies that medical aircraft in areas not controlled by an adverse party is to be respected and protected also if there is *no* agreement with that adverse party. Nor does Article 26 (1) on medical aircraft in contact or similar zones, strictly require an agreement, although it recognizes that protection for medical aircraft in such areas can be fully effective only by prior agreement between the Parties to the conflict. This increase in the legal protection of medical aircraft is counterbalanced by new rules setting forth certain restrictions on their operations (Art. 28), including the prohibitions to use them to acquire any military advantage, to collect or transmit intelligence data, etc (Art. 28) and provisions on landing and inspection of medical aircraft (Art. 30). It is noteworthy that the loosening of the agreement requirement in Additional Protocol I seems to have since informed a further process of customary law, which extends the regulation for contact or similar zones to medical aircraft in areas controlled by an adverse Party, as expressed in the Harvard Air and Missile Warfare Manual.<sup>11</sup> Such a process further underlines the importance of the rules in Additional Protocol I, which marked an important step in developing a regulatory framework that strikes an adequate balance between military concerns and humanitarian considerations.

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<sup>8</sup> These conditions are necessary and the making of immediate arrangements to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

<sup>9</sup> Art.s 36/37 GC I, 39/40 GC II and 22 GC IV.

<sup>10</sup> Art. 19 of the 1929 Geneva Convention.

<sup>11</sup> Rule 78 (a).

Beyond the aforementioned advances in the specific area of medical personnel, on the one hand, and medical units and transports, on the other, three more developments that apply to medical personnel, units and transports more broadly are worth pointing out. First, Additional Protocol I extends the prohibition of reprisals – that is otherwise contained in the Geneva Conventions<sup>12</sup> - against all of the aforementioned persons and objects, including civilian medical personnel and civilian medical units and transports. This is particularly significant in light of the fact that the prohibition of reprisals against individual civilians, the civilian population and civilian objects<sup>13</sup> have proven to be less than uncontroversial, even amongst states parties to the Additional Protocols, some of whom have entered reservations. No such reservations have been entered in relation to Additional Protocol I, which sets forth the prohibition of reprisals against medical personnel, units and transports.

Secondly, Additional Protocol I criminalizes acts ‘described as grave breaches in the Conventions as grave breaches if committed against medical personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.’<sup>14</sup> These acts hence become subject to the grave breaches regime, with its duty to extradite or prosecute, command responsibility and other ensuing obligations set forth in both the Conventions and Additional Protocol I.

Thirdly, some of the rules of Additional Protocol I that pertain to medical personnel, units and transports survived the melt down – or, as some would say ‘simplification’ - of Additional Protocol II and hence also apply in non-international armed conflict that reach the required threshold. This holds true for the general obligations to respect and protect medical personnel and medical units and transports, and certain aspects of the protection of medical duties.

Mentioning Additional Protocol II seems an appropriate moment to transition from the advances of the Additional Protocols to some of those areas in which the Additional Protocols have *failed to advance* the legal protection of medical personnel, facilities and transports. Again, I will be selective and only point out some of those that I consider to be particularly significant.

First, Additional Protocol II does not contain any definitions similar to those contained in Article 8 of Additional Protocol I. Accordingly, neither the notion of medical personnel nor the one of medical units or transports – much as any other notion in the realm of the protection of the wounded, sick and shipwrecked – is clarified. The solution of choice to fill the resulting definitional gap is to simply transpose the definitions from

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<sup>12</sup> In casu Article 46 of GC I.

<sup>13</sup> Cf Art.s 51 (6) AP I; 52 (1) of AP I.

<sup>14</sup> Article 85 (2) AP I.

Additional Protocol I and apply them by analogy. Yet, such an exercise needs to be approached with a certain degree of caution. To extend the definition in Additional Protocol I, which covers both military and civilian medical personnel, to also apply in non-international armed conflicts would import the continued conceptual obscurity that surrounds the notion of ‘civilian’ in non-international armed conflicts. Admittedly, this issue is irrelevant as far as the legal protection is concerned, since importing the definition from Additional Protocol I would mean that both military and civilian medical personnel have to be respected and protected in all circumstances in any event. However, the point here is the conceptual one that notions that are well established in the law of international armed conflict are not necessarily fitting or can be replicated in the law of non-international armed conflict. Indeed, this problem was already recognized during the negotiations at the Diplomatic Conference leading to the adoption of the Additional Protocols. When the issue of defining medical personnel arose in the context of Additional Protocol II, the idiosyncracies of non-international armed conflict, and more specifically the fact that one of the parties is a non-state organized armed group, was noted as warranting certain departures from the definitions in Additional Protocol I.<sup>15</sup>

Secondly, as is well known, Additional Protocol II does not contain any criminalization – be it of violations of the rules pertaining to the protection of medical personnel, units or transports or violations of any other of its rules. In that respect, the Rome Statute of the International Criminal Court has filled an important gap in the law of non-international armed conflict, in as much as it now contains the war crimes of ‘Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law (Art. 8(2)(e)(ii) ICC Statute) and ‘Intentionally directing attacks against buildings dedicated to (amongst others), hospitals and places where the sick and wounded are collected, provided they are not military objectives’ (Art 8 (2)(e)(iv) ICC Statute). Indeed, the corresponding war crimes in international armed conflict mark

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<sup>15</sup> See ICRC Customary Law Study, Commentary p 83: Eg, the term “Red Cross or Red Crescent organisations” was used in the draft definition of medical personnel in AP II order “to cover not only assistance provided on the Government side but also already existing Red Cross groups or branches on the side opposing the Government and even improvised organizations which had come into existence only during the conflict”. It should be noted in this respect that the term “Red Cross (Red Crescent, Red Lion and Sun) organizations” is also used in Article 18 of Additional Protocol II. Secondly, the drafting committee had deemed it necessary to specify that aid societies other than Red Cross organisations must be located within the territory of the State where the armed conflict is taking place “in order to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and being recognized by the rebels”.

a further development if compared to the grave breach contained in Article 85 (2) of Additional Protocol I to which I alluded previously. Be that as it may – Additional Protocol II does not contain any criminalization.

Thirdly, no prohibition of reprisals corresponding to Article 20 of Additional Protocol I has found its way into Additional Protocol II. Back during the days of the Diplomatic Conference, a suggestion to include specific prohibitions of reprisals in non-international armed conflicts was rejected. However, it is by no way certain what to make of that rejection. The ICRC has deduced from the opinions expressed by at least some states during the Diplomatic Conference, in combination with some other material, a customary rule prohibiting parties to non-international armed conflicts to resort to belligerent reprisals and to other countermeasures against persons who do not or who have ceased to take a direct part in hostilities.<sup>16</sup> In fact, one of the arguments in support of such a rule is that '[t]here is insufficient evidence that the very concept of lawful reprisal in non-international armed conflict has ever materialised in international law'. That statement comes very close to saying that the lack of a rule permitting reprisals in non-international armed conflict means that states are legally barred from resorting to reprisals.

Others have taken the absence of a prohibition in Additional Protocol II – or for that matter in any other area of the conventional law of non-international armed conflict - and state practice and *opinio juris* to suggest that reprisals are permissible in non-international armed conflict, under certain conditions. This is not the place to enter into a debate, which essentially would boil down to asking whether the Lotus-principle is still good law. Suffice it to say that we could have that debate to no small measure because Additional Protocol II is silent on the issue of belligerent reprisals, including belligerent reprisal against medical personnel, units and transports, rather than settling the issue.

To conclude, the Additional Protocols have advanced the protection of medical personnel, facilities and transports in several respects. However, some of the pertinent issues remain unaddressed, especially in the law of non-international armed conflicts as regulated by Additional Protocol II.

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<sup>16</sup> Cf Rule 148 of the ICRC Customary Law Study.

# **The protection of medical personnel under the Additional Protocols: the notion of “acts harmful to the enemy” and debates on incidental harm to military medical personnel**

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This presentation will be divided in three parts. It will begin with some remarks on the rules protecting the medical mission, the rules governing the conduct of hostilities and their interplay. It will then turn to the conditions under which wounded and sick and medical personnel and objects lose their protection, and it will close with a discussion on the relevance of incidental harm to such persons and objects.

## **Interplay between the rules protecting the medical mission and the rules governing the conduct of hostilities**

The development and clarification of the rules protecting the medical mission and of the rules governing the conduct of hostilities are among the most important features of the 1977 Additional Protocols. These two bodies of rules overlap and complement each other to protect wounded and sick<sup>1</sup> and medical personnel and objects against the effects of hostilities.

The rules affording protection to wounded and sick persons, and to medical personnel and objects are at the origin of the development of modern IHL.<sup>2</sup> Today they regulate multiple issues<sup>3</sup> such as the definition of

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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 thank Alexander Breitegger, Lindsey Cameron and Bruno Demeyere for their useful comments on earlier drafts of this presentation.

<sup>1</sup> The same holds true for shipwrecked even though the presentation will refer to wounded and sick only.

<sup>2</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (1864 Geneva Convention).

<sup>3</sup> Among many others, see Jan Kleffner, “Advances in the protection of medical personnel, facilities and transports under the Additional Protocols and interpretative challenges on the fundamental obligations to respect and protect” on pp. 151-157 above and Alexander Breitegger, ‘The legal framework applicable to insecurity and violence affecting

wounded and sick, medical personnel and objects;<sup>4</sup> the right to use the Red Cross, Red Crescent and Red Crystal emblems;<sup>5</sup> the status and treatment of medical personnel upon capture;<sup>6</sup> and the obligation of medical personnel to treat wounded and sick impartially and solely according to medical needs.<sup>7</sup> At the heart of the protection afforded to wounded and sick persons and medical personnel and objects is the obligation to respect and protect them.<sup>8</sup> A vital component of this obligation is the prohibition to attack them.

The rules governing the conduct of hostilities are often referred to as affording general protection, to distinguish them from the rules specifically protecting the medical mission described above. The rules governing the conduct of hostilities also afford protection against attack to wounded and sick and to medical personnel and objects. Their central feature is the principle of distinction. Parties to the conflict must at all times distinguish between civilians and civilian object on the one hand, and military objectives on the other. Attacks may only be directed against the later, and never against civilians and civilian objects.<sup>9</sup>

Wounded and sick persons, medical personnel and medical objects may be civilians or civilian objects, and protected as such under the principle of distinction and the other rules governing the conduct of hostilities. Furthermore, military medical personnel are not combatants,<sup>10</sup> and the principle of distinction therefore prohibits attacking them.<sup>11</sup> Finally, the prohibition to attack persons ‘hors de combat’ extends notably to all

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the delivery of health care in armed conflicts and other emergencies’ International Review of the Red Cross (2013), 95 (889), 83-127.

<sup>4</sup> Art. 8 of the 1977 First Additional Protocol (AP I).

<sup>5</sup> Art.s 38-44 of the 1949 First Geneva Convention (GC I); Arts 41 - 45 of the 1949 Second Geneva Convention (GC II), Arts 18 and 20 to 22 of the 1949 Fourth Geneva Convention (GC IV); Art. 18 AP I; Art. 12 of the 1977 Second Additional Protocol (AP II).

<sup>6</sup> Art.s 28 - 32 GC I; Art. 37 GC II.

<sup>7</sup> Art. 12 GC I; Art. 12 GC II; Art.s 9 and 10 AP I; Art.s 7 and 9 AP II; ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary IHL Study), Rule 110; ; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016*, (hereinafter ICRC 2016 Commentary), para. 765 on common Article 3.

<sup>8</sup> See in particular Art.s 12, 19, 20, 24, 35 and 36 GC I; Art.s 12, 22, 23 and 36 GC II; Art.s 16, 18 and 20 to 22 GC IV; Art.s 10, 12, 15, and 21 to 27 AP I; Art.s 7, 9 and 11 AP II; Rules 25 to 30 ICRC Customary IHL Study.

<sup>9</sup> Art.s 48, 51 and 52 AP I and Art. 13 AP II, Rules 1 and 7 Customary IHL Study.

<sup>10</sup> Art. 43(2) AP I; Rule 3 ICRC Customary IHL Study.

<sup>11</sup> Art. 48 AP I (*‘the Parties to the conflict ... shall direct their operations only against military objectives’*) and Rule 1 ICRC Customary IHL Study (*‘Attacks may only be directed against combatants’*).

defenceless wounded and sick, in particular military ones, who may therefore not or no longer be attacked.<sup>12</sup>

Turning to objects, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>13</sup> While the view has been expressed that a military medical unit ‘*prima facie* meets [this] test’,<sup>14</sup> it is submitted here on the contrary that military medical objects do not meet the definition of military objective (at least as long as they are not used to commit acts harmful to the enemy outside of their humanitarian function, see below). Military medical units and transports must be assigned exclusively to the medical purposes exhaustively defined by IHL, i.e. search for, collection, transport, treatment of the wounded and sick, and the prevention of disease.<sup>15</sup> In the exact same way as civilian medical units and transports, they must be used to provide care impartially and solely according to medical needs, whether the wounded and sick are civilians or military, friend or foe.<sup>16</sup> Ensuring care for all military wounded and sick, including for those of the enemy wounded on the battlefield, and not only for a party’s own military wounded and sick personnel, has been at the heart of the specific protection since the adoption of the very first 1864 Geneva Convention.<sup>17</sup> While at that time, military medical facilities and transports may not have been afforded protection other than the specific protection, as the rules on the conduct of hostilities were not clearly codified then, this is no longer the case. Military medical objects no more fulfil the contemporary definition of military objective than civilian medical objects do. Indeed, the definition of military objective adopted in 1977 crystallizes a development towards a more restrictive

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<sup>12</sup> Art. 41 AP I; Rule 47 ICRC Customary IHL Study.

<sup>13</sup> Art. 52(2) AP I; Rule 8 ICRC Customary IHL Study.

<sup>14</sup> Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff Publishers, Leiden, 2009, p. 195.

<sup>15</sup> Art. 36 GC I; Art. 22 GC II; Art. 18 GC IV; Art. 8 AP I; Rules 28 and 29 ICRC Customary IHL Study; ICRC 2016 Commentary paras 1787 - 1788 on Art. 19 GC I and paras 2369-2380 on Art. 35 GC I.

<sup>16</sup> See note 7 above. See also *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, Ministry of Defence, U.K., 2004 (U.K. 2004 military manual), para. 7.3.2: “Paragraph 7.3 [on Protection and Care of the Wounded and Sick] applies to all wounded and sick, whether United Kingdom, allied or enemy, military or civilian. (...) It is forbidden, for example, to give the treatment of United Kingdom and allied wounded priority over the treatment of wounded enemy personnel.”

<sup>17</sup> Art. 6(1) of the 1864 Geneva Convention: “Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for”.

concept than the limits previously set by IHL,<sup>18</sup> and has been said to require ‘a direct nexus to military operations’.<sup>19</sup>

In view of the fact that military medical objects must be assigned exclusively to specifically defined medical purposes, that they must be used to carry out these medical tasks impartially, including for the benefit of wounded and sick adversaries, that wounded and sick military personnel must refrain from any act of hostilities to avoid losing their specific protection, and that they may possibly never go back to the fight even after being discharged from the medical unit because of long-lasting physical or mental impairment, it is not tenable to argue that military medical objects offer an *effective* contribution to the military action of one party and that their destruction would offer a *definite* military advantage to the party that would carry out the attack. Any contribution that such objects may make to the future military potential of the enemy does not exhibit the close nexus between the object to be attacked and the actual fighting that the contemporary definition of military objective requires.<sup>20</sup> For the rules governing the conduct of hostilities, military medical objects such as military hospitals and military ambulances are therefore civilian objects.<sup>21</sup>

Considering hospitals that are not used to commit acts harmful to the enemy outside of their humanitarian function to be military objectives

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<sup>18</sup> See e.g. Hays Parks’ criticism of the restrictive character of this definition in W. H. Parks, ‘Air War and the Law of War’, 32 *The Air Force Law Review* 1 (1990), pp. 138-144.

<sup>19</sup> Michael N. Schmitt (speaking of ‘military advantage’ in the second prong of the definition of military objective), ‘Targeting in operational law’ in Terry D. Gill and Dieter Fleck, *The Handbook of the international law of military operations*, (Oxford, OUP, 2015), p. 279, para. 4. Similarly, Yoram Dinstein requires “a proximate nexus to ‘war-fighting’” (*The Conduct of Hostilities under the Law of International Armed Conflict*, 2016 (3rd Ed.), Cambridge, Cambridge University Press, para. 293, p. 109).

<sup>20</sup> See also Laurent Gisel, ‘Can the incidental killing of military doctors never be excessive?’, *International review of the Red Cross*, (2013), 95 (889), 215-230, at pp. 219f.

<sup>21</sup> ICRC 2016 Commentary on Art. 19 GC I, para. 1794. Under IHL, civilian objects are all objects that are not military objectives, see Art. 52(1) and Rule 9 ICRC Customary IHL Study. Several military manuals include ‘hospitals’ in general (and not only ‘civilian hospitals’) among the examples of civilian objects: *Law of Armed Conflict, Manual*, Joint Service Regulation (ZDv) 15/2, Federal Ministry of Defense, Germany, May 2013, para. 408 (“*hospitals and places where the sick and wounded are collected*”); Côte d’Ivoire, *Droit de la guerre, Manuel d’instruction, Livre III, Tome 1: Instruction de l’élève officier d’active de 1ère année, Manuel de l’élève*, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 32-33 (as quoted in ICRC Customary IHL Study, practice related to Rule 9); U.K. 2004 military manual, para. 15.16.1 (which mentions “*hospitals, and medical establishments and units*” among objects which are not military objectives; see also para. 5.24.2 which mentions hospitals when discussing civilian objects); in the same vein, the U.S. Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 13 February 2009 includes “*Medical facilities (both civilian and military)*” among “*Objects defined by the Law of War (LOW) as functionally civilian or noncombatant in nature*” (Enclosure B, p. B-1, para.(1) and 2(a)(4)).

would constitute a significant departure from the very notion of the medical mission under IHL. Moreover, it would be counterproductive to their protection and could even be taken by malicious actors as an encouragement to target them.

The rules protecting the medical mission and the rules governing the conduct of hostilities therefore largely overlap with regard to the protection of wounded and sick, medical personnel and medical objects against attack.

Some of their other provisions differ, however. For example, a warning is required in all circumstances before specifically protected medical personnel or object may be targeted, and this is true even - or rather especially - when this person or object has become a lawful target.<sup>22</sup> This is not the case for a non-medical civilian taking a direct part in hostilities, or a non-medical object normally dedicated to a civilian purpose but used as a military objective. Both may be attacked without warning to end such participation or use.<sup>23</sup> It is therefore important to underline that the provisions complement each other. When the protection does not exactly overlap, person or objects may be targeted only when they are protected neither by the specific protection nor by the general protection.

*Conditions under which wounded and sick and medical personnel and objects lose their protection*

Let us now turn to the loss of protection of medical personnel and objects, focusing first on the loss of specific protection, and then on the loss of general protection.

Turning to objects first, the Conventions and Protocols provide that medical objects lose their specific protection when they are used to commit, outside their humanitarian function, acts harmful to the enemy. The ICRC had suggested a more precise definition in 1949, namely ‘acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations’.<sup>24</sup> This definition was not included in the law, but Art. 23 of the 1977 First Additional Protocol (AP I) gives one example of an act harmful to the enemy for some categories of medical ships and craft, that is ‘the clear refusal to obey a command’ to stop, move off or take a certain course. Examples found in the literature include firing at the enemy for reasons other than self-defence; installing a military position on a medical post; sheltering able-bodied combatants; turning a medical unit into a weapons or ammunition depot, or an observation post; using the medical unit to shield a military objective from enemy operations; using medical

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<sup>22</sup> Art. 21 GC I; Art. 34 GC II; Art. 19 GC IV; Art. 13 AP I; Art. 11 AP II.

<sup>23</sup> An effective advance warning will nevertheless be required under Art. 57(2)(c) AP I if the attack may affect the civilian population, unless circumstances do not permit, but that type of warning has another purpose.

<sup>24</sup> ICRC 2016 Commentary on Art. 21 GC I, para. 1840.

transport for the deployment of combatants or weapons or for collecting intelligence.<sup>25</sup>

Conversely, the Four Geneva Conventions of 1949 and AP I list a number of situations or acts that may not be considered acts harmful to the enemy.<sup>26</sup> This includes:

- The equipment of medical personnel with light individual weapons for self-defence purposes;
- The presence of sentries or escort;
- The presence of small arms and ammunitions taken from the wounded and sick;
- The fact that civilian medical units also treat wounded and sick combatants or conversely that military medical units also treat wounded and sick civilians.

Art. 22 of the 1949 First Geneva Convention (GC I) on military medical units adds the presence of the veterinary services, maybe a bit of an anachronism today, while Art. 35 of the 1949 Second Geneva Convention (GC II) on hospital ships adds two other situations to the list:

- The presence of means to facilitate navigation and communication;
- The transport of medical personnel and equipment. This last point is today valid more generally, as it is included in the definition of medical transportations and transports given in Art. 8 AP I.

These examples are illustrative and not limitative. To give an example of a situation that is not expressly mentioned in the Conventions or the Protocols, if able-bodied combatants are in a hospital to visit wounded and sick relatives, the hospital is not used to commit an act harmful to the enemy outside its humanitarian function. Provided that such visits do not amount to able-bodied combatants using the hospital as shelter, they may not affect the protection afforded to the hospital.<sup>27</sup>

A few of issues have raised controversies in the literature or in operations, notably the means of defence available to medical units, the interrogation of wounded and sick, and the transmission of information concerning the wounded and sick.

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<sup>25</sup> See notably ICRC 2016 Commentary on Art. 21 GC I, para. 1842 and Nils Melzer (coordinated by Etienne Kuster), *International Humanitarian Law, a comprehensive Introduction*, ICRC, Geneva, 2016, p. 146.

<sup>26</sup> Art.s 22 GC I, 34 GC II, 19 GC IV and Art. 13 AP I.

<sup>27</sup> U.K. 2004 military manual, para. 7.18, includes visits to the wounded and sick among the medical reasons for which combatants may be in medical units under Art. 13(2)(d) AP I. See also United States, Department of Defense, *Law of War Manual* (U.S. DoD Law of War Manual), June 2015 (updated December 2016), para. 7.10.3.6.

As mentioned, the presence of sentries or escorts or the fact that medical personnel themselves would carry light individual weapons is not an act harmful to the enemy, and therefore does not deprive the medical personnel, unit or transport of their specific protection. The limitation to individual weapons stems from various grounds: while military units may not be attacked, depending on the circumstances they may be captured by the enemy; medical personnel, sentries or escorts are therefore not authorized to defend against a lawful attempt to capture a medical unit;<sup>28</sup> instead, medical personnel and sentries may use their weapons only in self-defence against illegal attacks; medical personnel may also have to maintain order within the medical unit. The assumption of the law is that light individual weapons will be sufficient to discharge these tasks. Furthermore, protecting the hospital with heavy weapons would entail two risks: first, that the party doing so ends up using the weapons beyond self-defence purposes; and second that the presence of heavy weapons raises the suspicions of the enemy on the real function of the hospital or of the weapons stationed there. This would put the wounded and sick and medical personnel or unit at greater risk of attack.<sup>29</sup> While the relevant articles in the Conventions and Protocol do not discuss the type of weapons that sentries might carry, the ICRC 2016 Commentary states that they may only carry the same weapons as medical personnel, namely light individual weapons.<sup>30</sup> Indeed, the reasons for which sentries are entitled to use their weapons without causing the medical unit to lose its protection against attack are the same as those for which the medical personnel themselves could use a weapon. To be noted that when such sentries are part of the armed forces, they do not become medical personnel. However, in practice they enjoy

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<sup>28</sup> See e.g. *Law of Armed Conflict, Manual*, Joint Service Regulation (ZDv) 15/2, Federal Ministry of Defense, Germany, May 2013, para. 617; U.K. 2004 military manual, para. 7.16; U.S. DoD Law of War Manual (updated December 2016), para. 7.10.1.3; Tom Haeck, 'Loss of protection', in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds), *The Geneva Conventions, A commentary*, 2015, Oxford, Oxford University Press, p. 846, para. 25.

<sup>29</sup> ICRC 2016 Commentary on Art. 22 GC I, para. 1873.

<sup>30</sup> ICRC 2016 Commentary on Art. 22 GC I, para. 1874. The U.S. DoD Law of War Manual (updated December 2016) states that GC I "*does not specifically restrict the weapons that medical units or facilities may have. Military medical units and facilities may be armed to the extent necessary to enable them to defend themselves or their patients against unlawful attacks*" but that "*medical units or establishments should not be armed such that they would appear to an enemy military force to present an offensive threat*". It explains that "*U.S. military medical and religious personnel have generally not been authorized to carry or employ crew-served weapons, hand grenades, grenade launchers, antitank weapons, or Claymore munitions*" (para. 7.10.3.4).

immunity from attack, as the medical unit that they guard remains protected.<sup>31</sup>

On this basis, how to deal with a situation where a belligerent genuinely concludes that a medical unit faces a threat requiring heavy weapons to defend against? To station such heavy weapons outside the medical unit would ensure that the unit does not lose its specific protection. They should actually be placed as far as possible from the medical unit as military requirements allow, to avoid the risk that the medical unit would suffer from incidental harm when combatants use such heavy weapons in hostilities.<sup>32</sup>

Let me turn to the second question, namely interrogation. May the party to the conflict that controls the hospital collect information from the patients? Information of a medical nature, obviously it may. Also, patients must be asked about their identity as soon as possible, to inform the families notably in case of the death of the patient. This is foreseen in detail in the Geneva Conventions,<sup>33</sup> and should be considered as appropriate information to be collected from patients in any hospital in an armed conflict. Wounded and sick people who come back from the battlefield may, however, also hold important up-to-date military information about the enemy tactical situation or operations. Such military intelligence is key to the efficient conduct of the fight. While the interrogation for military purposes of a single wounded or sick person is unlikely to cause a whole medical unit to lose its specific protection, it seems reasonable to consider that a medical unit in which such information would be systematically collected from the wounded and sick is in fact being used to commit acts harmful to the enemy outside of its humanitarian function. The United States is said to have refrained from interrogating wounded enemy fighters on hospital ships during the 2003 war in Iraq for this very reason.<sup>34</sup>

The situation is similar for the transmission of information: the information that parties must collect must also be transmitted, as soon as possible,<sup>35</sup> and such transmission, required by the law, may obviously not be considered an act harmful to the enemy. Information on the number of wounded and sick and type of injuries is necessary in particular to allow a proper planning of their evacuation and of the logistics that re-supplying the medical unit entails, while the identity of the wounded and sick is

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<sup>31</sup> Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 204, on Art. 22 GC I.

<sup>32</sup> See Art. 19(2) GC I; Art. 18(5) GC IV; Art.s 12(4) and 58 AP I.

<sup>33</sup> Art. 16 GC I; Art.s 17, 120 and 122 GC III.

<sup>34</sup> Gregory P. Noone and al., 'Prisoners of war in the 21<sup>st</sup> century: issues in modern warfare', *50 Naval Law Review* (2004), pp. 1 - 69, at pp. 39-40.

<sup>35</sup> See note 33 above.

necessary for tracing purposes, but no information of military nature may be transmitted.

Very importantly however, the use of a medical object for acts harmful to the enemy outside of the humanitarian function of the object does not immediately cause the loss of the specific protection. As noted above, a warning must be given in all cases, setting whenever appropriate a reasonable time-limit.<sup>36</sup>

Let us now turn to the question of whether the loss of the specific protection of a medical unit necessarily entails the loss of its general protection as well. Under the rules governing the conduct of hostilities, attacks may only be directed at military objectives. Assuming that an act harmful to the enemy is understood as had been suggested by the ICRC in 1949 namely as ‘facilitating or impeding military operations’, the medical object used in such a way will in many cases also fulfil the definition of military objective.<sup>37</sup> There may be exceptions however. For example, as noted above, a medical ship not obeying a clear command to stop, move off or take a certain course may lose its specific protection; however, as recalled by the San Remo Manual on Naval Warfare, if hospital ships and other vessels exempt from attack lose their specific protection, they may be attacked only if, among other conditions “*the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective*”.<sup>38</sup> Not obeying a clear command to stop, move off or take a certain course is not necessarily sufficient, in and of itself, to fulfil the definition of military objective. In many cases however, the same act will simultaneously entail the loss of specific and general protection - with the important caveat that the loss of specific protection requires a warning to be given.

The situation is similar for medical personnel, though with slight differences. The Geneva Conventions and the Additional Protocols do not include rules on the loss of the specific protection of medical personnel. However, the ICRC Customary IHL Study concluded that military medical personnel, like objects, lose their specific protection if they commit, outside their humanitarian function, acts harmful to the enemy.<sup>39</sup> For example, it is generally considered that taking a direct part in hostilities constitutes an act harmful to the enemy. Conversely, it is often noted that acts harmful to the enemy include *indirectly* interfering with enemy military operations,<sup>40</sup> and

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<sup>36</sup> See note 22 above and text in relation to it.

<sup>37</sup> ICRC 2016 Commentary on Art. 21 GC I, para. 1847.

<sup>38</sup> San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, paragraphs 51(c) and 52(c).

<sup>39</sup> ICRC Customary IHL Study, Rule 25.

<sup>40</sup> ICRC 2016 Commentary on Art. 21 GC I, para. 1841.

would therefore be a broader notion than direct participation in hostilities.<sup>41</sup> In any case, civilian medical personnel remain protected against attack unless and for such times as they take a direct part in hostilities, because they are civilians - a loss of specific protection due to the commission of acts harmful to the enemy that *indirectly* interfere with enemy military operations does not entail a loss of the general protection. Such civilian medical personnel may not be attacked, but the belligerents are no longer obliged not to unduly interfere with the exercise of the medical function that such personnel may still carry out, and, depending on the specific circumstances and act committed, this medical personnel may be interned or prosecuted under domestic law for the commission of the harmful act outside of his or her medical function. While the situation is less clear for military medical personnel, it has been advocated that the loss of specific protection should similarly be limited to acts that amount to direct participation in hostilities, because this notion would be a more relevant criteria for persons than the notion of acts harmful to the enemy, which had been developed for objects.<sup>42</sup>

*Relevance of incidental harm to wounded and sick combatants and military medical personnel and objects*

Let me now turn to the last part of my presentation, the relevance of incidental harm to wounded and sick combatants, and military medical personnel and objects.

This issue is relevant when a medical unit or transport has lost its specific protection, because wounded and sick patients and medical personnel in this medical unit may still be protected. It is also relevant more generally when the target is a separate military objective, the attack of which is expected to cause incidental harm to specifically protected persons and objects.

To illustrate the first situation, let us take the scenario of a military observation and transmission post located on the roof of a hospital building in a manner turning the building into a military objective; let us further assume that the military post is not removed following a warning that had set an appropriate time-frame. The fact that the building becomes a lawful target does not affect the protection afforded to the wounded and sick and the medical personnel in that building. They all remain specifically

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<sup>41</sup> ICRC 2016 Commentary on Art. 24 GC I, para. 2003; M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, Leiden Boston 2013 (2e ed), p. 411, para.2.10.2 (on Art. 57(3) AP I); Haeck, note 28 above, p. 842, para. 11.

<sup>42</sup> Marco Sassòli, 'When do medical and religious personnel lose what protection?' in *Vulnerabilities in Armed Conflicts: Selected Issues*, 14th Bruges Colloquium 17-18 October 2013, proceedings, pp. 50-57, at p. 54.

protected persons, and - as will be discussed below - all feasible precautions must be taken in the choice of means and methods of warfare to avoid or at least minimize incidentally harming them, and such harm may not be excessive in relation to the concrete and direct military advantage anticipated. Provided it is 'feasible' as understood in IHL, it might require directing the attack on the roof-top only, without damaging the rest of the hospital building, or even capturing the hospital rather than attacking it.

The title of the presentation mentions incidental harm to military medical personnel, but let us address more generally incidental harm to wounded and sick and medical personnel and objects other than civilians. Indeed, wounded and sick civilians and civilian medical personnel and objects undoubtedly enjoy the general protection afforded to all civilians by the principles of proportionality and precautions, precisely because they are civilians.<sup>43</sup> Whether the same is true for wounded and sick combatants and military medical personnel and objects is less evident at first sight. Indeed, the rules on proportionality and precautions in the First 1977 Additional Protocol explicitly speak of incidental loss of *civilian* life, injury to *civilian* and damage to *civilian* objects.

This debate has taken more prominence since the publication of the United States Department of Defense Law of War Manual in June 2015. The Manual held the view that the respect and protection due to wounded and sick combatants and military medical personnel and units does not require to consider expected incidental harm to these persons and objects when assessing proportionality, because they are deemed to have accepted the risk of incidental harm due to their proximity to military objectives, and such harm therefore gives no just cause for complaint.<sup>44</sup> Discussing incidental harm to several categories of persons, mainly civilians, that the Manual had excluded on this or similar<sup>45</sup> ground, Hathaway and Lederman argued that such ground was 'indefensible', and amounted to making 'proportionality... meaningless'.<sup>46</sup>

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<sup>43</sup> Arts 51 and 57 API.

<sup>44</sup> U.S. DoD Law of War Manual, June 2015, in particular paras 7.3.3.1, 7.8.2.1, 7.10.1.1, 17.14.1.2, 17.15.1.2 and 17.15.2.2.

<sup>45</sup> In particular according to para. 5.12.3.2 of the U.S. DoD Law of War Manual, June 2015, certain individuals who may be employed in or on military objectives are "*deemed to have assumed the risk of incidental harm from military operations*".

<sup>46</sup> Oona Hathaway, 'The Law of War Manual's Threat to the Principle of Proportionality', 23 June 2016, at [www.justsecurity.org/31631/lowm-threat-principle-proportionality/](http://www.justsecurity.org/31631/lowm-threat-principle-proportionality/) and Marty Lederman, 'Troubling proportionality and rule-of-distinction provisions in the Law of War Manual' 27 June 2016, at [www.justsecurity.org/31661/law-war-manual-distinction-proportionality/](http://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/).

In December 2016, the manual was amended.<sup>47</sup> The updated manual notably recognized the relevance of incidental harm to categories of civilians originally excluded from the proportionality analysis on the ground of their ‘assumption of risk’<sup>48</sup> - a radical change to be commended. It also highlighted repeatedly the obligation to reduce incidental harm to wounded and sick combatants and military medical personnel and objects as part of the required precautions, a welcome clarification.<sup>49</sup> It however retained the view that military medical personnel and objects have ‘accepted the risk’ of incidental harm, and continued to reject the relevance of incidental harm to such persons and objects for the principle of proportionality.<sup>50</sup> One of the manual’s new paragraphs explained that “*The exclusion of protected military personnel and military medical facilities from this prohibition [proportionality] reflects such factors as, among others, the general impracticality of prohibiting attacks on this basis*

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<sup>47</sup> For a discussion of this amendment, including on the issues discussed in this presentation, see e.g. Geoffrey S. Corn, ‘Initial Observations on the Law of War Manual Revision: “Three ups/Three downs”’, 14 December 2016, at [www.justsecurity.org/35531/initial-observations-law-war-manual-revision-three-upsthree-downs/](http://www.justsecurity.org/35531/initial-observations-law-war-manual-revision-three-upsthree-downs/) and Marty Lederman, ‘Thoughts on Distinction and Proportionality in the December 2016 Revision to the Law of War Manual’, 19 December 2016, at [www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual/](http://www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual/).

<sup>48</sup> Compare in particular U.S. DoD Law of War Manual, June 2015, para. 5.12.3.2 “*Harm to certain persons who may be employed in or on military objectives would be understood not to prohibit attacks under the proportionality rule. These categories include (...) civilian workers who place themselves in or on a military objective, knowing that it is susceptible to attack, such as workers in munitions factories. These persons are deemed to have assumed the risk of incidental harm from military operations*” with U.S. DoD Law of War Manual, updated December 2016, para. 5.12.3.3 “*Provided such workers [civilian workers who support military operations in or on military objectives] are not taking a direct part in hostilities, those determining whether a planned attack would be excessive must consider such workers, and feasible precautions must be taken to reduce the risk of harm to them*”.

<sup>49</sup> U.S. DoD Law of War Manual, updated December 2016, in particular paras 5.10, 5.10.1.2, 5.11, 7.3.3.1, 7.8.2.1, 7.10.1.1, 7.12.2.5, 17.14.1.2, 17.15.1.2 and 17.15.2.2. This obligation was already mentioned in the first sentence of para. 5.11 of the June 2015 manual. The importance of underlining the requirement to reduce incidental harm to wounded and sick combatants and military medical personnel and objects cannot be overemphasized. It is also telling, because Art. 57(2)(a)(ii) AP I speaks of avoiding or reducing incidental harm to civilians and civilian objects with the very same words used in the rule of proportionality in Arts 51 and 57 AP I.

<sup>50</sup> U.S. DoD Law of War Manual, updated December 2016, paras 5.10.1.2, 7.3.3.1, 7.8.2.1, 7.10.1.1, 17.14.1.2, 17.15.1.2 and 17.15.2.2. In the June 2015 manual, these paragraphs of chapters 7 and 17 expressly stated that incidental harm to such person and objects needed not be considered when assessing proportionality. In the December 2016 updated manual, these paragraphs mention that such incidental harm “*does not serve to exempt nearby military objectives from attack*”. However, para. 5.10.1.2 clarified that the December 2016 updated Manual continued to exclude such persons and object from the scope of the principle of proportionality.

during combat operations. For example, the expected incidental harm to a sick-bay on a warship would not serve to exempt that warship from being made the object of attack.<sup>51</sup>

Along an apparently similar line, Corn and Culliver held the view that extending the principle of proportionality to wounded and sick combatants and military medical personnel would be inconsistent with the nature of combat operations.<sup>52</sup> They suggested however that the Martens Clause would nevertheless require considering incidental harm to specifically protected persons and objects other than civilians when operationally feasible.<sup>53</sup>

Without downplaying the challenges of assessing proportionality during combat operations, it is only a narrow aspect of the issue which should not obscure the broader perspective. Furthermore, the law already takes operational reality into consideration.

First, it is only a narrow aspect of the issue. The scenario that Corn and Culliver use to illustrate their argument relates to combatants who become wounded during the initial stages of an operation,<sup>54</sup> and the U.S. DoD Law of War Manual might have the same concern in mind when stating that prohibiting attacks on the basis of the rule of proportionality would be impractical during combat operations. However, this has no bearing on the feasibility to assess incidental harm to persons and objects that are already specifically protected at the time of the planning of and decision upon the attack, such as fixed or mobile medical units, including medical personnel and wounded and sick present therein. In the view of the ICRC, such incidental harm can and must be considered, irrespective of whether the concerned persons or objects are civilians or belong to the armed forces. The specific challenges raised by the scenario discussed by Corn and Culliver do not justify to wholly reject the relevance of incidental harm to wounded and sick combatants and military medical personnel and object for the principle of proportionality.

Second, the law already takes into account operational requirements. While it is important to recall that the prohibition of disproportionate attack

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<sup>51</sup> U.S. DoD Law of War Manual (updated December 2016), para. 5.10.1.2.

<sup>52</sup> Geoffrey S. Corn and Andrew Culliver, 'Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk' (December 13, 2016), at <http://dx.doi.org/10.2139/ssrn.2884854> p. 10; see also Geoffrey Corn, 'Transatlantic Workshop on International Law and Armed Conflict: Wounded and Sick, Proportionality, and Armaments', 10 October 2017, at [www.lawfareblog.com/transatlantic-workshop-international-law-and-armed-conflict-wounded-and-sick-proportionality-and](http://www.lawfareblog.com/transatlantic-workshop-international-law-and-armed-conflict-wounded-and-sick-proportionality-and), and John Merriam, 'Must Military Medical and religious Personnel Be Accounted for in a Proportionality Analysis?' 8 June 2016, at [www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis/](http://www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis/).

<sup>53</sup> Corn and Culliver, *ibidem*, pp. 14-17.

<sup>54</sup> *Ibidem*, p. 10. See also the different hypothetical in Corn 2017, note 52 above.

is absolute, the precautions required to assess whether incidental harm would be excessive are qualified by what is ‘feasible’.<sup>55</sup> What precautions are feasible depends on the circumstances at the time, including humanitarian and military considerations.<sup>56</sup> It goes without saying that the precautions that can be taken to refrain from disproportionate attacks by the ground commander in the middle of an on-going military operation are more limited than those that can be taken during the planning process for deliberate targeting.

It is also worth noting that under Art. 57(2)(b) AP I and customary IHL,<sup>57</sup> an attack must be cancelled or suspended if it becomes apparent that the attack may be expected to be disproportionate. This rule is undoubtedly relevant in a situation where civilians, whether medical personnel or not, would rush to treat or evacuate wounded combatants in the midst of a military engagement, for example in the immediate aftermath of a first salvo. This shows that the law already envisages how the rule of proportionality must be applied when the situation changes during the execution of an attack. The challenges of doing so should therefore not be deemed so insurmountable as to justify disregarding the relevance of incidental harm to specifically protected persons and objects other than civilians in such situation.

Let us recall that the obligation to search and collect wounded and sick apply ‘at all times’ and must be implemented ‘without delay’ and therefore also during an engagement, as soon as circumstances permit.<sup>58</sup> The application of the principles of proportionality and precautions with regard to the incidental harm to medical personnel, including military medical personnel, decreases the risks that such personnel face. It therefore enables the parties to the conflict to discharge their obligation to search and collect all wounded and sick as soon as possible. To disregard the relevance of incidental harm to military medical personnel would also discriminate against them compared to civilian medical personnel, while one of the advances of the 1977 Additional Protocols was precisely to ensure that all medical personnel and objects, whether civilian or military (and all

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<sup>55</sup> ICRC Customary IHL Study, Rule 18.

<sup>56</sup> See the definition of feasible precautions e.g. in Art. 3(4) of the CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980, and in the States practice referred to in ICRC Customary IHL Study, p. 54. Corn and Culliver actually use strikingly similar wording when concluding that, under the Marten Clause approach they suggest, the obligations to consider incidental harm to specifically protected military personnel and objects would arise ‘*only when doing so is assessed as feasible under the circumstances*’ (Corn and Culliver, note 52 above, p. 16).

<sup>57</sup> Rule 19 ICRC Customary IHL Study.

<sup>58</sup> Art. 15 GC I; Rule 109 ICRC Customary IHL Study; ICRC 2016 Commentary on Art. 15 GC I, para. 1488.

wounded and sick, whether military or civilians) enjoy the same protection.<sup>59</sup>

Finally, the abovementioned sick-bay example given in the U.S. DoD Law of War Manual misses the point.<sup>60</sup> As explained in the commentary by Bothe, Parsch and Solf, targeting warships is not prohibited despite the presence of a sickbay because the incidental harm will normally not be excessive when attacking a warship.<sup>61</sup> This is precisely an application of the principle of proportionality, not an acknowledgement that such incidental harm would be irrelevant.

Turning to military practice, there should be little doubt that such incidental harm has been considered in proportionality assessment during armed conflicts. In particular, the 2009 U.S. Chairman of Joint Chiefs of Staff Instruction *No-Strike and the Collateral Damage Estimation Methodology*, defined collateral damage as harm to “*persons or objects that would not be lawful military targets in the circumstances ruling at the*

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<sup>59</sup> For more details, see Gisel, note 20 above, pp. 224f.

<sup>60</sup> See text in relation to note 51 above.

<sup>61</sup> Discussing Art. 12(4) AP I, Bothe clarifies that: “*The problem of collateral damage is dealt with in more detail, with respect to the civilian population, in Art.s 51 et seq. It is significant that Art. 12, para. 4 states, with respect to medical units, two rules which are also found in Part IV, Section I of the Protocol. The first sentence of para. 4 is a corollary of Art. 51, para. 7. Protected objects and persons may not be used to “shield” military targets. The second sentence prescribes (“whenever possible”) a precautionary measure which, for military medical units, is already provided for in Art. 19 of the First Convention and is a corollary of Art. 58, Protocol I. Article 12, para. 4 and Art. 19 of the First Convention show that, with respect to collateral damage, the rules which protect the civilian population against such damage constitute also, at least in principle, an adequate solution concerning the same problem as it arises in relation to medical units. Thus, the principle of proportionality applies in this case as well. The principle of proportionality is a general principle of the law of armed conflict which has found its expression in such provisions as the prohibition of “unnecessary” suffering (Art. 23 (c) of the Hague Regulations of 1907). It is not restricted to the question of the protection of the civilian population for which it has now been codified by Part IV of Protocol I. An obvious example that medical units cannot be exempted by law from suffering collateral damage is the existence of sickbays on men of war. If it were inadmissible to subject medical units to collateral damage, no attempt to sink a warship with a sickbay aboard would be permissible.*

*In applying the proportionality test to the protection of medical units against collateral damage, everything depends on the concrete situation. The yardstick of proportionality is the concrete and direct military advantage anticipated. If a medical unit operates near an important firing position (which it often has to do), the neutralization of this position constitutes a great advantage for the enemy and the enemy is consequently entitled to run the risk of causing a high degree of collateral damage within the medical unit as a result of the attack directed against the firing position. On the other hand, small and unimportant military objectives may not be attacked if this may be expected to cause important collateral damage within major medical units such as field hospitals” (Bothe, Parsch and Solf, note 41 above, p. 128, para. 2.2 on Art. 12 AP I).*

time”.<sup>62</sup> This includes protected persons and objects other than civilians, which must therefore be considered - and assuredly have been considered in practice.<sup>63</sup> While policies - and therefore also practices - might have considered incidental harm to non-combatants even beyond the requirements of IHL in specific instances,<sup>64</sup> the *Collateral Damage Estimation Methodology* Instruction dispels any doubt that its requirement in this regards would have been stated as a matter of policy only: “the *LOW [Law of War]* also stipulates that anticipated civilian or noncombatant injury or loss of life and damage to civilian or noncombatant property incidental to attacks must not be excessive in relation to the expected military advantage to be gained”.<sup>65</sup> Similar views also appear - though not always consistently - in military manuals of Australia,<sup>66</sup> Canada,<sup>67</sup> the

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<sup>62</sup> U.S. Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 13 February 2009, Glossary, p. GL-4. Similarly, the U.S. Joint Targeting, Joint Publication 3-60 (3 January 2013) defines collateral damage as ‘[u]nintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time’ (p. GL - 4 Terms and definitions).

<sup>63</sup> As noted by Lederman: “It is hard to imagine that U.S. commanders very often, if ever, order a strike in which the expected harm to protected military personnel, such as medical personnel, and the sick and wounded, would be excessive in relation to the expected direct and concrete military advantage” (Lederman, note 47 above).

<sup>64</sup> The 22 May 2013 U.S. Presidential Policy Guidance *Procedures for approving direct action against terrorist target locate outside the United States and Areas of Active Hostilities* required “[n]ear certainty that non-combatants will not be injured or killed” (sections 1.C(8), 1.E(2) and 5.A.2(2)), noting that “[f]or purposes of this PPG, non-combatants are understood to be individuals who may not be made the object of attack under the law of armed conflict” (p. 1).

<sup>65</sup> U.S. Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 13 February 2009, Enclosure D, p. D-1. It continues as follows: “Failure to observe these obligations could result in disproportionate negative effects on civilians and noncombatants and be considered a LOW violation. Furthermore, U.S. leadership and military could be subject to global criticism, which could adversely impact military objectives, alliances, partnerships, or national goals. The U.S. government places a high value on preserving civilian and noncombatant lives. The U.S. military must emulate and represent these values through the conscientious use of force in the accomplishment of assigned military missions.”

According to the CJCSI 3160.01 Instruction’s Glossary: “non-combatant. Military medical personnel, chaplains, and those out of combat, including prisoners of war and the wounded, sick, and shipwrecked” (p. GL-7).

<sup>66</sup> *Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, includes non-combatants other than civilians when setting out the principle of proportionality (para. 2.8).

<sup>67</sup> *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, Canada, 13 August 2001, para. 204.5: Deciding whether the principle of proportionality is being respected “involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other (emphasis added). However, most other

Netherlands,<sup>68</sup> New Zealand,<sup>69</sup> Philippines<sup>70</sup>, Switzerland<sup>71</sup>, the United Kingdom,<sup>72</sup> and the United States.<sup>73</sup> This is also the view, under customary

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statements of the principle of proportionality mention “*collateral civilian damage*”, including para. 204.4 stating the principle of proportionality immediately before the paragraph quoted here.

<sup>68</sup> *The Humanitarian Law of War, A Manual*, Royal Army of the Netherlands, September 2005, paras 227 – 228 in Chapter 2 ‘General concepts and terms’, Section 4 ‘Principles’: “0227. *Proportionality* There is a discordance between the principles of military necessity and of humane treatment. (...) The humane principle, however, places limits on this freedom of action, because unnecessary suffering must be avoided, and non-combatants respected. 0228. For this reason, it is inadmissible for weapons and methods of combat to go beyond this, e.g., to cause excessive suffering or excessive damage to non-military targets (*collateral damage*)” (unofficial translation available at ICRC library). However, statements of the principle of proportionality in chapter 5 ‘Behaviour in battle’ when discussing Arts 52 and 57 AP I focus on incidental civilian harm.

<sup>69</sup> *Interim Law of Armed Conflict Manual*, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, para. 207: “The principle of proportionality establishes a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need... It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other” (emphasis added).

<sup>70</sup> *Air Power Manual*, Philippine Air Force, Headquarters, Office of Special Studies, May 2000, paras 1-6.4: “The chief unifying principle always applies—that the importance of the military mission (military necessity) determines, as a matter of balanced judgment (proportionality), the extent of permissible collateral or incidental injury to [an] otherwise protected person or object” (emphasis added).

<sup>71</sup> Switzerland, *Bases légales du comportement à l’engagement (BCE)*, Règlement 51.007/IVf, Swiss Army, 1 July 2005, para. 163: “Principle of proportionality... Military action is only permissible if the loss of human life and damage to civilian or specially protected objects are not excessive in relation to the concrete and direct military advantage anticipated.” In the same vein, para. 225 states with regard to indiscriminate attacks (of which proportionality is an example according to Art. 51(5) AP I): “Prohibited methods of warfare... Indiscriminate attacks, i.e. attacks which cannot distinguish between protected persons/objects and military objectives” (as quoted in the practice related to Rules 14 and 25 of the ICRC Customary IHL Study).

<sup>72</sup> U.K. 2004 military manual, para. 13.5(g): “For the purposes of this chapter [maritime warfare] certain terms are defined below (...) (g) ‘collateral casualties’ or ‘collateral damage’ means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives” and para. 13.32 (d) “With respect to attacks, the following precautions shall be taken: (...) (d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive” (emphasis added). The statement of the principle of proportionality in chapter 5 on *The Conduct of Hostilities* reproduces, however, the wording of the proportionality rule in AP I (see para. 5.33).

<sup>73</sup> *The Commander’s Handbook On The Law Of Naval Operations*, U.S. Navy, NWP 1-14M, August 2017: para. 8.11.2 “The legal requirement to attack only military objectives

law, of the San Remo Manual on Naval Warfare,<sup>74</sup> of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia (with regard to persons),<sup>75</sup> and of the International Law Association Study Group on the conduct of hostilities.<sup>76</sup>

The ICRC believes that this is the better view.<sup>77</sup> It is submitted here that the relevance of incidental harm to protected persons other than civilians for the principles of proportionality and precautions has two mutually reinforcing sources: the rules affording specific protection to the medical mission and the rules governing the conduct of hostilities.

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*and to avoid excessive incidental injury/death and collateral damage to noncombatants, civilians, and civilian objects applies when identifying targets for physical attack/destruction as part of an offensive IO [information operation] plan” and para. 8.11.4: “In employing nonlethal means of OCO [offensive cyberspace operations] against a military objective, factors involved in weighing anticipated incidental injury/death to protected persons can include, depending on the target, indirect effects. The general statement of the principle of proportionality in para. 5.3.3. also seems to imply that the relevant incidental harm is not limited solely to harm to civilians and damage to civilian objects: “The principle of proportionality requires a commander to conduct a balancing test to determine if the expected incidental injury resulting from an attack, including harm to civilians and damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated to be gained from the attack” (all emphasis added).*

<sup>74</sup> The paragraph on ‘Definitions’ in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea states that “*collateral casualties or collateral damage means the loss of life of, or injury to civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives*” (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, p. 9, para. 13(c) (emphasis added); see also ‘Explanation’, p. 87, para. 13.9).

<sup>75</sup> In its Final Report to the Prosecutor, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia mentioned “*injury to non-combatants*” (and not ‘injury to civilians’) when speaking of incidental harm under the principle of proportionality (paras 49 and 50).

<sup>76</sup> The Final Report of the International Law Association Study Group on the conduct of hostilities concludes that “*While some members of the SG [Study Group] initially favored a literal reading of the proportionality rule, the SG agreed that incidental killings of or injury to protected persons other than civilians render the attack prohibited if it is excessive compared to the concrete and direct military advantage anticipated - whether one anchors this finding in the rules on the protection of medical mission (and in particular the obligation to protect and respect medical personnel including military medical personnel), in the rules on the conduct of hostilities, or in both*” (p. 27), at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=3763&StorageFileGuid=11a3fc7e-d69e-4e5a-b9dd-1761da33c8ab>.

<sup>77</sup> See ICRC 2016 Commentary on GC I, paras 1353 - 1357 on Art. 12, para. 1797 on Art. 19 and para. 1987 on Art. 24; ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, Report, Geneva, October 2015, 32IC/15/11, pp. 31-32, at [www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf](http://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf).

As recalled at the outset of this presentation, the obligation to respect and protect is at the core of the protection of the medical mission. The ICRC considers that the obligation to “respect” requires duties of abstention, such as not attacking the medical mission, whether directly, indiscriminately or in violation of the principle of proportionality.<sup>78</sup> A memorandum by the U.S. Secretary of Defense seems to go in this direction when requiring that “[c]onsiderations of humanity, proportionality, and honor should guide combatants in all their interactions with the wounded and sick” and placing this requirement under the overall obligation that “[a]ll the wounded and sick, whether or not they have taken part in the armed conflict, shall be respected and protected”.<sup>79</sup>

Disregarding the relevance of incidental harm to specifically protected persons and objects would indeed be incoherent with the very concept of the specific protection, which implies a more stringent protection than the one generally guaranteed to civilians and civilian objects,<sup>80</sup> a view also expressed most recently by Boothby and Heintschel von Heinegg.<sup>81</sup> Military instructions on collateral harm and academic writings reflect such a more stringent protection.<sup>82</sup>

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<sup>78</sup> ICRC 2016 Commentary on GC I, para. 1357 on Art. 12, para. 1797 on Art. 19 and para. 1987 on Art. 24.

<sup>79</sup> Ash Carter, Secretary of Defense, Memorandum *Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict*, 3 October 2016, para. II. The Memorandum states that “the statement reflects legal principles related to the protection of the wounded and sick and of impartial humanitarian organizations during armed conflict. Where the principles were not already legally binding as a matter of treaty or custom, the statement conveys the United States’ support for the recognition of the principles as customary international law”.

<sup>80</sup> For more details, see Gisel, note 20 above, pp. 224-226.

<sup>81</sup> William H. Boothby and Wolff Heintschel von Heinegg, “The law of war: a detailed assessment of the US Department of Defense law of war manual” Cambridge, Cambridge University Press, 2018, p. 450: “Curiously, paragraph 5.10.1.2 [of the U.S. DoD Law of War Manual] suggests that the prohibition on attacks expected to cause excessive incidental harm does not require consideration of military medical personnel, military wounded and sick and military medical facilities. This seems to be an illogical conclusion. Given that each of these categories of personnel and facility must be respected and protected, and indeed that they are entitled to protection, e.g. in the form of warnings, that goes beyond that to which civilians are entitled, it cannot be right that expected injury or, as the case may be, damage to them is simply ignored in applying the proportionality rule. The better view must be that because of their special protection, such persons and objects must be considered when an attack is being planned or decided upon.”

<sup>82</sup> For example, the U.S. Chairman of the Joint Chiefs of Staff Instruction, *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 13 February 2009, includes military medical facilities among “*Category I Protected or Collateral Objects... [which] includes the most sensitive subset of objects defined by the LOW*” (Enclosure B, p. B-1, para. 2(a)(4)) which are as such, put on the no-strike lists (on which medical facilities, schools and interest sites, whether military or civilians, are the third to fifth entities by

In any case, as noted above, medical units and transports, whether civilian or military, do not fulfil the definition of military objective.<sup>83</sup> Military medical units and transport are therefore civilian objects for the rules governing the conduct of hostilities, and protected by the principle of proportionality as expressed in Articles 51 and 57 AP I.

If incidental harm to military medical objects is relevant, the same must be true for incidental harm to persons discharging the same function (military medical personnel) and persons in favour of whom the specific protection has been established in the first place (the wounded and sick). To consider otherwise would run counter to the general approach of the rules governing the conduct of hostilities, which protect persons at least as much as objects, and sometimes more.<sup>84</sup>

Finally, medical units and medical aircrafts, whether civilians or military, may not be used to shield or immune military objectives from attack.<sup>85</sup> In the same vein, the war crime of using human shields in the Rome Statute of the ICC is defined as: “*Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations*”. If incidental harm to protected persons or objects other than civilians was not relevant for the prohibition of disproportionate attacks, how could they render certain military objectives immune from military operations?<sup>86</sup>

Taking a step back, it is important to underline that IHL is fundamentally rooted in a balance between military necessity and humanity. Kleffner highlighted that to consider that the obligation to respect and protect the medical mission prohibits any incidental harm would overemphasize humanitarian considerations. Conversely, to consider that incidental harm to specifically protected persons other than civilians could never be excessive as a matter of law would overemphasize military considerations. Considering that incidental harm to protected persons and objects may render the attack illegal, but only when such harm is expected

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priority order, Enclosure A to Appendix C, p. C-A-1). Non-specifically protected civilian objects are part of Category II Protected or collateral objects, and do not necessarily appear on the no-strike list. For an example in the academic literature: when introducing the notion of specific protection (often referred to as the special protection), Boothby explains that “*The adjective ‘special’ implies that there is an identifiable feature to the protection that in some way exceeds that accorded to civilian objects in general*” (William. H. Boothby, *The Law of Targeting* (Oxford, OUP, 2012), p. 232).

<sup>83</sup> See above text in relation to notes 13 to 21.

<sup>84</sup> On examples in which the law protects persons more than objects, see e.g. Bothe, Partsch and Solf, note 41 above, p. 411, para. 2.10.2 (on Art. 57(3) AP I).

<sup>85</sup> Art.s 12(4) and 28(1) AP I.

<sup>86</sup> For more details, see Gisela, note 20 above, p. 226.

to be excessive, appears to strike the very balance that IHL requires.<sup>87</sup> Such an understanding was already expressed shortly after the adoption of the Additional Protocols in Bothe, Partsch and Solf *New Rules for Victims of Armed Conflicts*. As noted above, Bothe expressed it in his commentary on Art. 12 on the protection to medical units,<sup>88</sup> while Solf expressed it in his commentary on Art. 41 on the safeguard of an enemy *hors de combat*: '[t]he accidental killing or wounding of such persons [*hors de combat* personnel], due to their presence among, or in proximity to, combatants actually engaged, by fire directed against the latter, gives no just cause for complaint, *but any anticipated collateral casualties of hors de combat persons should not be excessive in relation to the military advantage anticipated.*'<sup>89</sup>

It is, therefore, submitted that disregarding the relevance of incidental harm to protected persons and objects other than civilians is not tenable as a matter of law. Both the rules affording protection to the medical mission and the rules governing the conduct of hostilities support this conclusion. Beyond the legal debate, it is important in practice in order to ensure the continued protection of all those providing emergency medical care close to the fighting in sometimes very difficult and dangerous situations.

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<sup>87</sup> Jan Kleffner, 'Transatlantic Workshop on International Law and Armed Conflict: Wounded and Sick and the Proportionality Assessment', 12 October 2017, at <http://intercrossblog.icrc.org/blog/transatlantic-workshop-on-international-law-and-armed-conflict-wounded-and-sick-and-the-proportionality-assessment>.

<sup>88</sup> Bothe, Partsch and Solf, note 41 above, p. 128, para. 2.2 on Art. 12 AP I, quoted extensively in note 61 above.

<sup>89</sup> Bothe, Partsch and Solf, note 41 above, para. 2.2.1 on Article 41 AP I, p. 253 (emphasis added).

## **What are the rules on the protection of medical ethics and the respect of medical activities? How to ensure their implementation?**

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In June of 1859, Henry Dunant witnessed the terrible scenes after the battle of Solferino, where thousands of wounded soldiers died one after the other for lack of appropriate medical care, and asked a simple but decisive question in his *Mémoires*: “Would it not be possible, in time of peace, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and qualified volunteers?”

The International Conference convened in Geneva four years later based upon the fact that the medical services in times of war were inadequate and that States should address the question on the agreement of the status of medical personnel.

Thus, the protection of medical activities has been at the very heart of international humanitarian law since its inception.

I will divide this presentation into three parts. First, I will briefly refer to the provisions that hold the basic protection of medical ethics in international and non-international armed conflict; second, I will point some current challenges concerning the implementation of these provisions; and finally, I will try to infer some good practices from the experience in my country.

### **1. Protection of medical ethics in the Geneva Conventions and Additional Protocols**

The basic provisions of the Geneva Conventions and Additional Protocols are absolutely clear regarding the protection of the medical activities in international and non-international armed conflicts.

The First Geneva Convention dedicates chapters III to VII to the protection of medical activities in international armed conflicts, defined as conflicts between States. Article 19 provides three basic and general

conditions: “Fixed establishments and mobile medical units of the Medical Services *may in no circumstances* be attacked, but *shall at all times* be *respected and protected* by the Parties to the Conflict.”

The First Additional Protocol complements the four Geneva Conventions, and reiterates in its article 12 the same principle according to which the prohibition of attacks is absolute and applicable in all circumstances: “Medical units *shall be respected and protected and shall not be the object of attack*”.

On the other hand, concerning non-international armed conflicts (understood as conflicts between a State and a non-state armed actor, or among non-state armed actors), Common Article 3 holds that the parties to the conflict are “bound to apply” two broad provisions, the second of which holds that “the wounded and the sick shall be collected and cared for”.

The 2016 ICRC Commentary to Common Article 3 states that “the obligations to collect and to care also necessarily imply respecting and protecting medical personnel, facilities and transports.”

I will not go further into the details of these provisions. I would just like to call your attention to two similar articles concerning medical ethics, namely article 16 of Protocol 1 and article 10 of Protocol 2, whose first paragraphs are identical: “Under no circumstances shall any person be punished for carrying out medical activities *compatible with medical ethics*, regardless of the person benefiting therefrom.”

The provisions focus all their attention on the medical ethics. In the French version the translation makes reference to “*déontologie*”, which could be simply understood as the set of moral duties of the practitioners. In this regard, the ethical principles to which reference is made here are those defined by the World Medical Association, and known as the Declaration of Geneva adopted in 1948. This set of universal principles are used as a model for the oath taken at the time of being admitted as a member of the medical profession. The essential core of these principles is to act in the service of humanity, in an impartial and neutral manner. And here impartial and neutral are referred in their strongest meaning: to act in favor of the patient, respecting her or his interest, and not permitting that any adverse consideration intervenes between the doctor and the patient.

However, paragraphs 3 and 4 of article 16 of Additional Protocol II introduce a caveat:

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, *subject to national law*, be respected.

4. *Subject to national law*, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

This is the usual example of an outcome from difficult negotiations. On the one hand, we have a general prohibition of administrative or penal measures against “persons exercising medical activities” for not disclosing information, and at the same time such prohibition is subject to national legislation. How can such caveat be interpreted? The ICRC commentary holds that: “In accordance with the principle of penal law, ‘*nullum crimen sine lege*’ if there is no national law on the subject, a doctor cannot be penalized in any way for maintaining silence. This stand cannot be interpreted as taking sides in the conflict.”

## **2. Main challenges: how to implement IHL rules?**

In general terms, we can say without hesitation that the existing law is quite clear and straightforward: Medical personnel, units and transports *shall not be the object of attack*. But how do we guarantee and ensure implementation of this rule?

I think, and many of us think, that this is the key question today. How can compliance of IHL be guaranteed? How can respect for IHL be respected?

It is not a matter of interpretation to know if an attack against medical personnel or unit is lawful, it is rather a matter of facts.

As we all know, Resolution 2286 of the Security Council, adopted in May 2016, deals directly with this situation. As the former Secretary General put it in its statement: “The Council and all Member States must do more than condemn such attacks... They must use every ounce of influence to press parties to respect their obligations.”

The operative paragraph 4 of this Resolution urges States and all parties to armed conflict to implement concrete measures to prevent and address acts of violence against the medical mission. The set of measures includes: (i) development of domestic legal frameworks to ensure respect for their relevant international legal obligations, (ii) the collection of data on obstruction, threats and physical attacks on medical personnel, means of transport and medical facilities, and (iii) the sharing of challenges and good practices.

In Geneva, thanks to the initiative of Switzerland and Canada, a group of States from different regions has been working in ways to contribute to the implementation of these measures, with the support of ICRC, WHO and MSF. We have been discussing with experts from International NGOs involved in addressing this issue, the way to raise awareness about the importance of the question and also about the critical decisions that must be made in order to make attacks against medical mission an international taboo again.

We have been working in the three tracks established by the Council Resolution, and I would like to say that each one of them is feasible but requires a constant effort and particular determination.

For example, we are looking for spaces in the multilateral arena to demonstrate the relevance of having domestic legislation aiming at preventing and addressing the violence against the medical mission. This is of critical importance not only to ensure international obligations but also because it will allow the creation of an institutional environment infused with the very idea of protecting medical personnel in all circumstances.

This idea brings us back to article 16 of Additional Protocol II concerning measures that shall not be taken against persons exercising medical activities for holding patient's information and which must be read together with article 10 according to which "under *no circumstance* shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefitting therefrom." Achieving this long-term goal at the domestic level is perhaps one of the best ways to prevent future attacks against humanitarian actors whose main vocation is to be neutral and impartial.

Concerning the collection of data, we have a major challenge on many levels. We know, for example, that several actors gather information on attacks and general violence against medical mission. ICRC has developed for years the project Health Care in Danger, WHO has issued a Report on the attacks against Health Care, different NGOs report information on violence and incidents, but so far we do not have a platform or mechanism in charge of consolidating this scattered information.

The numbers differ from one actor to the other, because sources are different and methodologies are diverse. This creates two main problems: (i) if we do not have consolidated figures, it is very difficult to assess the real evolution of the question and identify trends or impacts on the ground; (ii) since the figures come from different sources, they are usually contested and even unacknowledged or simply ignored.

We shall collectively create a space to have a deep discussion on this matter and try to find the best way to gather and consolidate this data be it at the international, regional or national level. And this leads me to my last point, our national experience.

### **3. Lessons from Colombia**

Colombia for more than 50 years has suffered the devastating consequences of an internal armed conflict that we are now ending through political negotiation.

This is a beacon of hope for our country and particularly for the more than 8 million victims that have been officially recognized and are being repaired by the State.

During these hard times, we learned the utility of applying the norms of IHL. As our Constitutional Court put it when Colombia ratified Additional Protocol II:

Humanitarian norms, far from legitimizing war, appear as a projection of the search for peace, which is in the Colombian Constitution a right and a mandatory duty [...] Article 214 of the Constitution states that rules of IHL must be respected in all circumstances. Accordingly, all armed actors, state or non-state, are obliged to respect the minimum standards and principles of humanity that cannot be derogated even in the worst situations of armed conflict.

Taking this into account as well as the degrading situation of medical services in the middle of the conflict, since 1998 the ICRC and the National Red Cross launched a series of dialogues with Government institutions in order to promote respect for and protection of health facilities and health personnel. Many national entities joined the process: the Ministries of Health, Interior and Labor; the General Prosecutor; the Attorney General; the World Health Organization; the hospitals; the private sector; the police and the army.

Throughout the years, this space became the *National Permanent Roundtable for the Respect of Medical Mission*.

Thus, one of the first lessons learned is that Programs dedicated to protecting the Medical Mission are not a responsibility solely of the Health sector; they demand an inter-sectoral approach and engagement.

On the other hand, the Colombian armed conflict manifests itself differently in the regions of the country. Therefore, the national Roundtable saw the need to empower the authorities at a local level, specifically governors. Nowadays, the local roundtables are set up by administrative acts of constitution and their composition is similar to that of the National Roundtable, but structured in accordance with the needs of each region.

I would also like to stress a critical element in our case: the creation of an emblem for exclusive use of civilian medical personnel in 2002. Our national legislation incorporates the regulation of the use and protection of the emblem of the Red Cross, which serves the purpose of identifying the medical mission (both military and civilian). Creating an emblem that would only identify the different civilian elements of the medical mission allows for better access by civilian medical personnel to victims of armed conflict, natural disasters or any other catastrophe, and also for their

protection on the ground, preventing confusion, resistance and erroneous perceptions of their mission.

Additionally, as a main outcome of the work of the National Roundtable, in 2012 the Ministry of Health and Social Protection approved the *Manual of the Medical Mission*, which defines the standards and use of the emblem; stresses the rights and obligations of medical personnel; and gives recommendations for safety.

And last but not least, the Ministry of Health established a Register of Infractions against the Medical Mission, to follow up infractions and incidents in real time and take the necessary actions, which include logistical and operational measures to provide security when specific threats are detected.

This last practice is a concrete example that we would like to share. From our experience, one of the first steps to protect and prevent attacks against the medical mission is the identification of patterns of infraction and this can be better assessed with information coming from the ground. Of course, this must be built in a way that does not compromise the neutrality and impartiality of the medical mission. We do not say that our system is perfect and has successfully stopped all the incidents, but we definitely can assess whether the measures taken are effective in reducing the number of incidents and identifying the main underlying factors. For instance, between 1996 and 2016 we can count 1285 incidents and 1117 direct victims (medical personnel). We had a peak in 2002 of 175 incidents per year. For 2016 we had around 100 incidents reported. We also know that a significant percentage of these incidents during last year were not directly associated with actors of the armed conflict.

With this valuable information at hand, we have been able to bring to the fore front the necessity to respect the work of the medical mission and to constantly consider as a priority their unimpeded access to the most critical points of our territory.

## **VI. Humanitarian access**



## **Shedding light on the rules of humanitarian access. Reflections on the occasion of the 40<sup>th</sup> anniversary of the Protocols Additional to the Geneva Conventions\***

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How can the victims of humanitarian disasters, natural or man-made, be reached? This is a key question for the survival of victims, in particular, for the protection of the most vulnerable persons. The negotiators of the Additional Protocols at the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts (CDDH) held from 1974-77 were well aware of it. Recent conflicts have sadly proven its burning relevance.

I am grateful to the organizers of the Sanremo Round Table for giving me the task of trying to answer this question. This subject has been dear to me for more than 40 years. At the CDDH 1974/77, I had the privilege of being involved in the negotiations of the relevant provisions of the Additional Protocols. 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 in favour of the victims of armed conflicts. A right to provide and a right to receive humanitarian relief was the result desired by those States. But there were restraining 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 capacity to resist. This was the challenge.

Thus, a compromise had to be found: there is, on the one hand, a right to receive relief or to have access to the victims. Relief operations "shall be undertaken" (Art. 70 AP I). But the right is limited. The access was made

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\* Slightly revised version of the oral contribution presented at the 2017 Sanremo Round Table. The style of the oral conference has been maintained, but some references have been added.

“subject to the agreement” of the relevant actors.<sup>1</sup> Is this a valid answer to the problem?

Two fundamental questions follow: whose agreement is necessary? And is there a free discretion to refuse that agreement?

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 addressees,<sup>2</sup> which are “concerned”:

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

All three kinds of State pose particular problems:

- The State of origin: is it, for example, internationally lawful for a State to refuse an agreement by prohibiting an NGO wishing to organize a relief operation in a country which is ruled by an organization accused of being terrorist? This is, for example, a very practical problem for relief actions sent to the Gaza Strip from a number of European countries or from the U.S.<sup>3</sup>
- The transit State: what is the scope of 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 NIAC? Art. 18 AP II modifies the corresponding text of Art. 70 AP I to: “subject to the agreement of the High Contracting Party concerned”. Some authors<sup>4</sup> maintain that this is a clear text, meaning: The agreement of the government of the State on the territory of which a NIAC takes place is necessary. That government is concerned even if the area where relief is provided is not controlled by that government, and only the agreement of that government is required.

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<sup>1</sup> M. Bothe, Article 70, in M. Bothe/Karl Josef Partsch/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. 2013, at p. 485.

<sup>2</sup> Bothe, *op. cit.* at p. 483 *et seq.*

<sup>3</sup> E.-C. Gillard, *Humanitarian Action and Non-State Armed Groups: The International Legal Framework*, Chatham House Research Paper 2017.

<sup>4</sup> Apparently with some doubts S. Junod, ‘Art. 18 Protocol II’, marg.no. 4884, in Y. Sandoz *et al.* (eds.), *Commentary to the Protocols Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1986.

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.<sup>5</sup> That latter element disappeared due to an amendment adopted at the very last minute. That was due to the drafting decision not to mention the non-state party in AP II, a decision based on conference politics,<sup>6</sup> 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 a text, which obviously does not make sense, as being “clear”?

The second problem relating to the final text of Art. 18 AP II, is whether or not the agreement of the government in place is necessary even for relief operations which do not pass through and are not 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 Art. 18 as relating to the formal territorial sovereignty and 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. the same 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 the singular (“party”), the conference changed the meaning of the word “concerned” from one moment to the next one. Possible, but “clear”?

No, Art. 18 AP II is not clear as to the question whose agreement is necessary. In the light of the massive denial of access in Syria, the issue was finally addressed by the Security Council which authorized “cross border operations” for specific border crossings and specific times<sup>7</sup>. If the word “concerned” in AP II is understood as only relating to the *de facto* control of the relevant area, the SC resolution means a clarification and to a certain extent a restriction of Art. 18 AP II because a notification to the Syrian government is required. 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 suggest the latter version.<sup>8</sup> Yet

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<sup>5</sup> Bothe, in Bothe/Partsch/Solf, *op.cit.* note 1, at p. 801.

<sup>6</sup> Bothe/Partsch, ‘Protocol II Introduction’, in Bothe/Partsch/Solf, note 1, at p. 695.

<sup>7</sup> Resolution 2165 (2014), OP 2.

<sup>8</sup> See the statement of the representative of Luxemburg in the Security Council, UN Doc. S/PV.7216, p. 15: “The consent of the Syrian authorities will *no longer* be necessary”

I think the question remains open. This is where we stand regarding the question of whose agreement is necessary for relief action in the case of NIAC. AP II opened a question – I submit it is still open.

The second fundamental issue of interpretation raised by both Art. 70 AP I and Art. 18 AP II is whether the party whose agreement is necessary has an unlimited discretion to refuse it. In this connection, it has to be emphasized that the relevant parties are under 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 accord a practical significance to both elements of the text.<sup>9</sup> This is the rationale of the interpretation already put forward, and not contested, in the debate of the conference and then maintained in the ICRC Commentary.<sup>10</sup> It has now become generally accepted in international practice: the agreement may not be refused in an arbitrary manner.

This rule entails two further questions: What constitutes an “arbitrary” refusal? And what is the consequence if the agreement is unlawfully withheld?

Some clarifying light is shed on the first question by a recent document elaborated and published with UN support, but 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”<sup>11</sup> and are based on two background papers co-authored by two well-known experts in the field, namely Dapo Akande and Emanuela-Chiara Gillard.<sup>12</sup> The “Conclusions” convincingly list the following criteria which provide a useful concretization 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.”

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(emphasis added). Be it noted that there is no other statement with the same content to be found in the debate of Resolution 2165 (2014).

<sup>9</sup> Bothe, *op.cit.* note 1, at p. 485

<sup>10</sup> Y. Sandoz, ‘Article 70 Protocol I’, marg.no. 2805, in: *Commentary* (note 4).

<sup>11</sup> [www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf](http://www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf).

<sup>12</sup> *Cross-Border Relief Operations: the Legal Framework*, 2016; *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 2016.

Note that the final clause equals “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, 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 the State’s behaviour is 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 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, therefore, acts unlawfully.

Our starting point was the crucial need for access for relief operations in favour of the victims of bloody 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 internalizes and supports this legal position strengthening the humanitarian goal of keeping access in favour of victims of armed conflicts open.

## **Relief schemes and the delivery of humanitarian activities in situations of armed conflict: the ICRC's perspective**

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Humanitarian access is a central challenge to an effective protection of civilians. Unfortunately, impartial humanitarian organizations such as the ICRC too often face denial of access. These denials may take various forms such as long delays in receiving authorizations to conduct humanitarian activities in certain areas, refusal of access overlying on military necessity reason, multiplication of administrative obstacles, authorization 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 parties to the armed conflict or non-state armed groups alike. This bleak picture shows that the reality of nowadays armed conflicts is that problems of access is the daily business of impartial humanitarian organizations 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 quite silent until recently on the IHL legal framework governing humanitarian access. This is explained by two main reasons. First, humanitarians generally do not negotiate access with the Geneva Conventions in our hands. Negotiating access is a political process informed 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 actually 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 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 foresees an unrestricted right of access to impartial humanitarian organizations, which is unfortunately 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 a legal Lexicon on humanitarian access.<sup>1</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>2</sup> Eventually, the ICRC position is also reflected in the new ICRC Commentaries to Common Article 3<sup>3</sup> and Article 9 of the 1949 Geneva Convention I<sup>4</sup> and the 1949 Geneva Convention II.

### **ICRC’s perspective on IHL framework governing access**

Although the relevant rules vary slightly depending on the nature of the conflict (IAC other than occupation, occupation, 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 the primary obligation to meet the basic needs of the population under its control; 2) impartial humanitarian organizations 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 layer has an impact and provides important elements for the implementation and interpretation of another layer forming part of the IHL framework governing humanitarian access and the delivery of humanitarian activities in armed conflicts.

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<sup>1</sup> [www.icrc.org/en/international-review/article/icrc-qa-and-lexicon-humanitarian-access](http://www.icrc.org/en/international-review/article/icrc-qa-and-lexicon-humanitarian-access), 2014, 20 p.

<sup>2</sup> [www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts](http://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts), pp. 26-33.

<sup>3</sup> <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>. See in particular the paragraphs 779-840 on the offer of services.

<sup>4</sup> <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 organizations.

### *1. The primary obligation to meet the basic needs of the population*

The 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>5</sup>

However, it is much more difficult to locate this obligation under IHL, as with the exception relating to occupation law<sup>6</sup>, there is no specific IHL treaty rule in which such obligation can be found. However, 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. It can also be argued that this obligation derives also from the broader obligation to treat humanely persons who are in the power of a party to the armed conflict.<sup>7</sup> When it comes to the notion of "basic needs", the Additional Protocols to the Geneva Conventions 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 (Art.s 69 and 70 of API and Art. 18 of APII).<sup>8</sup>

Eventually, 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 purposes of humanitarian access must be interpreted under IHL.

### *2. The right of impartial humanitarian organizations to offer their services*

The right given by IHL to humanitarian actors 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-international armed conflicts and in

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<sup>5</sup> 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 person. See Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, E.C. Gillard & D. Akande, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, October 2016, p. 11.

<sup>6</sup> Art.s 55 of GCIV and 69 of API.

<sup>7</sup> Art.s 3 and 27 of the Fourth Geneva Convention of 1949.

<sup>8</sup> Art.s 69 and 70 of API and Art. 18 of APII.

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 organizations to propose their humanitarian activities to a party to the armed conflict. The right of initiative as foreseen under IHL only belongs to organizations that qualify as “impartial humanitarian organizations” under IHL. Therefore, an offer of services will be valid only if it emanates from an organization that qualifies as impartial and humanitarian in nature and in deeds.<sup>9</sup> Therefore, the quality and the *modus operandi* – both being intrinsically connected - of the humanitarian actor concerned are key for the latter in order to qualify as an impartial humanitarian organization 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 in its territory or the territory it controls.

In this regard, an offer of services emanating from an actor that does not qualify as an impartial humanitarian organization under IHL meaning could be lawfully turned down simply because of the lack of quality of its author. Offers of services placed by States or intergovernmental organizations that do not qualify as impartial humanitarian organizations 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 organizations 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>10</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 organizations 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 organizations to offer their services. It has been recently argued that the impartial humanitarian organization’s right to propose humanitarian activities to the parties to an armed conflicts would be conditioned by the fact that the civilian

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<sup>9</sup> For more details on the notion of an impartial humanitarian organization, see ICRC commentaries to the Geneva Convention I, 2016, Common Article 3, paragraphs 788-799.

<sup>10</sup> See Art. 70§1 of API.

population would actually not be provided with supplies essential for its survival.<sup>11</sup>

On this very issue, the ICRC considers that, there is no legal basis for such arguments under IHL as Common Article 3 and Article 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 organization to offer its services in 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 foreseen by law to turn down a valid offer of services and could prevent impartial humanitarian organizations 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 organizations 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 organization 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 conflict also includes all humanitarian activities.

Therefore, in terms of scope, offers of services made by impartial humanitarian organizations should be interpreted to encompass humanitarian activities writ large. While IHL does not specifically define the notion of humanitarian activities, these should be interpreted as including both an assistance<sup>12</sup> and a protection

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<sup>11</sup> See Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, E.C. Gillard & D. Akande, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, October 2016, pp. 14-15.

<sup>12</sup> 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 API 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

dimension.<sup>13</sup> This has been made clear notably by Article 81 of the API 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” (emphasis added).

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 conflict.

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 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 organizations 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: the so-called right of initiative

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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.

<sup>13</sup> 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. 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, *International Review of the Red Cross*, Volume 90, Number 871, September 2008, [www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm](http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm).

addressed above does not translate into an unrestrictive right of access given to humanitarian actors.<sup>14</sup>

It is clear from our perspective, that humanitarian actors in order to carry out their humanitarian activities in situations of armed conflict must seek and obtain the consent of the parties concerned.<sup>15</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>16</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 NIAC 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, also 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.

Therefore, it is clear from the logic underpinning international law in general and international humanitarian law in particular that, in principle, an impartial humanitarian organization will only be able to carry out the proposed humanitarian activities lawfully if it has consent to do so. In

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<sup>14</sup> 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.

<sup>15</sup> It goes without saying that when impartial humanitarian organizations are directly solicited by the parties to the armed conflict, their consent is presumed.

<sup>16</sup> See common Art. 9/9/9/10 of the GCs and Art. 70(1) of API for IAC; Art. 59 of the GCIV for occupation and Art. 18 of APII for NIAC.

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 organizations, such as the ICRC.

On the practical implementation of the notion of consent, it is important to underscore 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 organization 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 actors 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 lights given by the party concerned to carry out specific and targeted relief operations within the framework of the general consent. From the ICRC 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 an offer of services submitted by impartial humanitarian organizations to the parties to an armed conflict to be turned down.

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 of all, when the offer of services comes from an organization 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 fulfill 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 organization capable to meet those needs.

IHL does not foresee other grounds justifying a negative answer to 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 proposed

by impartial humanitarian organizations. The military necessity argument can only be invoked to regulate humanitarian access, not to prohibit definitely the possibility for an impartial humanitarian organization 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>17</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 organization, there would appear to be no valid/legal 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>18</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 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.

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<sup>17</sup> ICRC Q&A and a legal Lexicon on humanitarian access, 2014, pp. 5 and 10. See also 2015 ICRC Report on “IHL and challenges of contemporary armed conflicts”, p. 28

<sup>18</sup> See for example Article 59 of the Fourth Geneva Convention: “... the Occupying Power shall agree...” (emphasis added).

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.

Eventually, 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>19</sup>

#### *4. The obligation to allow and facilitate relief operations*

Eventually, 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 serves to implement the acceptance of the offer, on the other hand.

Once relief actions are accepted in principle, the States/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 organization’s work. In short, the parties must enable “all facilities” needed for an organization to carry out its agreed humanitarian functions appropriately. Measures should also be taken to enable the overall efficacy of the operation (e.g. time, cost, safety, appropriateness). This is an

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<sup>19</sup> This is without prejudice to arguments along those lines that may be derived from other bodies of international law.

obligation of results whose content and realization is largely left to the parties to the armed conflict concerned.

This obligation to “allow and facilitate” is expressly mentioned 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>20</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 organizations may need to pass in order to reach conflict zones must authorize such transit. However, IHL is silent on the consent of such third countries concerned. Does this mean that impartial humanitarian organizations are exempted from seeking and obtaining their consent? The answer should be negative, no. 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 organizations 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 from 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>21</sup>

These measures of control authorized 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

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<sup>20</sup> See ICRC CIHL Study, *supra*, Rules 55 and 56.

<sup>21</sup> See Art. 23 of the GCIV and Art. 70 § 3 of API.

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>22</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 shall 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>22</sup> See Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict, E.C. Gillard & D. Akande, commissioned by the United Nations Office for the Coordination of Humanitarian Affairs, October 2016, p. 28.

## **Humanitarian negotiations for access to persons in need of assistance: what role for gender diversity?**

*Cynthia PETRIGH*

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I am delighted to be back in Sanremo, where I started teaching exactly ten years ago. It has not been an easy trip from Bangui, where I am currently based but when Professor Pocar asked me to participate in the 40th Round Table and gave me the topic: “Humanitarian negotiations for access to persons in need of assistance: what role for gender diversity?” I could only accept the challenge.

In the current crisis of the humanitarian system, with serious problems of access to the populations in need in Syria, South Sudan, Yemen and elsewhere, to what extent are these problems gendered? We will assess if the Protocols provide us with more guidance than the Conventions; identify the obstacles to a gendered humanitarian negotiation; and we will finally look at recent developments.

### **The argument**

A common argument is that humanitarian assistance is delivered in emergency to save lives and that there is no time for gender considerations at that stage.

When humanitarian law started to be codified in the 19<sup>th</sup> and 20<sup>th</sup> century, it was drafted by European male officials who were preoccupied with issues that principally concerned *them*: what would happen if they were made prisoners? Under which circumstance could they be targeted? How would they be disciplined? Women, civilians, civil society were mentioned briefly, as if by accident. A French Officer summarised for me: « 50 years ago, in our operational doctrine, the population could be described with 3 words: friendly, enemy or evacuated”. That was the situation up to the end of the Cold War.

With “the end of history”, the end of the cold war and the new, ethno-political wars erupting in the Balkans and elsewhere, civil society women’s movements also flourished, and hundreds of new humanitarian actors emerged. There is now a solid base of material, conducted by the “Do No Harm Project”, supported by such donors as ECHO, SIDA, SDC, on what works or doesn’t work. Decades of evidence of humanitarian work show

that “considering the differences in needs according to sex and age is crucial for effective relief and life-saving assistance”<sup>1</sup>.

A 2008 SDC study<sup>2</sup> shows that women usually face more obstacles than men in obtaining adequate emergency food and non-food items (for example, blankets, soap, shelter) “as a result of discriminatory practices in registration, and because of their lack of access to information, and frequent absence from consultation processes over resources distribution”.

Not including women in the assessment or the delivery means that large parts of the population - the most vulnerable - will not receive it. Can humanitarian assistance that doesn't meet the criteria of impartiality (serving the most vulnerable) be labelled humanitarian assistance?

Including men and women in the delivery also means consulting them and integrating the gender dimension in *the design* of programmes. In refugee camps in Tanzania, humanitarian organisations who had identified that there was a number of women-headed households, decided to set up for them specially marked tents in a special, ‘safe’ area. During that period, the number of sexual attacks clearly increased. Why was that? “Because the bright orange tents acted like markers pointing to unaccompanied women, i.e. without a husband to protect them, sending a strong signal to other men that they were ‘available’. Had women been consulted, instead of having humanitarian workers decide for them, they for sure would have avoided being completely ostracised by their own community and would have chosen a different protection approach”.<sup>3</sup>

In 2008 the British NGO OXFAM, together with their partner in Iraq, the Al-Amal Association, asked Iraqi women to rate their own security. The report states that, “as compared with 2007 & 2006, more than 40% of respondents said their security situation worsened last year.” At the same time, most of the male American soldiers - and Iraqi officials – thought that the ongoing war in Iraq was a success, soon to result in an improved sense of security. Women had a very different assessment because, as highlighted by the OXFAM report, they had access to different information relating to security because of their interaction with, and care for, various constituencies in the community and in the family: for example, lack of access to healthcare; children being unable to reach their school; family members kidnapped or injured; widows not receiving a pension from the government.

In the past, humanitarian assistance programmes have assumed that men's and women's experiences of, and response to crises are fundamentally the same, and that they have common interests and needs,

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<sup>1</sup> SIDA, *Gender equality in humanitarian assistance*, March 2015.

<sup>2</sup> SDC, *Gender and humanitarian aid*, 2008.

<sup>3</sup> *The cost of ignoring gender in conflict and post-conflict situations: a feminist perspective*, Nadine Puechguirbal, The Amsterdam Law Forum, Vol. 4:1.

regardless of their sex. *The understanding of their responses and the targeting of humanitarian aid has often been based on ideas people have of men's experience.* Because gender and women's specific needs have not been taken into account, humanitarian aid has been gender-biased and has, therefore, failed in many cases to achieve its objectives.<sup>4</sup>

We need to add an additional dimension: women – and men – have different interests depending on their background, social class, education, age, if they live in a rural or urban area, etc. It should not be assumed that all women have the same needs or that all men have the same needs - or that consulting one of them is sufficient to determine the needs.

Access to humanitarian assistance is gendered and it can be life-saving to include the gender dimension. This is by now established. What does it tell us about humanitarian negotiation for access and assistance?

Firstly, humanitarian negotiators must have in mind the gendered nature of humanitarian assistance. They must include it in the design and the objectives of the negotiation, but also in the process. I worked briefly last year with the UN Mission in Libya (based in Tunis). When he met the Libyans, the Special Representative of the Secretary-General, Martin Kobler, told them: “you need to have women in your negotiating team”. “Where are yours?” was their answer.

What would advocating for impartial access mean if we do not ourselves live by the standards we promote, such as the principle of impartiality?

I have worked in the jungles of Mindanao with Islamic rebels; I have negotiated the price of 20 trucks at the Iranian-Afghan border; I have delivered goods in refugee camps controlled by ruthless militias in the Middle East. Is it easy? No. Is it made more difficult for women in a world where NIAC are multiplying as well as growing control of non-state armed groups (NSAGs) and criminal groups on large portions of the territory? Not necessarily. Is it important to include women? Yes, it is.

There is a clear, evidence-based case that humanitarian assistance is gendered and that the gender dimension should be integrated in the design of programmes; with the participation of men and women who receive the assistance; and by involving women at all levels and stages of the operation, including in negotiating access.

And yet, there are three types of resistance to this evolution: a cultural one; a structural one and a political one.

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<sup>4</sup> SDC, op. cit.

## The obstacles

The first obstacle is cultural. Earlier this year, I was teaching Officers at a reputable military Academy in Europe. The Majors were working on a case study where troops they were mentoring were about to commit rape on young IDPs. “By what is under-aged?” asked a LegAd. “Is it under-aged in *their* culture or in *our* culture?”

How often have I heard, from military, humanitarians and academics alike, that “since this is in their culture; it is safer, it is appropriate to accept”. How easily one accepts the “cultural” argument, without the slightest opposition or attempt to bend it, when it comes to demeaning women. The local warlord prefers that you do not employ women to conduct the assessment or delivery of humanitarian assistance? “Well, if this is their culture, there’s nothing we can do about it. We have a programme to deliver”. The same persons will react very differently when the Islamic state beheads someone. They will not say “it’s their culture”; but when it is about demeaning women, cultural awareness is suddenly broadly shared. What is the value of delivering the programme, if this programme is biased and does not correspond to the criteria of humanitarian assistance?

The second obstacle is structural. The design of our institutions is such that it is difficult today for women to participate meaningfully – and to impact on the successful delivery of humanitarian action. Due to our education, to our culture, to our patriarchal institutions, we are by default gender blind. The very vast majority of UN peace Envoys is male.

In 1994, Donald Steinberg (Former President Clinton’s special assistant for African affairs) participated in the signing of the Lusaka Protocol that put an end to the civil war in Angola. Asked about the participation of women in the peace process, Steinberg replied with confidence that the Lusaka agreement was ‘gender-neutral’, thus not discriminating against women. However, as he later explained: “It took me only a few weeks after my arrival in Luanda to realise that a peace agreement that is ‘gender-neutral’ is, by definition, discriminatory against women and thus far less likely to be successful.”

First, he realised that not a single woman had a seat on the Luanda based Joint Commission responsible for implementing the peace accords; secondly, the DDR programme was designed for men and it did not take into account the needs of women and girls who had been kidnapped by rebel forces and used as sexual slaves, cooks, messengers, etc. At the same time, male ex-combatants were sent back to their communities without adequate psychosocial support, job/skills training, and soon they sank into alcohol consumption and drug abuse that exposed women to more violence.

A process that does not include women is not gender-neutral; it is biased against the security and safety of women.

About two decades later, when I met the Coordinator of the Senior Women's Talent Pipeline in NY, she explained the difficulty in recruiting women for high-ranking positions. "We have to be very careful and choose the right person, she said, because if she fails, it will affect all the idea of recruiting women". I have never heard that recruiting an incompetent man would put in danger the whole idea of recruiting men.

A study conducted in 2011 by Insecurity Insight<sup>5</sup> shows that in about 43% of security incidents recorded by humanitarian agencies, the gender does not appear, whereas information about the nationality, or if the staff is local or expatriate, appear in more than 90% of the reports. "The scarcity with which information on victims' sex is made public is likely a result of general lack of awareness of the importance of gender analysis and concern for the privacy of affected staff" concludes the agency.

"Insecurity that is male on male (for instance, armed militias fighting each other) is more detrimental to political stability and stable governments than male on female violence is", explains Cynthia Enloe<sup>6</sup> Which explains why governments are promoting a very masculine definition of security. Their motto is the neutralisation of armed groups, be they rebels or militia, so as to avoid a new outbreak of violence that could jeopardise their holding of power; however, they do not always see addressing the root causes of the conflict, or the fight against impunity, as relevant at this stage. "Violence against women is not a threat to men in power although they do not realise the impact it will have on the post-conflict society in the long run and how it will prevent the creation of sustainable peace. For women indeed, peace is not just the absence of war."

I spoke to several women who were raped while working for the biggest humanitarian agencies. No one speaks about this and their employer did not do much to support them, hiding behind the pretext of "not stigmatising them". Is it the only reason, or does it also have to do with the way these agencies understand and report about staff security?

The third obstacle is political. The big humanitarian party of the 90s where any individual could load their personal car with useless items and drive to Kosovo, is over. The backlash manifested itself with the return of the State -and an angry one. In Sudan, in Syria, in Russia, in the US, the State is back with revenge. Humanitarians are not welcome. They are seen as part of a larger, hostile political agenda of the so-called West. Yes, about 90% of humanitarian assistance funding comes from Western governments. Can we articulate in a credible way that we do not have a political agenda?

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<sup>5</sup> Christina Wille, Larissa Fast, *Aid, Gender and Security: The Gendered nature of Security Events Affecting Aid Workers and Aid Delivery*, Insecurity Insights, 2011.

<sup>6</sup> Cynthia Enloe and Nadine Puechgirbal, quoted in Puechgirbal, *The cost of...*

Aren't the humanitarian agencies contributing to durably install countries in under-development, corruption and poverty? The Ebola crisis has demonstrated how the political choice of allocating funds to 3 main threats (Aids, TB and malaria), decided in Geneva and NY, had contributed to weakening the national health systems, that were unable to identify and respond to the Ebola emergency.

But with rejecting the humanitarian system as it is today, the authoritarian governments also reject what they see as a threat: democratic control and the contribution of a vibrant civil society, inclusive of women.

### **What do the Protocols say? Are they gendered?**

The Additional Protocols provide an increased visibility to women, but largely treat them as victims and object of the assistance, not as actors themselves. In the 558 articles (without annexes) of AP I, only a couple (Art. 8 a; 70.1; 75.5; 76.1, 2 and 3), mention them, in wording such as: "Measures for expecting mothers and children". Rape concerns only women, not men (76.1). Men are not portrayed as victims or vulnerable persons. Women are generally associated with children as recipients of assistance and services– not with male adults as actors. Gender is never mentioned when describing the combatants; the sanitary personnel; any actor really, with agency of their own and not a mere recipient of assistance. In the words of Nadine Puechgirbal: "Time and time again, women are labelled victims and put in the category of vulnerable people together with children, irrespective of the increasing responsibilities they take over in the absence of men. A military manhood is promoted for the protection of women who are defined as powerless individuals."<sup>7</sup>

In AP II, there are only 2 references to women: one confining them in the category "motherhood and children"<sup>8</sup>; interestingly, the second one, Art. 5.2.a, relates to "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"<sup>9</sup> and suggests that women can be interned or detained. It is the closest experience women can get in reference to the treatment of men in the Protocols.

While it is important to protect women during conflict because they are indeed more exposed to some forms of violence and need a specific form of

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<sup>7</sup> Nadine Puechgirbal, *The cost of...*

<sup>8</sup> Art. 6.4: "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children".

<sup>9</sup> "Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women".

protection, especially against sexual violence, it is not enough to confine them in the role of victims.

The Conventions and the Protocols do not exclude women in their spirit; article 75.1 for example, requests that people who are in the power of a party to a conflict are not discriminated on the basis of their gender. But the men who wrote them<sup>10</sup> did not think at that time that women would play more roles very quickly.

There is no need to change the texts. They do not prevent the inclusion of women in the design of the delivery of humanitarian assistance, on the contrary. The Principle of “Impartiality” says it all. Impartial assistance is assistance delivered on the basis of vulnerability and needs. Associating women is essential to determine needs, vulnerabilities and capacities in an impartial way. The change has to happen in our minds and in our structures; the law, including the Protocols, allows for such an evolution.

This evolution is also taking place in other fora.

## **Developments**

The UN, donors and in particular those who conceptualise humanitarian assistance and its challenges (SIDA, ECHO, SDC) as well as the IASC and CSOs have prompted humanitarian actors to better integrate the gender dimension in their work, including when designing and negotiating humanitarian access.

The UN took the lead and helped articulate political agendas around the questions of women’s participation; sexual violence; rights of children affected by war; or humanitarian access.

We saw during a presentation earlier this morning, the long list of UN Security Council resolutions relating to Women, Peace and Security and to combatting Sexual Violence. The UNSCR 1325, in particular, looks at four areas where governments are requested to improve gender equality.

*Participation:* “Ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict”.

*Protection:* “Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls as civilians, in particular, the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977

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<sup>10</sup> The President of the Diplomatic Conference, the Vice-President, the Chairs of all Commissions and all of the rapporteurs are male as well as the overwhelming majority of the representatives who signed the Protocols at the end of the Diplomatic Conference: only 3 women out of 102.

(...) and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court”.

*Prevention:* “Requests the Secretary-General to provide to Member States training guidelines and materials on the protection, rights and the particular needs of women, as well as on the importance of involving women in all peacekeeping and peace-building measures”.

*Relief and recovery:* “Calls upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design”.

It also emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions.



## **VII. Integrating a gender perspective into IHL**



# Women, gender and international humanitarian law: a complex relationship

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## 1. Defining gender: it's complicated

Usually the notion of gender refers to the culturally constructed and prescribed behaviour of men and women, including the roles, attitudes and values ascribed to them on the basis of their sex in a given society. Conversely, sex is commonly intended as biologically determined, consisting of the anatomy of individuals' reproductive system.<sup>1</sup>

If we wish to reflect more deeply on the meaning of gender, however, things appear more complex than they may seem. Firstly, since the concept of sex may also be interpreted as legally constructed, the two terms are often used interchangeably.<sup>2</sup> Secondly, according to opinions usually expressed by scholars and institutions gender is not just about women and girls but it also relates to men and boys. However, it should be recognised that the women's and feminist movement has played a crucial role in advocating that gender diversities be recognized as relevant to the domestic and international legal systems. As a consequence, the gender discourse often tends to focus on women and girls instead of treating the issue as a whole. Thirdly, due also to the factors mentioned above, there does not seem to be a shared notion of gender, at least in International Law.

A broad (if not comprehensive) definition predominates within the framework of the United Nations (UN) where gender is referred "to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned,

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<sup>1</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law. A Feminist Analysis*, Manchester University Press, Manchester, 2000, pp. 3-4.

<sup>2</sup> D. Otto, *Lost in translation: re-scripting the sexed subjects of international human rights law*, in A. Orford (Ed.), *International Law and Its Others*, Cambridge University Press, Cambridge, 2006, pp. 318-356 at p. 319. This Author explains how many feminists are concerned that "the language of 'gender' can lead to a denial of the systemic nature of women's disadvantage" (p. 350).

activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.<sup>3</sup>

By contrast, the Rome Statute of the International Criminal Court (ICC) at art. 7(3) provides that, regarding persecution on gender grounds as a crime of humanity, “the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”<sup>4</sup> Some scholars have criticized this definition as too narrow and weakening the notion of gender,<sup>5</sup> while others maintain that the two meanings are not totally incompatible as the expression “within the context of society” leaves some room for a broader interpretation.<sup>6</sup> Be it as it may, both the UN definition and the Rome Statute are significantly silent about sexual orientation and sexual identity, two further and obvious elements of gender analysis. This omission illustrates how politically sensitive the gender issue is. As a matter of fact, some catholic-inspired scholars reject the social construction of gender as promoting “a sexually polymorphous view of the human person.”<sup>7</sup>

Turning to International Humanitarian Law (IHL), since its aim is to ensure the same protections for men, women, girls and boys, it is frequently referred to as gender-neutral. From the 1990s onwards, however, feminist legal scholars have looked at IHL critically arguing that a gender bias has conditioned the development and content of its rules, which “masculinize” the law on the conduct of hostilities (the “Hague Law”) and “feminize” the protection of war victims (the “Geneva Law”).<sup>8</sup> The fundamental distinction between international armed conflicts (IACs) and non-international armed conflicts (NIACs) has also been challenged as

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<sup>3</sup> United Nations Entity for Gender Equality and the Empowerment of Women, Concepts and Definitions, [www.un.org/womenwatch/osagi/conceptsanddefinitions.htm](http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm) (last accessed 15 September 2017).

<sup>4</sup> The Rome Statute further refers to gender in some other articles, notably article 21 on applicable law prohibiting any adverse distinction founded on gender.

<sup>5</sup> S. Kouvo, *The United Nations and Gender Mainstreaming: Limits and Possibilities*, in D. Buss and A. Manji (Eds.), *International Law: Modern Feminist Approaches*, Hart Publishing, Oxford, 2005, pp. 237-252 at p. 249.

<sup>6</sup> V. Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?* in *Harvard Human Rights Journal*, Vol. 18, 2005, pp. 56-84 at p. 57.

<sup>7</sup> J. Adolphe and R. L. Fastiggi, *Gender (in International Law)* in R. L. Fastiggi (ed.) *New Catholic Encyclopedia, Suppl. 2012-2013: Ethics and Philosophy*, Vol. 2. Detroit, Gale, 2013, pp. 612-614.

<sup>8</sup> J.G. Gardam, *The Law of Armed Conflict: a Feminist Perspective*, in K. E. Mahoney and P. Mahoney, *Human Rights in the Twenty-first Century*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, pp. 419-436 at pp. 424-428.

irrelevant in the female experience of war.<sup>9</sup> Last, but not least, it has been quite properly observed that because societies treat men and women differently, the application of IHL rules in all likelihood impacts upon men and women in a different way.<sup>10</sup> In short, there is still considerable scope for discussion about gender issues in IHL.

## **2. Looking at international humanitarian law in a gender perspective: the role of women**

Since the word “gender” was not used in international documents before the 1990s it is not surprising that it is not contained in the Geneva Conventions (GCs) or in their Additional Protocols (APs). These treaties, however, make several references to sex, on the one hand, and to women, on the other.

Sex is typically listed among the grounds for prohibited discrimination, or adverse distinction according to IHL’s wording.<sup>11</sup> But it is also considered as a condition deserving particular attention and care when referred to women. Already in 1929 the Third Geneva Convention on Prisoners of War stipulated that “Women shall be treated with *all consideration due to their sex*” (Article 3, italics added). Similar provisions are presently included in the four GCs of 1949.<sup>12</sup> It is evident that they implicitly express a gender perspective as they are inspired by the attitude that society adopts towards the female sex, suffering from a kind of inherent vulnerability and thus deserving respect and protection. In the same vein, several provisions in the GCs protect women against attacks on their honour, “in particular against rape, enforced prostitution, or any form of indecent assault.” (Article 27 GCIV); a woman internee may only be searched by a woman (article 97 GCIV). Clearly these provisions are especially aimed at preserving the social values of honour and modesty traditionally attributed to women. But GCIII, which also contains several provisions on special treatment of women prisoners of war (POWs),<sup>13</sup>

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<sup>9</sup> C. Chinkin, *Women and Peace: Militarism and Oppression*, and J. Gardam, *The Law of Armed Conflict: a Feminist Perspective*, in Mahoney and Mahoney, *Human Rights*, op. cit., pp. 405-418 and 419-436, spec. pp. 408 and 430.

<sup>10</sup> *International Humanitarian Law and Gender*, Report Summary, International Expert Meeting: “Gender Perspectives on International Humanitarian Law”, 2007, p. 4, [www.icrc.org/eng/assets/files/other/ihl\\_and\\_gender.pdf](http://www.icrc.org/eng/assets/files/other/ihl_and_gender.pdf) (last accessed on 19 August 2017).

<sup>11</sup> See article 3 Common to the GCs; article 12 para. 1 GCI and GCII; articles 9 and 75 API; article 2.1 APII.

<sup>12</sup> See article 12 para. 4 GCI and GCII; articles 14 para. 2 and 49 para. 1 GCIII; articles 85 para. 2 and 119 para. 2 GC IV.

<sup>13</sup> GCIII articles 14, 25, 29, 97.

significantly fails to prescribe equality of opportunities for women in the election of POW's representatives.

A number of IHL rules highlight the reproductive, maternal and caregiving role of women. Although they are apparently designed to protect women, what they really are aimed at is safeguarding the interests of other subjects (unborn children, youngsters, the family).<sup>14</sup> For example, article 76 API states that pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict “shall have their cases considered with the utmost priority”, and that the parties to the conflict must endeavour to avoid the pronouncement of, and in any case must not execute, the death penalty on such women. Thus while women are legally classified as mothers and caregivers, IHL prioritizes the needs of youngsters, possibly because they are bound to re-establish the demographic balance after the conflict.

Indeed, the view that sees women as vulnerable subjects<sup>15</sup> does not do justice to their ability to react to emergency situations, particularly in times of armed conflict. It is true that civilian women suffer severe deprivation and abuse during war, but they are also very resilient and ready to assume greater responsibilities – that they are rarely allowed to retain after the end of hostilities.<sup>16</sup> Women also serve as active combatants in both international and internal conflicts. But they rarely assume leadership roles, especially in NIACs where the political objectives are normally established by a patriarchal structure.<sup>17</sup> In the light of the above, it is not possible to isolate the protection of women in IHL from the broader issue of gender.<sup>18</sup> It is the

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<sup>14</sup> H. Durham, *International Humanitarian Law and the Protection of Women*, in H. Durham and T. Gurd, (eds.) *Listening to the Silences: Women and War*, Leiden, 2005, pp. 95-107, at pp. 98-101; D. Otto, *Lost in translation*, op.cit., at pp. 322-323; H. Durham and K. O’Byrne, *The dialogue of difference: gender perspectives on international humanitarian law*, in *International Review of the Red Cross*, Vol. 92, n. 877, 2010, pp. 31-52 at p. 51.

<sup>15</sup> In human rights language – and in IHL accordingly – women are classified as vulnerable subjects like children, elderly and disabled people: notably, only women are considered to be vulnerable because of their sex. See J. Gardam, *Women and Armed Conflict: The Response of International Humanitarian Law*, in Durham and Gurd, (eds.) *Listening to the Silences*, op. cit., pp. 109-123 at pp. 112-113.

<sup>16</sup> M. Haeri, N. Puechguirbal, *From helplessness to agency: examining the plurality of women’s experiences in armed conflict*, in *International Review of the Red Cross*, op. cit., pp. 103-122 at p. 107. See also C. Lindsey, *Women facing war*, ICRC, Geneva, 2001, pp. 28-32.

<sup>17</sup> Lindsey, *Women facing war*, op. cit., pp. 23-27; Chinkin, *Women and Peace*, op. cit., p. 413 and Gardam, *The Law of Armed Conflict*, op. cit., pp. 430-431.

<sup>18</sup> Yet both Lindsey, *Women facing war*, op. cit., p. 35, and the ICRC Guidance Document *Addressing the Needs of Women Affected by Armed Conflict* (Geneva, 2004, p. 7) chose to focus on the needs of women caught up in armed conflict and not on gender issues. This is explained by the fact that the ICRC refrains from interfering with the cultures and policies of the states in which it works.

gender discourse that aptly captures the multiplicity of factors influencing the women's experience of armed conflict.

Legally speaking, the special protections accorded to women by IHL based on their vulnerability are inherently discriminatory towards men, but also towards other vulnerable groups. For example, the special treatment of women having dependent infants provided for in article 76 API is not accorded to men taking care of kids, or to women having dependent elderly or disabled persons. While a woman internee may only be searched by a woman, as mentioned above, no such privilege exists for the benefit of a male internee.

Taking everything into consideration, it seems that there exists a degree of latent conflict between the protection of women under IHL and the principle of non-discrimination based on sex. This is unfortunate because it may hinder the development of innovative interpretations such as those adopted by the human rights bodies by reference to the principle of non-discrimination, according to which "sex" is deemed to include sexual orientation and gender identity.<sup>19</sup> In the absence of a specific body in charge of the progressive development of IHL it is up to domestic institutions, and especially the military, to interpret the rules of the GCs and APs that afford special protection to women consistently with contemporary practice, values and sensibilities.

### 3. Gender and child soldiers

An example of the importance of the gender dimension in IHL is the issue of children participating in hostilities, involving aspects connected *inter alia* with physical and mental integrity, social behaviour and criminal responsibility. There is indisputable evidence that rape and sexual violence are instrumental to enlisting, conscripting and forcing children to participate in hostilities and that they are widely used as a way to demonstrate control and ownership over child soldiers, who become the object of social stigma when and if they make it back to their communities.

The issue of sexual violence in the crime of conscription, enlistment and use of child soldiers in hostilities is about to emerge in the cases before the international criminal tribunals. On 14 March 2012, in the ICC's first verdict, Thomas Lubanga Dyilo was found guilty of the war crime of

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<sup>19</sup> See Human Rights Committee, Communication No. 488/1992 of 31 March 1992, Toonen c. Australia, *Report of the Human Rights Committee*, Vol. II, GAOR Forty-ninth Session, Suppl. No. 40 (A/49/40) p. 235 para. 8.7 ; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) of 26 November 2002, *The right to water*, in ESCOR 2003, Suppl. No. 2, E/2003/22(2003) p. 125 para. 13. See also Oosterveld, *The Definition of "Gender"*, op. cit., p. 78 and fn. 137.

enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities and subsequently sentenced to a total of 14 years of imprisonment.<sup>20</sup> Although the indictment did not include charges for crimes of sexual violence, the pattern of rape and sexual violence in the region surfaced in the facts of the case, in the witness's evidences, in the testimony of victims. More recently the Appeals Chamber of the ICC has confirmed a decision of the Trial Chamber finding that the Court has jurisdiction on alleged crimes of rape and sexual slavery of child soldiers committed by members of an armed group against other members of the same armed group.<sup>21</sup>

For its part, the United Nations Security Council (UNSC) has repeatedly urged parties to armed conflicts to take special measures to protect children from rape and other forms of sexual abuse and gender-based violence, insisting on the special needs and particular vulnerabilities of girls affected by armed conflict, including those sexually exploited and used as combatants.<sup>22</sup> This one-sided approach is not found in subsequent resolutions, where the UNSC stresses the primary role of national governments in providing protection to all children affected by armed conflicts and recalls their responsibilities to end impunity and to prosecute those responsible for grave violations against children in situations of armed conflict.<sup>23</sup>

But rape and sexual violence against children are not gender neutral; on the contrary, they can take different forms and give rise to different consequences depending on whether they are directed towards girls or boys. Girls are regularly raped, kept in a status of sexual slavery, sometimes subjected to forced marriage. Boys are also raped and sold for entertainment and sexual activities, but they are especially forced to witness rape and taught to commit rape as a tactic of war, thus becoming perpetrators as well as victims.<sup>24</sup> It is thus necessary that gender awareness

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<sup>20</sup> The Prosecutor v. Thomas Lubanga Dyilo. ICC-01/04-01/06. The verdict and the sentence were confirmed by the Appeals Chamber on 1st December 2014.

<sup>21</sup> *Judgment on the Appeal of Mr. Ntaganda against the "Second Decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"*, ICC-01/04-02/06-1962 of 15 June 2017.

<sup>22</sup> See S/Res. 1261 (1999) of 25 August 1999 para. 10; S/Res. 1314 (2000) of 11 August 2000 para.13; S/Res. 1379 (2001) of 20 November 2001 paras 8 (c) and 11 (d); S/Res. 1460 (2003) of 30 January 2003 para. 10; S/Res. 1539 (2004) of 22 April 2004 paras 1, 8, 10, 12 (a).

<sup>23</sup> See S/Res. 1612 (2005) of 26 July 2005; S/RES/1882 (2009) of 4 August 2009 para. 3.

<sup>24</sup> See 'Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v. Thomas Lubanga Dyilo' in *International Justice Monitor*, August 31, 2011, [www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/](http://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/) (last accessed 29 August 2017); Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Sexual Violence*

inspire the development of policies and programmes related to disarmament, demobilization and reintegration of former child soldiers, taking into account the specific experiences and needs of both boys and girls and their right to a balanced and appropriate transition to normal life, with a particular emphasis on protection, education and welfare.

#### **4. How to mainstream a gender perspective into International Humanitarian Law?**

“Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality”. This definition, formulated by the UN Economic and Social Council in 1997,<sup>25</sup> has caused the term “gender mainstreaming” to become a *mantra* that since then has been conveying the UN doctrine of gender equality.<sup>26</sup>

Perhaps the major areas where the efforts of gender mainstreaming have been focused (with mixed results) are peacekeeping, peace-building and peace negotiations, starting with the fundamental UNSC Resolution 1325 of 31 October 2000 aimed at expanding the role and contribution of women in UN field-based operations, involving women in all peacekeeping and peace-building measures and supporting gender-sensitive training efforts.<sup>27</sup>

Mainstreaming a gender perspective in IHL has up to now received less attention. It is not difficult, however, to identify rules the implementation of which would benefit from an appropriate gender analysis. In the conduct of hostilities, for instance, “gender mainstreaming” should mean to evaluate a military operation as a whole in a gender perspective, i.e. taking into account the roles of men and women in the communities and groups – both

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*Against Children*, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/sexual-violence/> (last accessed 29 August 2017).

<sup>25</sup> General Assembly, Fifty-second Session, Report of the Economic and Social Council for 1997, A/52/3 of 18 September 1997, p. 27.

<sup>26</sup> See M. Freeman, *Human Rights. An Interdisciplinary Approach*, Blackwell Publishing Ltd., Oxford, 2002, p. 128; S. Kouvo, *The United Nations and Gender Mainstreaming: Limits and Possibilities*, op. cit., pp. 237-252; P. Degani, *Condizione femminile e Nazioni Unite. Recenti sviluppi della politica internazionale per i diritti umani delle donne*, CLEUP, Padua, 2010, pp. 177-183.

<sup>27</sup> S/RES/1325 (2000) of 31 October 2000, paras 4, 6 and 7.

military and civilian – involved in or affected by the armed conflict, as well as the consequences of the armed actions on each of them.

With the goal of protecting the civilian population, civilians and civilian objects API distinguishes between precautions in attacks (art. 57) and precautions against the effects of attacks (art. 58). The former lie on the attacker, the latter must be taken by the defender. The abovementioned provisions are generally recognized to reflect customary international law applicable in international armed conflicts and as such they are reformulated in Rules 14 to 24 of the ICRC Study on Customary IHL.<sup>28</sup> Basic IHL obligations (including precautionary rules) must be respected by all parties involved in an armed conflict, be it an international or a non-international armed conflict. It is recognized that the greatest part of the precautionary rules mentioned above also apply in non-international armed conflict.<sup>29</sup>

It is submitted that the obligations to adopt precautions in attacks and against the effects of attacks and especially the obligations of due diligence contained therein (to “take constant care”; to “do everything feasible”...) have the potential to mainstream gender in the conduct of hostilities. The gender composition of the military units, on the one hand, and of the civilian population, on the other, should certainly be evaluated when making decisions about the most appropriate precautions to be taken.

Weaponry is also an area where the impact of armed conflict on men and women is considerably different. While men mostly use weapons as means of attack and defence in the conduct of hostilities, women – as well as children – mainly fall victims of those weapons the disruptive effects of which continue for a long time after the conflict. They are highly exposed to the damage caused by explosive remnants of war, anti-personnel mines and cluster munitions while trying to find food or water, working in the fields or grazing cattle.<sup>30</sup>

Two important treaties: the Ottawa Convention of 1997 and the Dublin Convention of 2008 prohibit the use, stockpiling, production and transfer of anti-personnel mines and cluster munitions, also providing for assistance to victims, clearance of contaminated areas and destruction of stockpiles; they are not, however, universally accepted.<sup>31</sup> As for the Protocol on explosive

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<sup>28</sup> See [www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul).

<sup>29</sup> See Rules 21 (Target Selection), 23 (Location of Military Objectives outside Densely Populated Areas) and 24 (Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives) ([www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul)).

<sup>30</sup> See Durham, *International Humanitarian Law and the Protection of Women*, *op. cit.*, pp. 103-105.

<sup>31</sup> Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction of 18 September 1997; Convention on cluster munitions of 30 May 2008. Article 5(1) of the Convention on Cluster Munitions adopts a gender perspective by requiring that states parties shall provide age- and gender-sensitive

remnants of war it merely addresses post-conflict remedial measures of a generic nature in order to minimize the occurrence, effects and the risk of explosive remnants of war.<sup>32</sup>

For those reasons, the review of the legality of new weapons required by article 36 API is of the utmost importance. In a gender perspective states should foresee the different impacts of certain weapons on men and on women and children in order to determine whether their use should be prohibited. This process implies that legal advice is sought not only when a state develops, manufactures, buys or otherwise acquires a new weapon, but also when new weapons-related technology is developed, existing technology is adapted to military uses, or an existing weapon is upgraded or otherwise changed.<sup>33</sup>

## 5. Gender issues in the protection of civilians.

While IHL does not distinguish among different categories of civilians as regards protection against dangers arising from military operations, some groups – women, children, refugees and stateless persons – are singled out as persons deserving special protection when they are in the power of a party to a conflict. A gender perspective is thus embodied in a number of provisions covering the treatment of internees as well as in those regulating humanitarian assistance.<sup>34</sup>

Since the early 1990s, due to the extensive use of rape as an instrument of war during the Balkans conflict, the focus has been the distinctive impact of armed conflict on sexual violence and the means to respond to such crimes. As is the case with the resolutions on children and armed conflict, the UNSC has captured only in part the gender dimension of sexual violence in armed conflict. Indeed Res. 1325 (2000) emphasizes the protection of women and girls from gender-based violence and the responsibility of states to prosecute the related crimes, apparently overlooking the sexual violence against men and boys.<sup>35</sup> This limited

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assistance, including medical care, rehabilitation and psychological support to the cluster munitions victims, as well as provide for their social and economic inclusion.

<sup>32</sup> Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Protocol on Explosive Remnants of War (Protocol V) of 28 November 2003.

<sup>33</sup> See B. Boothby, *The Law of Weaponry: Is It Adequate?*, in M. N. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein*, Leiden, Boston, M. Nijhoff (2007) pp. 297-316 at p. 302. See also ICRC, *A Guide to the Legal Review of New Weapons Means and Methods of Warfare. Measures to implement Article 36 of Additional protocol I of 1977*, ICRC, Geneva, 2006, p. 10.

<sup>34</sup> Articles 25, 29, 97 and 108 GCIII; articles 76, 85 and 124 GCIV.

<sup>35</sup> S/RES/1325 (2000) op. cit., paras 9-11. See Gardam, *Women and Armed Conflict*, op.

approach has been partially corrected by the subsequent resolutions, which are focused on “gender mainstreaming” in peacekeeping and peacebuilding and where “all acts of sexual violence against civilians” are condemned; the situation of women and girls, however, still deserves special mentioning.<sup>36</sup> The Rome Statute of the International Criminal Court, for its part, refers to sexual and gender violence in strictly gender-neutral terms.<sup>37</sup>

Where gender-related elements of the crimes of sexual violence have clearly emerged is in the case law of the international criminal tribunals, which have investigated and prosecuted systematic detention and rape of women, men and children and have defined gender crimes such as rape and sexual enslavement under customary law.<sup>38</sup> The very same gender composition of tribunals may have played a role in bringing to justice and sentencing perpetrators of sexual and gender crimes.<sup>39</sup>

Gender also impacts significantly on the application of the IHL rules related to the treatment of persons deprived of their liberty. Civilians may be deprived of their freedom during armed conflict for a number of reasons related to the conflict. In IACs protected persons may be interned or placed in assigned residence if the security of the detaining power makes it absolutely necessary;<sup>40</sup> those having committed an offence against public order and security may be prosecuted and imprisoned by an occupying power.<sup>41</sup> GCIV lays down detailed rules regarding their treatment, where

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cit., pp. 109-110; A. Barrow, *UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law*, in *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 221-234; S. Sivakumaran, *Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict*, in *International Review of the Red Cross*, Vol. 92, No 877, 2010, pp. 259-277.

<sup>36</sup> S/RES/1820 (2008) of 19 June 2008; S/RES/1888 (2009) of 15 September 2009.

<sup>37</sup> Rome Statute of the International Criminal Court, articles 7(1)(g); 8(2)(b)(xxii); 8(2)(e)(vi) and the related Elements of Crimes.

<sup>38</sup> Among the many works existing on this subject see De Brouwer A.-M., *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, INTERSENTIA, Antwerpen-Oxford, 2005 pp. 9-14, 26 and Part I (pp. 41-224); Verrall S., *The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY Judgments*, in Brammertz S. and Jarvis M. (eds.) *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, Oxford, 2016, pp. 299-334; Nabti N. and Verrall S., *Annex A: The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY Judgments*, in Brammertz and Jarvis (eds.) *Prosecuting Conflict-Related Sexual Violence*, op. cit., pp. 387-428.

<sup>39</sup> See King K.L. and Greening M., *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, in *Social Science Quarterly*, Vol. 88, December 2007, pp. 1049-1071 arguing that female judges tend to assess more severely crimes of sexual violence committed against women, while male judges do the same for those committed against men.

<sup>40</sup> Articles 64 ff. GCIV.

<sup>41</sup> Article 41 GCIV.

gender considerations (as already noted) are reflected in a number of provisions granting special protection to women. With regard to NIACs, however, Common Article 3 is gender-neutral and APII contains very limited provisions concerning the treatment of women convicted and imprisoned.<sup>42</sup>

Although in principle applicable to persons detained for ordinary offences unrelated to armed conflict, some soft law instruments such as the Standard Minimum Rules for the Treatment of Prisoners,<sup>43</sup> the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment,<sup>44</sup> the Basic Principles for the Treatment of Prisoners<sup>45</sup> and the more recent United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules)<sup>46</sup> may become relevant by analogy.<sup>47</sup> The common denominator of all these documents is the emphasis on institutional training, which in turn should be given in a gender perspective, i.e. taking into account the functions, but also the feelings and values of prison and police male and female officers. It is, therefore, the task of states to ensure the implementation of measures provided for in the rules recommended by the UN bodies and to incorporate the gender perspective into their domestic law and practice.<sup>48</sup>

## 6. Conclusions

IHL is firmly rooted in universal principles and rules aimed at protecting all persons involved in, or affected by, an armed conflict. The gender discourse does not intend to challenge the universality of the rights incorporated in the IHL treaties and in customary international law. Gender is not an ideology or a system of beliefs. Gender represents, on the one hand, a tool of interpretation of the IHL rules and, on the other, a lens

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<sup>42</sup> Articles 5.2(a) and 6.4 APII.

<sup>43</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Text in: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>.

<sup>44</sup> A/RES/43/173 of 9 December 1988, Annex.

<sup>45</sup> A/RES/45/111 of 14 December 1990, Annex.

<sup>46</sup> A/RES/65/229 of 16 March 2011, Annex. Available at [www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf).

<sup>47</sup> C. Lindsey, *Women Facing War*, op. cit., at p. 159; J. Ashdown and M. James, *Women in Detention* in *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 123-142 at pp. 128-129.

<sup>48</sup> The Council of Europe has been promoting implementation at the regional (European) level by issuing recommendation Rec (2006)2 of 11 January 2006 of the Committee of Ministers to Member States on the European Prison Rules.

through which to assess the consequences of their implementation for men, women, boys and girls.

Having said that, it has to be admitted that the current conversation about gender and IHL tends to leave the male image in the shadows. This is how the UNSC has mainly emphasized the situation of women and girls and IHL likewise focuses on the protection of women and children. Sadly, prosecutions before the international criminal tribunals have shown that sexual violence and gender-based violence in armed conflict affect men and women, boys and girls and impact differently on each of them. Therefore, the role, attitude, culture and responsibilities of the accused, and of the victim, of international crimes must be given due consideration in the investigation as well as in the conduct of the proceedings, and the rehabilitation and reintegration measures should be set accordingly.

For the full picture one should, however, not focus exclusively on the negative, pathological aspects such as violations of IHL and gendered crimes. It is important to bear in mind that the gender perspective should positively impact on the application of IHL through a gender-aware planning of any action, in the conduct of hostilities just as in the protection of civilians. In this light, gender awareness is a valuable instrument to guide the responsible behaviour of those who have the power to decide on military actions to be taken and of those who have the task of implementing IHL on the ground.

## **NATO experience in operations**

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In UNSCR 1325 one can read as follows: “An understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security.”

In addition NATO Secretary General, Jens Stoltenberg, declared that: “Gender equality is not optional - it is fundamental. It allows us to respond better and smarter to the many security challenges we face today.”

Starting from these two points the final NATO directive, updated in May 2016, states as follows: the active participation of men and women is critical to the security and the success of the Alliance and its partners. It is fundamental to lasting peace stability and security. The directive, therefore, provides further advanced direction and guidance to support the continued and effective institutionalization of gender perspective in all activities within the Strategic Commands (SCs). It must be recognized that men, women, boys and girls are components of a gendered system and have influence on, and are influenced by, armed conflict. However, women and girls are disproportionately affected and thus have a unique perspective to share and solutions to offer. Unless gender-based similarities and differences are addressed, conflict prevention, conflict-resolution, post-conflict reconstruction and peace-building are negatively impacted. Consequently, it is necessary to assess notions equated with traditional masculinity and femininity that underpin organizations, societies and communities.

Gender is a crosscutting issue to be implemented from the very beginning of a mission/operation (ANNEX – OPLAN and OPORD).

Since 2011, responsibility for security was gradually transitioned to Afghan forces, which took the lead for security operations across the country by summer 2013. The transition process was completed and Afghan forces assumed full security responsibility at the end of 2014, when ISAF mission was completed.

A new, smaller non-combat mission (“Resolute Support”) was launched on the 1<sup>st</sup> January 2015 to provide further training, advice and assistance to the Afghan security forces and institutions.

Originally deployed to provide security in and around the capital of Kabul, ISAF’s presence was gradually expanded to cover the whole

country by the second half of 2006. As ISAF expanded into the east and south, its troops became increasingly engaged in fighting a growing insurgency in 2007 and 2008, while trying to help Afghanistan rebuild. In 2009, a new counter-insurgency was launched and 40,000 extra troops were deployed.

In support of the Afghan government, ISAF assisted the Afghan National Security Forces (ANSF) in the conduct of security operations throughout the country, helping to reduce the capability of the insurgency.

An important priority for ISAF was to increase the capacity and capabilities of the Afghan forces. This became the main focus of the mission from 2011 onwards, as responsibility for security was progressively transitioned to Afghan lead and ISAF shifted from a combat-centric role to training, advising and assisting.

The multinational force also helped to create the space and lay the foundations for improvements in governance and socio-economic development for sustainable stability.

ISAF was one of the largest coalitions in history and has been NATO's most challenging mission to date. At its height, the force was more than 130,000 strong, with troops from 51 NATO and partner nations.

In 2014, there was an average of approximately 6% of women and 94% of men involved in NATO member and partner nation operations. As regards gender issues, Command ISAF Operation Plan states as follows: "NATO policy states that gender mainstreaming should become routine with full regard to operational requirements in order to improve operational effectiveness. Gender mainstreaming represents the process to recognize and incorporate the role Afghan women play in relation to the ISAF mission. During the operation it was clear that gender perspective is an enabler, a force multiplier and a combat reducer. It benefits the operation by providing

1. more complete information gathering
2. situational awareness
3. complete picture of the security situation
4. force protection
5. tool to achieve our mandate.

By understanding the different needs of men, women, boys or girls the action we undertake will be on target and we avoid negative consequences which increase our operational effect and help us win the hearts and minds of the population and thereby increase our credibility and their willingness to cooperate with us.

Information gathering by addressing men, women, boys or girls will give us access to additional and different type of information which will increase our situational awareness and lead to increased force protection and operational effect.

Now it is time to indicate some good practice for operations at the tactical and operational level:

- consult regularly with local women in the theatre of operations;
- ensure all reporting requirements, from weekly reporting to After Action Reviews, include attention to gender issues;
- devise databases specifically for tracking female contacts;
- strengthen coordination with international and local NGOs with local area of operation.

To measure the effectiveness and to answer the question of how gender perspective can make a difference to security in NATO operations, the following is necessary:

- identify key elements for successful implementation;
- identify indicators to measure effectiveness of gender implementation in military operations;
- prove that gender perspective contributes to operational effect.

What happened in Afghanistan can be considered a true story regarding integration in a gender perspective. This integration was always taken into consideration in the following cases:

1. when building a bridge
2. in mine awareness campaigns
3. in setting up refugee camps
4. in constructing a water pipe
5. in searching for survivors after earthquakes
6. in the appeal recruitment campaigns to both men and women.

A very important statement was made by the previous NATO Secretary-General, Rasmussen: “if women are not active participants in peace building and reconciliation, the views, needs and interests of half of the population in a conflict area are not properly represented. That is simply wrong. It can also undermine the peace”. In fact Chapter Two: Fundamental Rights and Duties of Citizens, Article 22 of the Afghan Constitution (2004) states that any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, men and women, have equal rights and duties before the law.

## **Some important aspects of ISAF Operation in respect of the gender issues**

### *Search operation*

As far as the body search of men, women and children is concerned, it is mandatory to provide female staff to search women, and also take cultural and religious customs under consideration. This means that female personnel search women and young children while male personnel search men and older boys. It is accepted for male personnel to instruct a woman to lift up her “burqa” a little and tighten her clothes to enable him to see if she is carrying any objects. Particular attention was given to:

- setting mixed teams
- bringing a local witness (elders, mullahs or other representatives)
- gathering women and children
- not leaving a male soldier alone with women
- limiting the occasions male soldiers talk with youngsters.

### *De-mining*

Remember: it has always been considered that women, men, boys and girls do not have the same pattern of movement and that they do not perform their duties in the same area.

Ask: Where is it most effective to clear mines taking into account the benefits of the entire society?

In the fields, who produces food?

Which is the road to the market where products are sold?

## **The role of gender advisor (GENAD)**

His/her role was both internal and external to ISAF: internal, raising gender awareness among the personnel involved in the mission, especially the key leaders/commanders. External, interacting and liaising with local women and men to keep a focus on the gender aspects of the mission.

As regards all the above-mentioned activities, the GENAD had to take the time to report lessons observed and identified in order to enable the organization, Nations, and function to improve effectiveness and learn from experience.

To complete the ISAF gender factor analysis and in consideration that a correct implementation of the gender perspective requires that it has to be included from the very beginning of a military operation/mission, the following steps were implemented:

- GENAD as a member of the Planning Group;

- Gender as an element of the Comprehensive Operations Planning Directive (COPD);
- Gender contribution to the Comprehensive Preparation of the Operational Environment (CPOE);
- OPLAN should include a specific GENDER ANNEX;
- Force Generation Process should, clearly, include female personnel.

Carrying out a gender analysis means:

- looking at the different roles and activities that women, men, girls and boys have in a particular society;
- analyzing the social relationship between them.

Examining the aspects of a society reveals the differences in the experiences of women, men, girls and boys and the differences in their needs. Gender Analysis is conducted in four steps:

1. gathering of information and data categorized by gender;
2. identification of gender roles;
3. identification of different needs in relation to the gender;
4. assessment of impact/consequences of planned actions/projects on different groups of stakeholders.

Before concluding, it is necessary to indicate clearly the female percentage out of the 33 million of the Afghan population. In particular, it must be highlighted that, in 2011 in Afghanistan, women represented more than half of the population who were between 25 and 39 years of age.

The achievements of ISAF were:

- Institutionalization of the Gender Perspectives in Operations
- Establishment of GENADs and Network
- Mixed Teams (always males and females)
- Pre-deployment training on gender issues
- In theatre training on gender issues
- OPLANs and Annexes on gender issues
- Projects supporting an education and small business for women
- Supporting: Afghan Action Plan on UNSCR 1325 – WPS
- Recruitment of women in ANA and ANP
- Representation of women in Government.

Brig. Gen. Gordana Garasic, ISAF Gender Advisor, who served in Kabul in 2014, declared: “We believe, and it has been proven that if women participate in the police and military that it will help stability of the whole society.” As a consequence of the General’s statement, currently there are approximately 2,000 women serving in the Afghan National Police and roughly 700 women serving in the Afghan Air Force and Army. The target

is raising the number of women in ANSF (Afghan National Security Forces) by 10% in the next decade. Lessons learned from ISAF: by excluding women, you exclude:

- 50% of the population
- 50% of capabilities
- 50% of the sources of information

Gender Perspectives are:

- Force multiplier
- Fundamental
- Part of daily work
- Impossible without leadership support
- Must have political engagement
- Successful with situational awareness (cultural, historical, religious)
- Key tools:
- Gender lens
- Training (pre-deployment)
- Communication
- Education in the long term
- Gender analysis
- Comprehensive approach.

In conclusion, the main takeaways from ISAF are:

- No sustainable peace without equal inclusion of women and men alike
- Gender perspective is about: human rights and women's rights & consideration and inclusion
- Lessons learned and best practices included in training
- Training and education (internal, external)
- Some done, but more to do
- Already implemented gender plans in the operational plan.

## Gender perspectives on IHL

*Lotta EKVALL*

Gender Advisor, Gender section to the Officer  
of the Secretary-General, OSCE

This panel will consider what it means to integrate a gender perspective on IHL and whether the Additional Protocols (APs) allow for gender factors to influence the application of the law in today's armed conflicts. The panel will also consider whether structural inequalities and gender stereotypes in society may lead to the application of IHL rules in a way that is inherently discriminatory, and whether there is a need to clarify or further develop the law to address these effects.

Some questions which need to be considered: should parties to armed conflict integrate a gender perspective into the rules on the conduct of hostilities and, if so, how should they do so? For instance, is there room there for a gender perspective in the protection of "civilians"? What is the impact of a gender perspective in the application of the rules related to the treatment of persons deprived of their liberty? How should gender factors influence the legal review of new weapons pursuant to Article 36 of API? Is there a gender perspective in dealing with children participating in hostilities?

Allow me first to express my appreciation for the invitation to speak at this Round Table today. It is a great pleasure and honor for me to be here, among these distinguished and experienced speakers, to share with you some perspectives, from foremost a military point of view, on the integration of a gender perspective into IHL.

First of all, let me share with you my firm belief that there are no specific "gender questions" or issues but rather gender perspectives and gender dimensions in every question or situation. If gender perspectives are not considered this will inflict different consequences on men, women, boys and girls and risk perpetuating existing inequalities. The application of the law will have a discriminatory effect if we do not always consider and at all times assume that lives, experiences, security threats, freedom of movements, healthiness, and access to health care, resources and influence are not the same for men and women or boys and girls.

These differences and their consequences should be analyzed and regarded when conducting military operations and in all decision making and planning.

Is there the need to clarify or further develop the law in order to mitigate discriminatory effects?

According to the Swedish Red Cross publication *IHL and gender – Swedish experiences*, by Cecilia Tengroth and Kristina Lindvall, there are some topics that are not covered in the laws or which would benefit from being developed such as strengthening the protection of IDPs when it comes to gendered demands. Furthermore, their research calls for an expansion of the interpretation of “direct humanitarian effects” of armed conflict that takes into account women’s specific challenges. These challenges are often regarded as outside the protective scope of IHL, but include issues that can be a direct consequence of armed conflict, such as, for example, protection from domestic violence.

The prohibition regarding the death penalties for “mothers of young children” is indeed gender specific but at the same time discriminatory as it does not apply to fathers of young children just to mention one example.

While having gender-neutral international humanitarian law can be problematic in specific cases, much more harmful is the gender-blind application of the law.

We have to admit and realize that the structures and inequalities during peace have a direct impact on our ability to ensure non-discriminatory protection of all persons protected under IHL during armed conflict. This emphasizes the importance of addressing a wide range of root causes of inequalities within societies and cultures in order to ensure a non-discriminatory application.

Gender perspectives on IHL provides the capacity to consider different experiences of both women and men in order to break down stereotypes about how men and women ‘should’ operate, and the complex ways in which conflict impacts upon them.

The other way of ensuring a gendered application of the law would be to explicitly address and cover every little detail of gender perspectives and gender dimensions within IHL. Which I believe still will not ensure non-discriminatory application as cultures and societies are neither alike nor unchangeable. Proper analysis of the specific context including gender perspectives and gender dimensions must make up the starting point and the foundation for all decisions, planning and conduct of military operations in order to capture the particulars of the actual context or situation. The ability to do so within Armed Forces is today limited, and a way to increase capability would be to use Gender Advisors and Gender Focal Points as part of all processes.

Therefore, integrating gender perspectives is not only an abstract discussion when talking about IHL application, but it is actually a prerequisite to ensure IHL lives up to the principle that adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or

social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

Moving on now to the more specific questions, about what room is there for a gender perspective in the protection of “civilians”?

Major General Patrick Cammaert from the Netherlands stated, after his experiences as Commander of several missions in Africa, that, “It has probably become more dangerous to be a woman than a soldier in armed conflicts.”

The UN Security Council has articulated the link between sexual violence and the restoration of peace and security in resolutions 1820 (2008) and 1888 (2009) 2106 (2016). Therefore, most mandates of peace support operations nowadays contain provisions for peacekeepers to protect civilians and most recently also to address sexual violence.

Protection of civilians cannot be delivered effectively without the understanding of the diverse vulnerabilities of men, women, boys and girls in a specific society or context.

So how should Armed Forces ensure a gendered approach to security needs when it comes to protection?

Knowledge of Gender-Based Violence (GBV) and Conflict-Related Sexual Violence (CRSV) among units has to be ensured through an adequate level of training and education in these matters along with an understanding of the context and situation deployed to. By listening to and engaging with the local population, men, women, boys and girls their opinions, priorities and vulnerabilities will appear and set out the foundation for interventions. Unless you know who is affected — women or men, girls or boys —and who among them is most at risk, at what time, place and situation, the protection provided may be off target.

To be present at the right place at the right time will prevent violence and abuse and protect the targeted group as, for example, being present early in the morning at the road to the market where women travel to sell their products or collect firewood. Or being present in an area where young men are being forcibly recruited. Monitoring trends, propagation and search for early warning signs will indicate when protection measures should be put in place and which group in this specific situation is vulnerable.

Monitoring trends and propagation requires sex-disaggregated data and statistics when reporting. It will also allow further analysis of the theatre - as the military calls the area of deployment.

The Armed Forces are often the first on the spot and often operate in remote areas where other organisations have no presence. Therefore, the reporting part also becomes very important when it comes to Sexual Exploitation and Abuse (SEA).

For example, if we look at the situation in Kosovo today, there has been little or no justice for the many survivors of sexual violence during the war.

One part of that problem relates to the difficulties of proving what happened but of course there are other implications such as a resistance to come forward due to the stigma and prevailing gender roles. But if it could be proven maybe several more would be willing to come forward. The delicacy and sensitivity surrounding these matters call for further development of standards of reporting along with the procedures of how to secure information and data, and the modalities of information sharing, also ensuring that the reporting is held up as evidence in courts. It will also support the efforts of ending impunity for CRSV when able to address the topic during peace negotiations and mediation and with the knowledge, evidence and statistics concerning its prevalence. It's only when the perpetrators are punished that such behavior will stop.

Ensuring Freedom of Movement (FoM): making sure that all members of society can move freely around and have access to whatever resources they might need, being water wells, health institutions or maybe IDP camps.

In order to ensure assistance to survivors the personnel must be aware of where to find and how to access existing health care facilities, safe havens and the judicial system but they must also be informed about which organisations are active in the area and their field of work.

What is the impact of a gender perspective in the application of the rules related to the treatment of persons deprived of their liberty?

Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. During the recent migrant flow Sweden learnt about certain challenges when it came to holding families together. What is the practice when it comes to child marriage where the spouse is actually a child and was maybe forced to marry? Marrying someone under the age of 18 is not allowed in Sweden. Are they to stay together or be held separately? And if there are also children involved - should they be kept with the father or the mother who is also a child?

Furthermore, in order to be able to safeguard health and hygiene of detained persons one has to be aware of the different needs of men and women where women might need access to reproductive health care.

Should parties to armed conflict integrate a gender perspective into the rules on the conduct of hostilities and, if so, how should they do so?

Again the answer for me is of course they should and the means to do it starts again with a proper gender analysis. One has to understand who does what, where and when in order to abide by the principles of distinction, proportionality and precautions. An operation can not be seen as successful if it breaches the principles of IHL at the same time.

To adjust the time for operations, alert if possible in advance so people can leave the area, or actually abort operations are options one could take into consideration along with the choice of methods and weapons.

The same principles, distinction, proportionality and precautions very much come into play when it comes to, for example, Crowd Riot Control. You can not apply the same amount of force to elderly women, pregnant women or children as to big grown men. Without knowing if and how a planned measure of protection or means or methods of warfare affect men, women or children differently, it is impossible to act without risking that the action will be either inadequate or discriminatory in a way that could be avoided by another similar action.

Which leads up to the question of how should gender factors influence the legal review of new weapons pursuant to Article 36 of API?

Different weapons are used for different purposes, so when prioritising which type of weapon to develop gender dimensions have a part in the equation. By knowing who does what, where and when through a gender analysis it is possible to assess the impact on women, men, boys and girls. If they have different patterns of movement or perform their duties in different areas or under different circumstances - do they work indoors or out in the fields? - will enable an estimate of how exposed different categories are to that particular kind of weapon.

Before coming back to what it entails for Armed Forces to fully integrate and implement a gender perspective there is the final question: is there a gender perspective in dealing with children participating in hostilities?

A total nightmare for most soldiers: on one side a potential threat and on the other, a child. It creates very mixed feelings and also contradictory emotions. Soldiers are trained to react to threats but their hearts may react differently. Due to gender roles I do think it is even more complicated if the child soldier is a girl. The reason for taking part in the hostilities might be different and most of them are likely to be forced but by different means. The law stipulates that children affected by armed conflict are entitled to special respect and protection and in addition, the UN Security Council, UN General Assembly and UN Commission on Human Rights frequently require the rehabilitation and reintegration of children who have taken part in armed conflict. Here again one must be aware of the different vulnerabilities of girls and boys and what security risks they are likely to be exposed to. Furthermore, concerns have been raised that the type of experiences specific to girl soldiers, such as sexual exploitation in the form of forced marriages, forced child-bearing and domestic slavery, are not expressly covered by API's prohibition on using children under 15 to take 'direct part in hostilities', nor by the Optional Protocol to the Convention on the Rights of the Child along with the existing gender roles which

causes different stigmas for boys and girls if they take part as soldiers in hostilities and, therefore, require a totally different rehabilitating process.

Now back to the question of what Armed Forces have to do in order to gender mainstream its organizations to ensure that gender perspectives and gender dimensions are fully integrated in planning, conduct and evaluation of operations and included in all decision making processes. The same question is also applicable to any organization in order to accomplish change.

First of all, the Leadership level has to have a positive and supporting attitude and understanding of the importance of applying gender perspectives and including gender dimensions. They must be informed and educated about the benefits of integrating gender perspectives and their obligation to implement the UN resolutions on “Women Peace and Security”.

Secondly, the institutionalization of the integration of gender perspectives and gender dimensions within doctrines, policies and directives, plans and orders from the very highest level down to the concrete, practical procedures and practical advice to personnel in the fields must be fulfilled.

Thirdly, education and training of subject matter experts such as Gender Advisors, as well as a middle leader and other categories of personnel must be conducted. Gender perspectives and gender dimensions as a natural, integrated part of all education, training and exercises throughout the system must also be supported.

Resources have to be allocated and a budget available for this purpose, meaning that it requires creating positions within the organizations and also allowing personnel to take part in education, training and other development work. From what I have seen, almost all organizations struggle with the implementation part even when the policies, guidelines and directives are there. If the practitioners, or in military terms, the tactical levels are not included and involved, very little will happen. They are the ones carrying out the tasks in the field - if they are gender blind so is the mission/organization.

Furthermore, in order to constantly develop concepts and adapt to a world in transformation, documentation and evaluation of efforts should be conducted along with the collection of sex-disaggregated statistics, writing reports and having lessons learned processes which include gender perspectives and gender dimensions. This will also enable research work.

The number of women is often a scarce commodity within today’s Peace Support Operations and it is a problem we have to address if we want to succeed in our efforts to provide peace and security. We need mixed teams who can address any situation they encounter in their daily work no

matter who the person they are dealing with - men, women, boys or girls - and under any circumstances.

Therefore, the question of how to attract and retain more women within the Armed Forces is imperative. Giving them the same possibilities and opportunities as men and also revising and reflecting on qualifications and requirement standards and making sure they are valid and relevant so the very resources which are so desperately needed in order to enable a non-discriminatory response are not excluded.

Last but not least I would like to bring up the “clause” of military advantage or military necessity. From my point of view it gives military commanders an opportunity to go ahead with more indiscriminate attacks if not handled and monitored properly and calls for a more regulated approach. A force unaware of gender dimensions or gender blind could afflict devastating consequences to specific categories of the civilian society and society as a whole if they do not have the ability to assess the gendered impact of their operations.

Just let us hypothetically say that if the loss of 30 lives when conducting a strike against a target which is considered important to fight down from a military point of view is acceptable would it still be acceptable if the victims were all men or all women from a village? The consequences to that particular community would be totally different to their survival if a cross section of the population was involved or a specific category of the population was affected.

A long list, but it is not until each and every one of these conditions are fulfilled that we can say that the Armed Forces or any organization has the capability to ensure a non-discriminatory application of IHL, and that will not happen overnight.



**VIII. Reinforcing respect  
for the additional protocols:  
the 40<sup>th</sup> anniversary as an opportunity?**



## **Procedures and mechanisms to ensure respect for IHL**

*Réka VARGA*

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### **1. Advantages and disadvantages of existing international procedures aimed at ensuring respect for IHL**

Regrettably, violations of IHL occur frequently nowadays, and there is a tendency today to address legal issues and questions related to the interpretation of IHL rules through inter-governmental and expert processes and adopt soft law documents. This is understandable, since there is a strong reluctance by states to adopt new treaties and, according to the opinion expressed by many, it is not the existing rules that are inadequate but the major challenge IHL is facing today namely, the lack of respect. In addition, new kinds of conflicts and new types of security challenges trigger further considerations. Therefore, through our intergovernmental or expert discussions related to questions of interpretation and best practices we often end up with soft law documents when seeking answers to these challenges.

At the same time, despite the many dialogues we may have, it still appears that there is a need for more interaction between different circles: lawyers and non-lawyers, representatives of different regions or legal systems and experts in different disciplines. There are some conferences and initiatives which attempt to bridge this gap, however, there seems to be a feeling of necessity for more global and interdisciplinary discussions.

This is why the Compliance Initiative, led by the Swiss Government and the ICRC is of utmost importance: it could serve as a forum for discussions with a universal focus. During the discussions devoted to the Compliance mechanism, one pertinent concept was that the future mechanism should have a reporting function as well. However, despite all deliberations, it soon became clear that states were not ready to accept a reporting function due to their fear that introducing such a mechanism would lead to naming and shaming.

Decisions of national authorities on certain issues, including the Compliance process, are often taken through a political lens. This is customary. However, this decision-making determines how multilateral mechanisms work and to what extent they support compliance with IHL. This is perhaps why a suggested mechanism, such as a regular meeting of states, which would be voluntary, non-politicized and non-contextualized,

is such a sensitive topic. It would be, therefore, important that states exercise a certain self-criticism when they accept the need for better compliance with IHL but fail to agree on a related mechanism.

Another question that needs serious consideration is how to include armed groups into such discussions? Obviously, there is no receptivity to include armed groups in any mechanism intended for states. At the same time, in many cases armed groups are parties to the conflicts and indeed play an important role in how victims of these conflicts are affected. Although some organizations have established a structure of dialogue with armed groups, in general this topic is highly sensitive and controversial. At the same time, if we want our discussions to have an actual effect, we need to listen to the opinions and problems of armed groups and engage in a two-way discussion with them.

Another interesting phenomenon is the relative absence of civil society in the domain of international humanitarian law (IHL), as opposed to the numerous civil society organizations active in the field of human rights law (HRL). The number of civil society organizations dealing with IHL is a very small portion compared to those active in the HRL field, consequently, there seems to be much less public pressure on governments or armed groups from the civil society. In many cases, partially responding to this lacuna, NGOs tackle IHL issues as well. This is also true for enquiry or fact-finding procedures, where a human rights law mandate is often much more present than an IHL mandate. This frequently results in a self-extension of the mandate, whereby IHL issues are also considered. We will have to see whether this has an advantageous effect from the perspective of protection of victims of armed conflicts.

There are many reasons why IHL rules are not respected. Reaction to non-compliance should, therefore, be adjusted to these specific causes, and a wider perspective on how to approach individual cases could further assist better compliance.

Given the fact that reasons for non-compliance vary, finding alternative ways to respond is very important. In each case, the mechanism aimed at ensuring better respect must be custom-tailored to the particular situation. We talk to armed groups about respect for IHL differently from the manner we address this issue with states. Differences in approach similarly apply when it comes to dialogue with states: some states are engaged in an asymmetric warfare where the enemy is not respecting IHL on purpose and some have less means at their disposal than others.

I would also like to mention the importance of non-legal measures in addressing compliance with IHL. Recent findings in the field of psychology and behavior studies may be used to develop new strategies both in the field of engaging with certain actors and making compliance more effective. Finding specific solutions to individual problems of warring

parties – a bit similar to counselling – might signify a breakthrough in cases where traditional approaches fail.

It is important to use social media. ISIS reaches its members or to-be members through social media, so this effective channel has to be used by humanitarians as well. Sometimes it is the only way to reach those who are in control of a certain territory and its population.

How religious leaders could be involved in the process should also be explored. Sometimes this is the only way to reach out to members of armed groups. If fighters are approached by people from the same cultural/religious background, they may be more open to discussion.

Thus, a multidisciplinary approach is necessary: we need to rely more on experts, such as psychologists, anthropologists, sociologists so that we can properly address questions related to the problem of non-respect. Although there are some initiatives on the table already, it could be useful to include in our conferences, regional discussions and negotiation processes representatives of other disciplines as well.

## **2. Potentials of existing legal frameworks and mechanisms**

There is a lot of potential in universal jurisdiction. However, it should be looked at from a wider perspective. This obligation exists since 1949 and is only sporadically applied. Within the system of international criminal justice, both international and domestic courts have a role to play. For decades, the international criminal justice system was the centre of attention, and these courts and tribunals were seen as a global salvation to our problems of bringing perpetrators to justice. It has become clear, however, that international courts and tribunals also have their constraints. They are not able to deal with a big number of cases, they are often the centre of political attention and there is now a fatigue in establishing new tribunals. The ICC faces similar problems, both in terms of political attention and workload. As we all know, the Court is only a last resort and will best reach its ultimate goal if it has few or no cases at all.

Hence, the dynamism seems to be that more attention should be paid to the role of domestic courts. Recognizing that exercising universal jurisdiction can also be politically sensitive sometimes and has many practical difficulties, we must realize that it is in the first place the responsibility of domestic courts to bring perpetrators to justice. This is enhanced by migration: in many states, the exercise of universal jurisdiction is limited to cases where the offender is present on the territory. Given that migration may just naturally result in situations where potential suspects are present on the territories, even in case certain states have not really exercised universal jurisdiction earlier, they may be confronted with

a situation where they simply must proceed. This puts more pressure on national authorities.

Some states are already quite active in proceeding based on universal jurisdiction. However, looking at the overall number of cases, there is still a long way to go. Discussions and practical arrangements are necessary to make prosecutors and judges ready for the task, including training, material support for the specific requirements of universal jurisdiction cases (where the crime may have been committed far away, a long time ago), cooperation and coordination among relevant domestic authorities, such as immigration office, police, prosecutors and judges. Here, governments, NGOs and international organizations may also have a role in raising attention to this problem, engaging in discussions, providing training opportunities, fostering international cooperation and dialogue.

National judicial bodies need to be better prepared for the exercise of universal jurisdiction. National courts might face the challenge of gathering evidence that reaches the required standard according to criminal procedure laws in force. In this respect, it is essential to consider ways of cooperation between states, or within international organizations. A good example was the adoption of General Assembly resolution 71/248 on 21 December 2016, establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. Another instrument that could facilitate cooperation between states is the Mutual Legal Assistance Initiative, which aims to start discussions on a future multilateral treaty on mutual legal assistance and extradition for domestic prosecution of the most serious international crimes.

Some initiatives within the UN system, directly or indirectly, also aim at ensuring better respect for IHL. However, the role the UN itself can play is constrained. First, the UN is a political body; second, there are many instances in the operation of the UN where it clearly cannot exercise its role (i.e. use of veto). There are many initiatives that aim at eliminating these constraints, such as the Accountability, Coherence and Transparency Initiative, which requires states not to use their veto in the case of serious UN resolutions aimed at preventing crimes against humanity, genocide or war crimes being committed. In respect of the UN, the Responsibility to Protect concept also has to be mentioned, especially its prevention pillar. The 9<sup>th</sup> Secretary-General report on Responsibility to Protect proposes a holistic approach to achieve better compliance.

The International Humanitarian Fact-Finding Commission (IHFFC) is an example of existing mechanisms whose potentials have not yet been explored. As it is known, the IHFFC has not received a mandate for

decades, partially due to constraints inbuilt in Article 90. However, the IHFFC received its first mandate this year.

According to Article 90, para. 2 lit. c subpara. ii of Additional Protocol I, the IHFFC is competent to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol”. On this basis, the IHFFC and the Organization for Security and Cooperation in Europe (OSCE) have entered into a Memorandum of Understanding (MOU) this year, bearing in mind the Memorandum of Understanding concluded between the Organization of American States and the IHFFC in 2012.

The MOU concluded with the OSCE, discussions about which had already started in 2016, and was signed on 18 May 2017 by the Secretary General of the OSCE, Lamberto Zannier, and the President of the IHFFC, Thilo Maruhn, in light of the incident of 23 April 2017 that occurred in Pryshyb (Luhansk Province) and caused the death of a paramedic and the injury of two monitors of its Special Monitoring Mission to Ukraine (SMM). The IHFFC and the OSCE agreed to set up an independent forensic investigation (IFI) into the incident.

The purpose of the independent forensic investigation was to establish the facts of the incident by conducting a post-blast scene forensic and technical assessment against the background of international humanitarian law. While the investigation was guided by the applicable rules of international humanitarian law, criminal responsibility and accountability for the explosion were outside its scope.

The IFI was led by Amb Alfredo Labbé (Chile), and team members included two additional IHFFC members. The IFI employed an operational manager and forensic, medical, blast experts. The investigation included on-site investigation, analyzing documents, hearing witnesses, examination of the affected car.

The report was submitted to the OSCE Secretary General on 27 August. Pursuant to the decision of the OSCE Secretary General, the report (a blackened version of the report to ensure data protection) was shared with all OSCE member states, and presented to the Permanent Council of the OSCE on 7 September by Alfredo Labbé, with an introduction by Thilo Maruhn.

The report was received very positively by member states, many stating that the report exceeded their expectations. An executive summary of the report is public and available on the OSCE and IHFFC websites. All evidence reached during the investigation was handed over to OSCE.

The report’s main conclusion is that the incident was caused by a mine that had most likely been recently laid on that road. According to the findings, the attack was not directed against the OSCE. The report also mentions that the laying of mines was a violation of IHL, because it was

laid on a road that was known to have been used by civilians as well. The report does not identify any state, party or individual that could be held responsible, but contains a lot of evidence.

It is important to emphasize that the investigation was conducted against the background of IHL, and not international criminal law. Therefore, it was not the IFI's aim to look into state responsibility or individual criminal responsibility, as this was also reflected in the OSCE-IHFFC agreement. The report facilitates the restoration of an attitude of respect for IHL by stressing the need to respect the principle of distinction.

This mission was a novelty for the IHFFC, not only since it was its first mandate, but also because its "good offices" have always been ignored by commentators. Taking into consideration that a formal inquiry as provided for in Article 90.2.c. (i) is less probable to happen, because the threshold formulated in Article 90 is very strict, offering the Commission's good offices might be the way ahead for the Commission to become operational, simply because giving a mandate to IHFFC based on good offices is a much easier trigger mechanism. Therefore, the aim of IHFFC is to conclude agreements with international organizations and regional organizations. This would be a welcome development, as it would add another layer to mechanisms aiming at better compliance with IHL. An additional important virtue of the IHFFC is that any future investigation can be tailor-made, designed specifically for the case, while still keeping the basic principles of the Commission. The mandate given by the OSCE was a perfect example for the flexible nature of any future IHFFC activity, and for the availability of the IHFFC based on "good offices".

## **Building respect for IHL: a role for the judiciary**

*Bakhtiyar TUZMUKHAMEDOV*

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Firstly, allow me to thank the Institute, its most able staff, and its indefatigable leader and longtime friend, Fausto Pocar, for a new invitation to appear in front of this august gathering of academics with practical skills, and practitioners with strong academic credentials.

Secondly, I would like to seize the opportunity offered yesterday by Professor Sivakumaran who, in his exchange with members of the audience, referred to a role that domestic courts may play in promoting respect for International Humanitarian Law (IHL).

Courts in various jurisdictions are not alien to notions of international humanitarian law. Depending on facts and circumstances of cases brought before them, they refer to, comment on, or expound legal obligations under IHL in general, or its specific provisions and sources, in particular. Courts have looked into situations arising from armed conflicts, both international and non-international, as well as from peace operations.

To cite but a few notable examples, there is the case of the *Public Committee against Torture in Israel v. The Government of Israel*, also known as *Targeted Killings case*, where the Supreme Court of Israel discussed at length the applicability of IHL to what it described as “the armed conflict between Israel and the terrorist organizations”. The Court further stated that “confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character”<sup>1</sup>. However, while making several references to Article 3 common to the Geneva Conventions, the Court reckoned that a classification of the conflict as international or non-international was immaterial for the case at hand. Moreover, the Court apparently shared the Respondent’s view that the conflict could belong “to a new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations”.<sup>2</sup>

In *Hamdan v. Rumsfeld* the US Supreme Court decided by majority that what transpired between the United States and al Qaeda amounted to an armed conflict. And, since it was not a conflict between two nations, and

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<sup>1</sup> H CJ 769/02, December 11 2005, para. 21.

<sup>2</sup> Id., para. 11.

hence not international, the Common Article 3 applied. To quote the majority, that “kind of conflict does not involve a clash between nations”<sup>3</sup>.

In *Regina v. Brocklebank* the Court Martial Appeal Court of Canada ruled that the Geneva Conventions, the Fourth Convention in particular, did not apply to a situation in which Canadian Forces deployed to Somalia as part of UNITAF (which was a non-UN international mission). The reason was that “the mission of the Canadian Forces in Somalia was a peacekeeping mission. There is no evidence that there was a declared war or an armed conflict in Somalia, let alone that Canadian Forces were engaged in any conflict”<sup>4</sup>.

By contrast in *Regina v. Ministry of Defence Ex Parte Walker* the British Law Lords accepted the argument of the Government that the UN peacekeeping operation in Bosnia was conducted in a “warlike situation”<sup>5</sup>. The case at bar did not require the Law Lords to analyze the applicability of IHL, but their reasoning may lead to a conclusion that it should have applied.

Allow me to digress here as I have a certain bond to that case. Sergeant Trevor Walker of 21<sup>st</sup> Engineer Regiment had arrived in Bosnia on or around May 1, 1995 to be assigned to the British Cavalry Battalion of the United Nations Protection Force. At the material time, I was a Civil Affairs Officer with UNPROFOR concurrently acting as a civilian political advisor to the British Cavalry Battalion, or, if you will, a red commissar with the British Horseguards. Walker did not serve as part of the Battalion for even a couple of days when the base was shelled and he received severe injuries to his leg. It was literally mended together at the Battalion Medical Unit, but several months and thirteen surgeries later he lost his limb. He applied for compensation, sued the Ministry of Defence when his application was denied, and ultimately lost his case before the Law Lords. Had Walker received his injuries while serving in Northern Ireland where the British Army deployed in support of the Royal Ulster Constabulary, he would have had a better chance of receiving the compensation. Alas, he was in a “warlike situation”. Ironically, several years later a Royal Air Force typist received a five-digit compensation for straining her thumb and suffering from depression resulting from that work-related injury.

Let me get back to discussion of cases. Another one that I wanted to mention is the *Expanded ISAF Mandate* case that was decided in 2007 by the German Federal Constitutional Court. The case dealt with the distribution of constitutional authority between the executive and legislative branches in decisions on foreign deployments of Bundeswehr. Here the Federal Constitutional Court seemed to have accepted the IHL

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<sup>3</sup> Hamdan v. Rumsfeld, decided June 29, 2006, para. 4 (d – ii).

<sup>4</sup> Regina v. Brocklebank, rendered April 2, 1996, para. 62.

<sup>5</sup> Regina v. MoD (Respondent) Ex Parte Walker (Appellant), 6 April 2000.

applicability to international coalition operations in Afghanistan<sup>6</sup>. A more recent case regards foreign deployment into an armed conflict environment to evacuate German nationals, entirely focused on that distribution of authority, and did not discuss IHL<sup>7</sup>.

There were, of course, other cases. Professor Sivakumaran mentioned Swedish jurisprudence. There were cases in Belgium and France and other jurisdictions.

The Russian experience bears both similarities to and differences from those cases.

The Russian Constitutional Court, and to a lesser extent other branches of the Russian Government, used the language borrowed from IHL with respect to a non-international armed conflict not in foreign lands, but on domestic soil. But it was the high judicial authority that considered applicability of IHL with special reference to Additional Protocol II, to that conflict.

In 1995 the Constitutional Court of the Russian Federation was petitioned by legislators of both Chambers of the Federal Assembly who challenged the constitutionality of several acts passed by the President and the Government aimed at quelling the insurgency in Chechnya. In its review of Presidential decrees that authorized the use of military force in Chechnya the Constitutional Court, while never directly referring to hostilities there as a ‘non-international armed conflict’, none-the-less cited Additional Protocol II to Geneva Conventions as a source of law that should have been applied by parties to the conflict. The Court did not analyze the Protocol, nor did it consider it as applicable law in the judicial review of decrees simply because in was neither required, nor authorized to do so under the Constitution. However, the Court explicitly stated that lack of appropriate consideration of the Protocol in the domestic legislation had been one of the grounds for “non-compliance with rules of the aforesaid Additional Protocol”. The Constitutional Court further instructed the legislator to take into consideration provisions of the Protocol while amending legislation applicable to “extraordinary situations and conflicts”.

Sufficient time has elapsed to now reveal that judges were advised to engage in, and may indeed have considered a more detailed analysis of Additional Protocol II and IHL in general. However, I am not in a position to discuss or to even be aware of the course of their *in camera* debates, though heated they were judging by a number of separate opinions. The outcome was a rather abridged *obiter dictum* that appeared in the judgment.

And yet, the Court stated that although it was not authorized to review the acts and consequences of the use of force in light of Additional Protocol

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<sup>6</sup> BVerfG, Judgment of the Second Senate of 03 July 2007 - 2 BvE 2/07.

<sup>7</sup> BVerfG, Judgment of the Second Senate of 23 September 2015 - 2 BvE 6/11.

II, such review should be the duty of other branches, whether courts of general jurisdiction or supervisory bodies. Furthermore, it indicated that under the International Covenant on Civil and Political Rights persons who sustained damages due to such use of force were entitled to remedies. As a reminder: at the material time Russia was not yet party to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Other branches of the Russian Government acknowledged that prolonged and intensive armed violence in the Russian North Caucasus could be characterized as a “non-international armed conflict”. They also acknowledged that armed conflict was part of what was referred to as “counter-terrorist operation”. While stopping short of making specific references to Common Article 3 or Additional Protocol II, the legislature, and the then Prime Minister, Vladimir Putin, specifically named IHL as applicable law.

As to the legislative instruction, unlike the US Congress that in the aftermath of *Hamdan v. Rumsfeld* enacted the Military Commission Act, the Russian Parliament failed to specifically and precisely execute the Judgment of the Constitutional Court in so far as it concerned the need to amend the legislation. Of course, current laws and regulations relevant to the use of armed force by uniformed services both domestically and beyond national territory make general references to international treaties and principles of international law, but not to IHL specifically.

However, the Armed Forces under Charters promulgated by the Presidential Decree, and two manuals on Legal Administration and on Application of IHL, are bound to study, respect and apply International Humanitarian Law. Whether related to, and influenced by the Judgment of the Constitutional Court and the burden they carried from the armed conflict in the North Caucasus, they seem to be the only Government organization that literally responded to the Court’s instruction.

To conclude, let me reiterate that, as this brief and cursory review of jurisprudence may demonstrate, courts in various jurisdictions are not alien to international humanitarian law and its particular sources and norms. Sometimes, what the courts say may be inconclusive or even misleading. And yet the least they prove is that *inter arma non silent leges* – please correct my Latin if I erred. But they go beyond that and set certain standards and guidelines to be followed by governments while resorting to armed violence, as well as indicate remedies for those affected.

# **Difficulties and opportunities to increase respect for IHL: specificities of the Additional Protocols**

*Jonathan CUÉNOUD*

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## **1. Key achievements**

Let me begin by highlighting some key achievements of the Additional Protocols (APs).

First success: the wide participation in the negotiations. One of the biggest successes of the APs is indeed that participation in their negotiation was universal. All States Parties to the GCs or Members of the UN were invited to attend the Diplomatic Conference. Among other reasons, this may explain why the APs took four years, and the GCs only four months, to negotiate. Tellingly, although the authentic texts of the GCs are in English and French, the APs are authentic in English, Arabic, Chinese, Spanish, French and Russian. This allowed new States to gain a greater ownership of IHL which was an important goal in itself, to create a new sense of ownership.

Second success: the APs are a catalyzer of the development of international law. As Ambassador Peter Maurer has said in the video projected on Thursday, the APs inspired the elaboration of multiple weapons treaties. We can think here of the 1980 Convention on certain conventional weapons but also the Ottawa Convention on antipersonnel mines, the Oslo Convention on cluster munitions and more recently the Treaty on the prohibition of nuclear weapons.

Third success: the contribution of the APs to the fight against impunity. As we have seen during this Round Table, API expanded the list of grave breaches of IHL in IAC and APII blazed a trail for international criminal law in the realm of NIAC.

## **2. Continued relevance**

The main criticisms we hear today with regard to IHL are mainly the following ones:

1. The law is not adequate to the nature of armed conflicts.
2. The law is not applicable in the context of fighting terrorism.
3. The law imposes unfair symmetric obligations on parties involved in NIAC.

These criticisms are absolutely not new. In fact, these challenges were precisely issues that the APs sought to address.

States have again very recently confirmed the adequacy of existing rules of IHL. Let me quote Resolution 2 of the 32<sup>nd</sup> IC RC/RC adopted in December 2015: “Stressing the importance and continued relevance of IHL for regulating the conduct of parties to armed conflicts, both international and non-international, and providing protection and assistance for the victims of armed conflicts”.

At the same time, we observe a trend to be pessimistic when discussing respect of IHL which is notably due to the ever-presence of IHL violations in the media. Some, including humanitarian organizations, have begun to speak of the “erosion of IHL”. This may represent a risk to its credibility, as it can discourage parties to conflicts to respect the law. This may actually contribute to the misconception that IHL does not serve its purpose and may, therefore, be counterproductive.

The ICRC has recently launched a conference cycle on generating respect for the law in order to change this narrative and to focus also on instances of respect. I also know how much this positivist approach is dear to Professor Sassòli.

At the risk of being repetitive: the main challenge is, therefore, not the relevance of the existing rules but strengthening respect for them.

### **3. Current initiatives**

Let me now say a few words on two initiatives Switzerland is co-facilitating together with the ICRC with a view to generating political will to strengthen respect for IHL.

The first is the Montreux Document on Private Military and Security Companies (PMSCs) which is the result of an intergovernmental process launched in 2006 by CH and the ICRC. The Montreux Document Forum (MDF) was established in December 2014 to push further the implementation of the obligations contained in the Montreux Document. The MDF is a positive example of a forum where States are able to share challenges they face, as well as good practices, on the implementation of their obligations relating to the activities of PMSCs. Its 3<sup>rd</sup> Plenary Meeting was held in late April.

The second is the intergovernmental process on strengthening respect for IHL, which is being jointly facilitated by Switzerland and the ICRC. In the first consultative phase, which took place from 2011 to 2015, it became clear that the GCs and their APs were an exception in the galaxy of multilateral treaties: so far, States parties do not gather at regular intervals to exchange experiences and views on their implementation. In the current

phase, based on a mandate of the International Conference of the Red Cross and Red Crescent of December 2015, States are revisiting the idea of a potential forum of States, and how the International Conference of the Red Cross and Red Crescent and regional forums could also be better utilized to enhance implementation of IHL. These avenues are to be considered as complementary. I seize the opportunity to invite States to take an active part in this inter-governmental process, to share their views, and to invest the necessary political will to achieve a common understanding on what would be an effective way forward. The result of these discussions will be submitted to the next International Conference of the Red Cross and Red Crescent in 2019.

#### **4. Ratification record**

Let me now turn to the ratification record of the APs. Let me firstly say that the ratification record of the APs is also one of the key achievements of the APs. The APs are indeed among the most widely ratified international instruments.

What is the exact state of ratification of the APs 40 years after their adoption?

174 States are Parties to API and 168 to APII meaning that 22 States are not Parties to API and 28 are not Parties to APII. Approximately 15 percent of States parties to the GCs (196) are not yet Parties to the APs.

We often focus on the same States when we speak of the ratification record of the APs, but it is interesting to have a more precise look at the facts and figures. Let's have a look region by region:

Western European and Others Group (WEOG): very satisfactory on the whole, though four absentees, namely Andorra, Israel, Turkey, United States of America.

Africa: Very few absentees (Angola (AP II), Eritrea, Somalia).

Eastern European Group: very satisfactory, only one absentee (Azerbaijan).

Latin American and Caribbean Group (GRULAC): Only Mexico has not ratified AP II.

Asia-Pacific Group: this is the region with the highest number of non-participating countries (four States have ratified API but not AP II (Iraq, DPRK, Syria and Vietnam); 15 have ratified neither API nor AP II: Bhutan, India, Indonesia, Iran, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Pakistan, Papua New Guinea, Singapore, Sri Lanka, Thailand, Tuvalu.

To be complete, I should add that: Iran, Pakistan and the US have signed the APs.

Therefore, despite the universal participation of States during the negotiations of the APs, they are not yet universally ratified.

The principal concerns of most States not ratifying AP I were:

- Firstly: The inclusion of wars of national liberation in the definition of international armed conflict under Art. 1(4) (which applied AP I and all provisions of the four GCs to conflicts in which peoples were fighting against colonial domination, alien occupation and racist regimes),
  - Despite the case of Polisario with regard to Western Sahara in 2015, I would say that it is no longer a concern today.
- Secondly: The possibility that AP I would apply to cases of terrorism linked to the definition of armed forces of a Party to the conflict under Art. 43 and of combatant under Art. 44.
  - Some doubts may still exist today for some with regard to Articles 43-44 of API, with respect to the definition of armed forces of a Party to the conflict and to the definition of combatant.
- Thirdly: The provisions on means and methods of warfare that would limit the use of certain weapons, including, it was believed, nuclear weapons.

For AP II, the fear of some was that extending the essential rules of IHL to NIACs might affect State sovereignty and prevent governments from effectively maintaining law and order within their borders.

Despite these concerns, most of the States in the world finally joined API and II, including States that had at first voiced reservations regarding their content (and indeed joined in the end, subject to a number of reservations and important interpretive declarations).

## **5. Switzerland's efforts for further ratification**

Switzerland believes that the fact that 40 years have now passed since the APs were adopted is in itself a good reason for States not yet parties to examine if the considerations raised at the time for not joining the APs are still relevant. The context has changed since 1977.

In most cases, we are confident that most of the reasons for not joining the APs at the time they were drafted will appear to no longer constitute an obstacle to joining them today.

We have, therefore, seized the occasion of the 40<sup>th</sup> anniversary of the two APs to ask States not yet parties to reconsider joining them. At the beginning of June this year we established bilateral contacts with States not yet parties to API and/or II to encourage them to accede.

Some States are considering acceding to the APs (Andorra, Angola (for APII), Kiribati, Tuvalu, and Mexico (for APII). Others mentioned that it is not a priority and invoked a lack of resources.

As we have seen during this 3-day Roundtable, there is wide agreement that the rules of the APs give expression to international customary law.

One may, therefore, ask why accede to the APs given that through the development of customary law and the development of the practice of the International Tribunals, the decision not to join APs has now limited practical effect?

Two main reasons:

- The first is that each additional accession will send a much needed signal in favor of IHL. It is a kind of a pledge for IHL.
- The second is what Professor Clapham pointed out on Thursday. The difference between applying the APs as a matter of policy or as a matter of law and the possible impact on criminalization at the national level and through references to war crimes in other treaties such as the Arms Trade Treaty (ATT).

Therefore, all States not parties to the APs may examine whether the reasons for not ratifying the APs still exist. And if yes, they should answer the two following questions:

- Firstly: Are there ways to address lingering concerns?
- Secondly: Do the challenges outweigh the advantages of joining the APs?

What concrete means and ways may lead to further accession? The role of the National IHL Commissions is of paramount importance in these efforts. 9 States not yet parties to the APs have such a Commission. One State explicitly told us to be ready to consider joining the APs if the IHL Commission formulates a recommendation in this direction.

States may consider seizing all available opportunities to promote the ratification/accession such as bilateral diplomatic dialogue. We are considering making use of the *Universal Periodic Review* to encourage further accession.

And last but not least, States parties to the APs may also seize the opportunity of the 40th anniversary to:

- Firstly: if they have not already done so, they may consider recognizing the competence of the International Humanitarian Fact-Finding Commission (IHFFC) (art. 90 of API). This may also be done at the time of ratification or of accession to API. Reminder: Out of 174 States parties to API, 76 have done so.

- Secondly: they may consider withdrawing the reservations they may have issued at the time of ratification or accession. I am very much aware that reservations do not have solely unfortunate aspects but may also foster universal participation in a treaty.

# **Challenges and opportunities to increase respect for IHL: specificities of the Additional Protocols**

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## **1. Introduction**

In order to answer the question of what specific challenges and opportunities regarding the implementation and enforcement of international humanitarian law (IHL) arise from the two Protocols Additional to the 1949 Geneva Conventions of 1977, I will mention the difficulties regarding the monitoring of the respect of the rules on the conduct of hostilities codified therein, certain characteristics of Additional Protocol II (AP II), and the implementation mechanisms created by the Additional Protocols.

As a preliminary point, I would like to stress that the adoption of the two Additional Protocols in 1977 has been a remarkable advance for IHL, at the very least because of the great detail some of their provisions have provided compared with the pre-existing law. This, I believe, is also a welcome contribution to increase their respect. In fact, more precise rules are easier to implement and to enforce in practice and give rise to less controversies, especially given that IHL is not a body of law designed to be interpreted only by courts, but rather to be applied on the battlefield by soldiers.

## **2. Difficulties in assessing compliance with the rules on the conduct of hostilities**

One of the greatest progresses, if not the greatest progress, brought about by the Additional Protocols has been the codification of the rules on the protection of the civilian population against the effects of hostilities. This is all the more remarkable as it occurred following the horrors of the Second World War, after which one could have doubted whether any customary rules protecting the civilian population from aerial bombardments existed.

However, external bodies, such as the ICRC or fact-finding commissions, but also public opinion and the media, face particular difficulties in assessing whether those rules on the conduct of hostilities, and namely the principles of distinction, proportionality, and precautions,

have been violated. Although the Additional Protocols have overcome the traditional distinction between Geneva Law (protecting war victims, mainly in the power of the enemy) and Hague Law (regulating the employment of means and methods of warfare), it remains considerably easier to determine violations of Geneva Law (e.g. whether a detainee has been mistreated or tortured), than of Hague Law, to which the rules on the conduct of hostilities belong. For instance, in order to establish whether the destruction of a school and the killing of children during an aerial bombardment amounts to a violation of IHL, it is necessary to know who else was in the building at the time of the attack, whether the building was a military objective, as well as the plans of the attacker and of the defender.

When it comes to precautionary measures, one might think that the mere occurrence of civilian casualties necessarily implies that the precautions taken were insufficient. However, this is incorrect, because to assess whether the principle of precautions was respected, one should know which precautionary measures were taken, which other precautionary measures were feasible but were not taken, and why the measures taken have failed. Additionally, one should always keep in mind that, while facts are established *ex post*, the lawfulness of an attack depends not on the results, but rather on an *ex ante* evaluation by the party conducting the attack.

The already difficult process of conducting an inquiry into whether IHL rules on the conduct of hostilities were violated is further complicated by the fact that the attacker's plans are often considered military secrets. While it is natural that the belligerents do not wish to disclose their military strategy because the enemy could take advantage of this information, more transparency would be needed with respect to military plans, especially those regarding operations that have been concluded for a long time. Indeed, as we have seen, disclosing this information is fundamental for *ex post facto* monitoring purposes by external organs. Additionally, this is crucial information for the public opinion, which is often led to believe that, if an incident in which civilian casualties have occurred cannot be otherwise explained, a violation of IHL has occurred, while this is not necessarily the case. Without transparency, we can at best rely on the conclusions of internal investigations conducted by the military on certain incidents. However, their results will convince neither sceptics nor the adversary, thus undermining the credibility of IHL and the willingness to respect it. Few are those who are willing to respect IHL even if they think that no one else respects IHL.

### 3. Achievements and challenges specific to Additional Protocol II

The adoption of AP II providing much more detailed rules applicable to non-international armed conflicts (NIACs) than Article 3 common to the Geneva Conventions which was previously the only IHL rule applicable in NIACs in itself represented a great advance for IHL. Unfortunately, sovereignty concerns prevented states from formulating the provisions of AP II so that it is clear that they address both states and armed non-state actors directly. The formulation of its prohibitions in the passive tense inevitably diminishes the sense of ownership by the armed groups Protocol II is equally addressed to.

Article 1 AP II defines the scope of application of AP II and provides for a high threshold to be met for the Protocol to apply.<sup>1</sup> Most scholars find it regrettable that the application of AP II is thus restricted to a smaller number of NIACs.<sup>2</sup> However, I believe that this is a reasonable and necessary requirement. In fact, it would be unrealistic for organized armed groups to comply, not simply with the basic rules of Common Article 3 (CA3), but also with some of the more detailed rules of the Protocol, without having control over territory as required by Article 1 AP II.

Moreover, while the fact that the rules of AP II are less numerous and detailed than those of Additional Protocol I (AP I) can be explained by the sovereignty concerns that animated the negotiation of the two Protocols, I believe that this is also a natural and welcome characteristic of AP II. As a matter of fact, it would be impossible for non-state actors to comply with some of the rules of AP I, and one should always remember that unrealistic rules do not protect anyone.

To a certain extent, one could say that AP II is even more realistic than CA3, having regards to the obligations of armed groups parties to a conflict. This is the case for judicial guarantees. According to CA3, “the passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court*, affording all the

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<sup>1</sup> Article 1(1) AP II reads: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

<sup>2</sup> See e.g. N. Quéniwet, ‘Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Conflict’, in D. Jinks, J.N. Maogoto, S. Solomon (Eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies. International and Domestic Aspects* (Asser Press, 2014), 31-60, at 35.

judicial guarantees which are recognized as indispensable by civilized peoples” (emphasis added).<sup>3</sup> However, given that for a court to be regularly constituted it must be based on the law and that laws are traditionally a state prerogative, it may be very difficult for armed groups to comply with this provision. On the contrary, Article 6(2) AP II provides that “No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by *a court offering the essential guarantees of independence and impartiality*” (emphasis added). Complying with the requirement of having a court that is independent and impartial is far more realistic for an armed group. In fact, for a state court to be independent, it needs to be independent from the executive and legislative branches of that state, not from the state itself. Similarly, for a court established by an armed group, the court simply needs to be independent from the executive, military branch of that armed group, while it may and must have a link with that party to the conflict: otherwise its decisions will not be complied with.

Another important feature of AP II, which unfortunately is the only implementation measure included therein, is Article 19, which provides that the Protocol must be disseminated as widely as possible. Training of fighters is absolutely essential to ensure respect for IHL, as an important part of training and dissemination of IHL is making those engaged in an armed conflict understand that it is possible for them to achieve their military aims while respecting the rules. However, IHL training of armed groups is rendered more difficult by the fact that all armed groups are considered as terrorist groups by the governments against which they fight and many have even been so classified by the international community. As a consequence, supporting “terrorists”, including by training them, is criminalized in some jurisdictions.<sup>4</sup> In my view, the criminalization of IHL training of armed groups is at odds with IHL, provided of course that one should check whether the so-called IHL training is not just disguised support to the armed group, and that a humanitarian impartial body is really just trying to ensure the respect for IHL.

A problem intrinsic to the law of NIAC is the absence of rewards or incentives for the respect of IHL. In fact, the absence of combatant status and immunity in NIAC implies that members of an armed group can, and probably will, be prosecuted for the sole reason of having participated in hostilities against the state, even if they complied with IHL at all times. In domestic law, killing soldiers or civilians are both murder. However, AP II tries to alleviate this problem, as Article 6(5) AP II encourages “authorities

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<sup>3</sup> Article 3(1)(c) Common to the 1949 Geneva Conventions.

<sup>4</sup> See e.g. Section 2339B, title 18 of the United States Code (USC), 2339B (a)(1), Antiterrorism and Effective Death Penalty Act of 1996, and the US Supreme Court in *Holder v Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, 2720 and 2725.

in power (...) to grant the broadest possible amnesty to persons who have participated in the armed conflict (...).” Two remarks are necessary with respect to this provision. First, at the end of a conflict, the phrase “authorities in power” might also refer to the rebels, if the armed opposition group has succeeded in topping the former government against which they fought. Second, the amnesty would, of course, not cover serious violations of IHL, but simply the mere participation in hostilities (which constitutes a crime for armed non-state actors in all domestic legislations).

#### 4. Implementation mechanisms under the Additional Protocols

Unfortunately, as already mentioned, the only implementation mechanism in NIACs under AP II is dissemination. Even the right of initiative of the ICRC in NIACs is only mentioned in CA3, which remains applicable in all NIACs, but is not repeated in AP II. I do not think that the Additional Protocols have strengthened the ICRC, which in any case maintains its prerogatives under the 1949 Geneva Conventions, including the right to visit prisoners of war and protected civilians in international armed conflicts (IACs) and the right of initiative in both IACs and NIACs.<sup>5</sup> As we know, a treaty body or even a regular meeting of High Contracting Parties, were not foreseen in the Additional Protocols and are still opposed by states today.

With respect to IACs, Article 5 AP I has enhanced the mechanism for the appointment of Protecting Powers, a system which allows a third state to act as an intermediary representing one of the belligerent states *vis-à-vis* the adversary in order to cooperate in the implementation of IHL and to monitor compliance. The adoption of more detailed rules regarding the appointment of Protecting Powers, however, has not resulted in an increase in the use of this mechanism, nor even stopped its decline, as proved by the fact that between 1949 (when the Geneva Conventions were adopted) and 1977 (year of the adoption of the Additional Protocols) Protecting Powers were appointed only in four occasions, and since 1977 only one such appointment has been made<sup>6</sup> - while most belligerents were represented by protecting powers during World War II.

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<sup>5</sup> Article 126 of Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949); Articles 76(6) and 143 of Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949); Common Articles 3 and 9 and 10, respectively, of the 1949 Geneva Conventions.

<sup>6</sup> Switzerland and Brazil were appointed as Protecting Powers in the Falklands/Malvinas conflict between Argentina and the United Kingdom in 1982 (but technically not under the scheme of IHL but under that of the Vienna Convention on Diplomatic Relations). For the other cases in which this mechanism was used see ICRC, *Commentary of 2016*, Article 8 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed

It is also important to acknowledge that AP I has contributed to the spectacular development of International Criminal Law, thanks to the progress made in the regulation of grave breaches, which now also include battlefield crimes.<sup>7</sup>

With respect to the implementation of IHL, however, the greatest novelty contained in AP I is the creation of the International Humanitarian Fact-Finding Commission (IHFFC or the Commission). As already mentioned, serious fact-finding by an impartial, independent and trustworthy body is essential for ensuring better respect for IHL and to strengthen its credibility when this is jeopardized by the wrong perception that it is continuously violated (which weakens IHL and leads to further violations).

Moreover, while lawyers may find questions regarding the interpretation of certain concepts or provisions of IHL fascinating, the real challenge relating to the implementation of IHL on the ground in today's conflicts is not how a certain provision is interpreted, but whether it is applied at all. Precisely facts, not legal theories, are often the object of dispute, and thus need to be established. For instance, the parties to the conflict in Syria do not have divergent interpretations of the prohibition to use chemical weapons, but disagreement exists as to whether chemical weapons have in fact been used and by whom.<sup>8</sup>

Under Article 90 AP I, the IHFFC has no routine monitoring powers but can only start an enquiry into allegations of serious IHL violations in an IAC between states which have accepted its jurisdiction *ex ante* or *ad hoc*. Although a declaration accepting the Commission's jurisdiction *ex ante* has so far been made by 76 states,<sup>9</sup> the IHFFC has never been triggered under its treaty mandate, for a number of reasons.

First, it must be triggered through the consent of both belligerents, which is incredibly difficult to secure during an armed conflict. Today, however, there arguably exists an IAC between two states that have accepted the jurisdiction of the IHFFC *ex ante*: Russia and Ukraine. The Commission could potentially be asked by Ukraine (Russia denies the existence of an IAC) to establish the facts relating to this conflict, including whether it is in fact an IAC by virtue of the alleged overall control

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Forces in the Field (Geneva, 12 August 1949), at para. 1115. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1BA7CE908060F31EC1257F7D0035D639>.

<sup>7</sup> See Part V, Section II (Repression of breaches of the Conventions and of this Protocol) of AP I (Articles 85 ff.).

<sup>8</sup> See e.g. *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic, April 2017*, S/1510/2010, 29 June 2017. Available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1510-2017\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1510-2017_e_.pdf).

<sup>9</sup> According to the IHFFC website, [www.ihffc.org/index.asp?Language=EN&page=home](http://www.ihffc.org/index.asp?Language=EN&page=home).

exercised by the Russian Federation over the Ukrainian insurgent forces. Nevertheless, not even Ukraine has seized the IHFFC, perhaps because it would inevitably equally enquire into Ukrainian conduct.

Second, it has no mandate in NIACs. The IHFFC has indicated its willingness to work in NIACs, but again, this would only be possible if the consent of both parties were obtained.

Third, unlike in the case of *ad hoc* enquiries set up by the United Nations, the IHFFC is not linked to any international body that could follow up on its findings and recommendations. Finally, states, in my view, simply dislike automatism, preferring *ad hoc* mechanisms over which they have a greater degree of control.

Outside its treaty mandate, the Commission has, however, recently concluded its first enquiry. The IHFFC was asked by the Organization for Security and Co-operation in Europe (OSCE) to look into an incident that occurred in Ukraine in April 2017, in which one paramedic died and two members of the OSCE Special Monitoring Mission to Ukraine were injured. Such a request by the OSCE would certainly not have been possible if all parties had not consented to this mandate. Although the final report is confidential, a redacted summary of it has been made available to the public online.<sup>10</sup> The summary of the report shows that the Commission has not limited itself to establishing that OSCE Mission members were not the intended targets of the attack object of its investigation, but it has also noted that, since the road on which the anti-tank mine that caused the incident was positioned was frequently used by civilian traffic, the placing of the mine in that location constituted a violation of IHL because of its predictable indiscriminate effects.<sup>11</sup> For this, the Commission is to be praised.

Under Article 90 AP I, the reports of the IHFFC are confidential (unless the parties to the conflict request otherwise), which, in my view, is no longer realistic, considering the interest of the public opinion in knowing whether allegations regarding serious IHL violations are true or not and the importance of establishing such facts for the credibility of IHL, mentioned above. Therefore, I welcome the fact that the IHFFC and the OSCE have managed to overcome this shortcoming at least partially by making the summary of the report regarding the OSCE Mission to Ukraine public.

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<sup>10</sup> *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*. Available at: [www.osce.org/home/338361?download=true](http://www.osce.org/home/338361?download=true).

<sup>11</sup> *Ibid.*

## **Conclusion**

In conclusion, contrary to their substantive rules, the implementation mechanisms of the Additional Protocols did not constitute a break-through, but they offer some opportunities, while the nature of the substantive rules also implies some particular challenges for implementation and monitoring by outside bodies.

## **Concluding session**



## Introduction to the closing remarks

*Helen DURHAM*

Director of International Law and Policy,  
International Committee of the Red Cross, Geneva

On behalf of the International Committee of the Red Cross I am delighted today to introduce the Vice-President of the ICRC, Madame Christine Beerli. It is a special introduction as it is the last time Madame Beerli will be attending these Round Tables in her current capacity as she steps down as the ICRC Vice-President early next year. With this in mind I would like to warmly thank our Vice-President for her extraordinary support over the years – both to the Department of Law and Policy and to the Sanremo International Institute of Humanitarian Law. She is a lady of great grace, intellect and a committed humanitarian with whom it has been an honor to work. Madame Beerli has definitely contributed substantially to the ‘spirit of Sanremo’ over her six years on the Council of this Institute and her ten years as Vice-President of the ICRC.

When it comes to this Round Table – as usual it is not my task to summarize the rich, engaged and interesting discussions held over the last few days. What I will say is that in examining the 40 years of the Additional Protocols we have clearly seen what the new challenges are and what remains the same. Much is ‘old’ about our debates – indeed the archives of the ICRC indicate that back in the mid-1970s issues relating to new technologies and acts of ‘terrorism’ were key factors for the push for new additions in the shape of Protocols to the normative framework. These issues are still topics we grapple with today. Our Round Table commenced with an examination of the new questions surrounding the scope of application (particularly, extra-territorial non-international armed conflicts fought by coalitions against non-state armed groups.) We moved on to reflecting upon issues found in Additional Protocol I relating to the conduct of hostilities. In particular, we discussed distinctions in different battle spaces (including cyber) and the interpretation of indiscriminate or disproportionate attacks. The complexities of implementing ‘all feasible precautions’ are highlighted in the current situations where civilians and their objects are intermingled with military objectives.

Other areas discussed in the last few days included: the important issue of fundamental guarantees for persons deprived of their freedom, with analysis of the customary nature of Article 75 dealing with fundamental guarantee, and the practical and military operational experiences in which detention activities have to take into account a State’s international humanitarian law (IHL) and human rights obligations. The specific work of

the ICRC with our ‘detention track’ was also noted, with the importance of moving forward to deal with a number of humanitarian dilemmas. Humanitarian access was also raised in detail and Madame Beerli will address some of the key issues raised (including rights and obligations, and gender diversity in negotiations) in her presentation.

The topic of gender was dealt with in an afternoon of important presentations and dialogue which included Professor Pocar’s introduction. It was noted that sexual and gender-based violence did not discriminate based on sex, to the extent that sadly women and men, girls and boys were victims. Discussion was held on the continual challenges encountered in the development of jurisprudence in this area, the range of practical work being done on gender issues within the military, and the importance of incorporating a gender perspective within IHL as well as in military operations.

My sincere thanks go to the organisers, the speakers/Chairs and to you, the audience. This is a unique opportunity that we are granted each year in this beautiful location to discuss critical issues relating to IHL and I look forward to seeing you all in 2018.

## Closing remarks

*Christine BEERLI*

Vice-President, International Committee of the Red Cross

As I am the last speaker, I would like to take the liberty of making some more personal remarks and give my own thoughts on some of the topics discussed here today.

I will start with an experience I had on May 26<sup>th</sup> of this year, when I had the opportunity to brief the Security Council, representing the ICRC. The briefing was on the situation in the Middle East, with regard to the implementation of Security Council Resolution 2286, the “Healthcare in Armed Conflicts Resolution”. I was there with a colleague from Human Rights Watch. Having the head of a non-governmental organisation also invited to brief the Security Council was a real first.

We both gave our briefings, describing the situation as bad and as difficult as it was. Then, I listened to the statements of all the Security Council Members and each of them agreed totally with what my colleague from Human Rights Watch and I had said. They all admitted that the situation was unacceptable, that things had to change and that they would do their best to prevent such things happening again. However, nothing changed and the situation went on. We can take the example of Yemen with the shelling of hospitals; or the mere 35 percent of health infrastructure working in Yemen; and the big cholera epidemic, the scale of which is a consequence of the health system not functioning at all. We can look too at the doubling of attacks on health care facilities in Afghanistan since last year, as happened the year before that. We can look at all the attacks on civilian infrastructure taking place in Syria and Iraq. Things are not getting any better.

Personally, I think we have a very well developed international humanitarian law system. It is strong and adapted to the situations with which we currently have to cope. Nevertheless, the law is not really respected and that is what we have to work on.

What we encounter when we are working in the field is that it is often difficult to bring medical devices or surgical instruments, for example, to assist people who have been wounded in conflict. And when the wounded people are fighters, it is even more difficult. The very idea that wounded soldiers who are, therefore, *hors de combat*, have to be looked after no matter what side they are on is still in many cases contested. As a matter of fact this is the basic principle promoted by Henri Dunant, one that he developed after witnessing the suffering of wounded soldiers at the Battle of Solferino. Yet if this principle is contested, I think we really have a lot to

do. We have to then go back to basics and make people understand the importance of this principle.

We had an interesting panel on the medical mission, which was very insightful. We also had a very interesting panel on access. To take a look at what we see in the field, we can take the example of the four towns in Syria: Fuaa, Kafraya, Madaya and Zabadani, where we work together with the Syrian Arab Red Crescent and others including the UN. People there were in a desperate situation: two of the towns were besieged by governmental forces, and two by the opposition forces. What we were allowed to bring in was the result of negotiation and we had severe constraints. For example, we had to bring exactly the same amount of relief items into both towns. This was so strictly imposed that when a truck broke down, we needed to take a truck out of the convoy going to the other town. Everything was very closely checked; calculated truck by truck. We stuck to the system because people were in dire need of our help, so in a certain sense we accepted unacceptable conditions.

I am a lawyer but not a specialist in international humanitarian law. I have really appreciated all the discussions I have heard here and I have learnt a lot. I really enjoy academic discussions; I think they are thrilling gymnastics for the brain. However, I think we also have to bring to light the reality and the conditions under which we have to work. I think we have to recognise that what we see every day, and what we will see more and more in the future, is that we have to tackle dilemmas. Nothing is just black and white. Nothing is just right or wrong under the law. It is always somewhere in between.

So, I ask myself: was it correct to accept the conditions imposed on us by the government and the non-state armed groups in Syria? Was it correct to accept to go and help people in these besieged cities under these conditions and constraints? I think the answer is yes, because going in we saw how horrible the reality was. We really did bring life-saving help. However, on the other hand, it was probably not totally in accordance with our principles. Can we accept that medical devices are unloaded from trucks in one location as a condition for granting access to other critical regions? Sometimes we have to do it because we want to bring help to people in the most desperate need.

We heard yesterday from Dr Ferraro that “access” means “access to bring assistance”, and “access to bring protection”. I would be the first to agree that this is extremely important. Protection is really at the core of our mandate. It is one of our strategic objectives and the ICRC has to work strongly on protection. But, sometimes, if we get involved in a situation where assistance is deeply needed, starting with protection dialogue might prevent us from bringing assistance. So, do we decide to wait a little bit

before starting the protection dialogue, in order to bring assistance first? And how long do we wait until we start this protection dialogue?

These dilemmas are our daily bread. I am not questioning the strength and the importance of the law. I would be the first to say that it is extremely important to have strong legal bases and that our mandate is as strong as it is because it is built on the law and a principled approach. I also think that it is extremely important to bring together academics, legal experts and field practitioners. Indeed, bringing together such groups of people reflects the richness and the very strength of the Sanremo Round Table.

This is not always easy because sometimes people from different disciplines and backgrounds do not speak the same language and sometimes they disagree. But, because it is not easy, it is important to do it. Sanremo is an ideal place and platform for such meetings, because here we remain friends, despite the arguments. It is important to exchange conflicting views, because only in this way can we make progress.

If I may make a wish as a departing member of the Council, it is that the Institute should continue being an open platform and invite very bright academics, perhaps more practitioners than we have had up to now, people from the field, military people and humanitarians – all of them people who know exactly how things work and where the dilemmas lie, and who will try together to tackle those dilemmas, translating law into a meaningful reality on the ground. Indeed, for the people who serve in the field, the most important thing is to find practical solutions.

## Closing words

*Fausto POCAR*

President, International Institute of Humanitarian Law

Before bringing the Round Table to a close I would like to say a few words about a great friend of the Institute who passed away while we were meeting here. I am referring to Frits Kalshoven. We received the sad news yesterday. He was a close friend of all of us and participated in I don't know how many of our round tables. His life was an example of a combination of practice, since he was a member of the Dutch marine for many years, and high profile academic performance. He, in fact, successfully combined these two activities and some of his writings are now classic reference works in the field of IHL, starting with his thesis on belligerent reprisals which continues to be quoted and referred to. I would add that he was the most recent laureate of the Institute to receive the Institute's Prize for the promotion, dissemination and teaching of international humanitarian law. The ceremony took place at the IIHL Round Table two years ago. I wish to add that he was proud to receive such an award from the Institute. While participating in events in the Netherlands he always introduced himself as a member of the Institute and receiving such a prize meant a great deal to him.

There is no need to spend too much time now on his work and his friendship but I would like to say that he was an example of commitment to IHL, an example that encourages us in our endeavours. I have sent a message of condolence to Mrs Kalshoven and the family on behalf of the Institute and I took the liberty of sending it also on behalf of the participants in this Round Table because he was a friend of so many of us.

Now let me come to the closing of this Round Table. I will not make comments on the proceedings – Helen has made some, Christine has made others. We had a rich discussion and I will not go into the substance. I will express my gratitude firstly to the ICRC, who co-organized this Round Table, as in the past together, with the IIHL. I think everybody can appreciate that the result of such cooperation has been constructive and I look forward to continued collaboration in view of future round tables and other activities of the Institute as is tradition.

Let me also thank all our highly qualified speakers who delivered good presentations and stimulated discussion on the floor. I would also like to thank you for your participation in such debates.

May I also thank the moderators for their valuable contribution in the conducting of debates. Moreover, I would like to thank the ACAD Institute of Sanremo for its assistance in the conference room. My gratitude also

goes to our interpreters who did a very good job as usual and assisted us in our deliberations here.

Let me finally express my gratitude to the coordinators of the Round Table for their collaboration.

And last but not least, may I say a big “thank you” to the staff of our Institute. These days are usually very tough ones for them. The Institute does not have a large number on its staff but when we have events like this I believe that those who don’t know the Institute will think there are more staff members involved but the contrary is true. I would like to thank them very much for their work.

I shall now close the Round Table by wishing you all a safe return to your activities and I look forward to meeting you all again next year.



## Acronyms

AMIS	African Union Mission in Sudan
ANA	Afghan National Army
ANP	Afghan National Police
ANSF	Afghan National Security Forces
AP I	Additional Protocol I to the 1949 Geneva Conventions
AP II	Additional Protocol II to the 1949 Geneva Conventions
CA 3	Common Article 3
CAI	Conflit armé international
CANI	Conflit armeé non international
CCW	Convention on Certain Conventional Weapons (1980)
CDDH	Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts
CDT	Conduct and Discipline Teams
CDU	Conduct and Discipline Unit
CIHL	Customary International Humanitarian Law
COPD	Comprehensive Operations Planning Directive
CPOE	Comprehensive Preparation of the Operational Environment
CRSV	Conflict-related sexual violence
CSO	Civil Society Organization

DIH	Droit international humanitaire
DOMP	Département des Opérations de Maintien de la Paix
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
ECHO	European Community Humanitarian Aid Office now known as European Civil Protection and Humanitarian Aid Operations
ESCOR	Economic and Social Council Official Records
GBV	Gender-based violence
GCs	Geneva Conventions
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
GENAD	Gender Advisor
GGE	Group of Governmental Experts
GRULAC	Latin American and Caribbean Group
HRL	Human Rights Law
IAC	International Armed Conflict
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defense Forces
IED	Improvised Explosive Device
IFI	Independent Forensic Investigation
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
IIHL	International Institute of Humanitarian Law
ISAF	International Security Assistance Force
ISR	Intelligence, Surveillance and Reconnaissance
LOAC	Law of Armed Conflict
LRV	Legal Representative of the Victims
MDF	Montreux Document Forum
MOAB	Mother of All Bombs
MOU	Memorandum of Understanding
NIAC	Non-International Armed Conflict
NSAGs	Non-State Armed Groups
OMP	Opérations de maintien de la paix
OPLAN	Operation Plan in Complete Format
OPORD	Operation Order
OSCE	Organization for Security and Cooperation in Europe

PGM	Precision-Guided Munition
PMSCs	Private Military and Security Companies
POW	Prisoner of war
RCA	République Centre Afrique
RCRC	Red Cross Red Crescent
SALA	Systèmes d'armes létaux autonomes
SDC	Swiss Agency for Development and Cooperation
SEA	Sexual Exploitation and Abuse
SIDA	Swedish Development and Cooperation
TPIY	Tribunal pénal international pour l'ex-Yougoslavie
UNAMSIL	United Nations Mission in Sierra Leone
UNITAF	Unified Task Force
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
USC	United States Code
VBIED	Véhicules kamikazes
WEOG	Western European and Others Group

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BRITISH RED CROSS

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DELLA COOPERAZIONE INTERNAZIONALE

QATAR RED CRESCENT

## The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives

This collection of contributions made by renowned international experts and practitioners in the field of IHL - recalling the 40<sup>th</sup> anniversary of the adoption of the Additional Protocols to the Geneva Conventions - addresses the central question of sexual and gender violence in armed conflicts and of the integration of a gender perspective into IHL.

The 40<sup>th</sup> Round Table on current issues of international humanitarian law (IHL), focussed on some very fundamental themes, such as the principles of distinction and precaution, the definition and the time frame of armed conflicts, as well as the threshold of the application of the Protocols.

The Round Table provided a forum to discuss other relevant topics including the treatment of persons deprived of their liberty, the protection of medical personnel and of medical activities, and the question of humanitarian access, as well as to explore whether and how the 40<sup>th</sup> anniversary of the Protocols could serve as an opportunity to shed some light on their enforcement.

The **International Institute of Humanitarian Law** is an independent, non-profit humanitarian organization founded in 1970. Its headquarters are situated in Villa Ormond, Sanremo (Italy). Its main objective is the promotion and dissemination of international humanitarian law, human rights, refugee law and migration law. Thanks to its longstanding experience and its internationally acknowledged academic standards, the International Institute of Humanitarian Law is considered to be a centre of excellence and has developed close co-operation with the most important international organizations.