

**PRECISE OF THE LAWS OF ARMED CONFLICTS**

**Second Edition**

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**INTRODUCTION**

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The *Precise of the Laws of Armed Conflicts* is a book that was published at the end of 2004 while working on the credit requirements of my doctoral program at *Pázmány Péter Katolikus Egyetem* under the directorship of my supervisor, Judge at the Hungarian Constitutional Court, Pr. (Hab.) Kovács Péter, Ph.D., then Head of the Department of International Law of the University.

As I presented a copy to Pr. Kovács, he proposed to me that I submit it *in lieu* of a dissertation as it represents countless hours of research, writing, condensing and clarifying in the aim of providing a practical, yet scholarly, instrument of meeting the commitment of the laws and customs of armed conflicts to spread the knowledge of international humanitarian law. It joined the requirements of contribution to science while contributing to a practical mean of application of the law for its understanding by those who need to apply it.

Therefore, this work is not presented in the usual pattern of “thesis-hypothesis-synthesis”. Instead, it aims at providing the practitioners of the laws of armed conflicts with a method and a source that encompasses applicable law and remains easily comprehensible for the reader: from soldier to general, from civilian employee of a Defence Ministry to Head of State, this book aims at providing not another treatise on obtuse points of law, but instead a clear and concise approach to applying the legal norms of the LOAC.

That is not to say that it does meet the requirements of contributing to science. The difference, from this book, is that it does so with a holistic approach: joining the juridical with the psychological and the historical with modern experiences on the ground. In this sense, this work provides for a fresh look at the applicability of the LOAC and further brings clarification on some particular points that have emerged recently, in particular the treatment of detainees, the confusion regarding the status of prisoners of war, the concept of anticipatory self-defence, the Canadian approach regarding the prevention and repression of war crimes as well as the questions regarding the legality of the use of torture and the respect of fundamental human rights.

Doing so, it contributes to legal science by attempting to bring a working and applicable knowledge of the law as it currently stand - not barring future development, but indeed encouraging them as long as they do not lower the bar of the protections already part of what I would term the *acquis* of the LOAC.

One criticism that may be made against this work is its adoption of a clear ideology whereby humanity as a value, and humanism as a philosophy, prevails. In some quarters of this work, where it concerns children-soldier, personal responsibility or where it addresses the question of torture, I use very frank language. This is due to my own experiences in the Balkans as a peacekeeper and to my core belief in humanity. This might be seen as a politicising of the law and an attempt to influence its interpretation. Well, so be it for so it is.

And I would not have written this book otherwise as there is no finality in stating the law if it is to destroy its hard-won *acquis* or to provide murderers, torturers and other lesser kinds of war criminals with yet another excuse not to be prosecuted and punished for actions contrary to the principles of humanity.

All it takes for evil to win is for good men to do nothing. I have written this book due to my experience on the ground, due to my belonging to the brotherhood of war and to my legal training. Even with my bad leg, I would again go tomorrow to prevent idleness because I refuse to do nothing and this book is one little thing forward to further help us help one another.





**PREAMBLE**

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The laws of armed conflicts are an impassioned field of study that gives rise to a sense of achievement, yet also to a cynicism that is sometimes well deserved. For while the human race seems in effect to have reduced suffering in times of conflict, by the same token the twentieth century has seen more horrors than any period since the recording of history.

Since time immemorial, human beings have desired to live in peace. Nonetheless, there seems to be a sleeping beast within that at times awakes and shocks the human conscience by its aggressiveness and barbarity. The usual appellation is the *Law of Armed Conflict* (LOAC); however, one can remark from the title of this book that the plural is used under the form *Laws of Armed Conflicts*. This is because while the LOAC are the mechanisms by which humankind has attempted to tame this beast and usually understood as a separate body of law, this book attempts to gather a larger view of this body of law and link it to both national purviews of its applicability and to international body of laws applicable to it which are applicable at all times, including in peace, such as protection of the environment and of fundamental human rights. For this reason, while the use of LOAC will refer to the generally understood body of law applicable to armed conflicts, it must also be understood as all the laws at large applicable to the situation of an armed conflict, whether international or non-international.

One must keep in mind that these laws do not aim at eradicating violence or war itself. They aim simply at avoiding the free and purposeless use of that violence. Some would have us believe that violence is never justified, independent of circumstances. This is an illusion; most believe that even if war is gradually taken out of the field of human endeavour, the use of violence, when justified, localized, and temporary, will still remain a way of resolving conflicts.

The study of the LOAC calls for knowledge of history, law, and the principles of combat. More importantly, it demands knowledge of exactly what war is and why it exists. War is not a simple instrument of politics or a simple tool of national policy, though it obviously serves this particular purpose. More than this, war or armed conflicts often represent the impact of conceptions of what society could and must be. Wars are a mean of acquiring wealth, but they can also assure the survival of nations in periods of conflict. Above all, war and armed conflicts are the results of hidden causes that if they were known would often be avoided. War may not be avoidable every time, but suffering incurred while waging it can be curbed. Of course, the reduction of suffering depends on the willingness of those involved in the operations.

Why humans risk their lives and wage war is still in large part a mystery. Some reasons are superbly explained in Robert L. O'Connell's book *The Ride of the Second Horseman* (New York, Oxford University Press, 1997). Reading this book is strongly recommended. It will help you to understand the roots of the will of persons to die for a cause.

This book examines different terms such as the *laws of war*, the *laws of armed conflicts*, and *international humanitarian law*. The expression "laws" is used here instead of the usual "Law of Armed Conflict", which is the official appellation of the LOAC as jurist have the sad tendency to compartmentalise their approach, whether they are legal or general. The 'Law' of Armed Conflict as it is usually understood only encompasses those treaties and customs which relate directly to the law applicable during an armed conflict.

This approach, as the concept of 'war' itself, is a left-over of the Second World War and the previous period that defined the approach to the modern applicable laws. It is too restrictive as it does not take into account

numerous treaties not of a pure application in armed conflicts, but indeed applicable either at all times or in a majority of situations, even those short of armed conflicts, or in different types of armed conflicts, such as international and non-international ones. For this reason, the expression used here refers to an enlarged body of inter-relating treaties and customs in international law that apply in armed conflicts and/or in periods of peace or even of so-called 'situations of exceptions (civil unrest, terrorism, troubles, internal disturbances and the like). The aim of this book is to be holistic in its teaching of the body of law that exist today to protect humans during these situations, to include their bases, psychological bases and their development.

The terms *laws of war*, the *laws of armed conflicts* concern the same issues, that is, the rules of law applicable in periods of conflicts between states or inside one state. The difference between the two terms is that the laws of war designate international conflicts while LOAC designates any conflicts, international or non-national. The first expression was used mostly up to the Second World War.

As for the LOAC, its modern shape was developed during the de-colonizing period of the 1960s and 1970s. This term is applicable to most conflicts we have seen since the beginning of the 1990s. The term *international humanitarian law* designates the rules of law that aim at protecting the victims of war. This body of rules is used especially with regards to situations such as peacekeeping and peacemaking, and particularly since the 1992 Somalia crisis, as prior to this the *Additional Protocols of 1977* have been applicable only in very few situations. Since then, however, a multitude of conflicts implicating parties to the *Conventions* and/or the *Protocols* have taken place, for which we can mention Chechnya, Croatia, Bosnia, Kosovo, East Timor (Timor Leste), Afghanistan and Iraq. The Canadian Forces refer to these rules as the LOAC.

Whatever the terminology, the applicable laws are those to which you are subjected to in an operation and they represent the best hope for the re-establishment of peace and the reduction of suffering during and after a crisis. Their study is fundamental. One day someone may thank you for applying them. More importantly, maybe will you one day thank somebody for having applied such laws towards you. The LOAC will not stop war and the suffering that results when a shot is fired in anger. But if they save one life, they have already moved us a step forward.

**LIST OF ABBREVIATIONS**

IAC	International Armed Conflict
NIAC	Non International Armed Conflict
GC 1949	1949 Geneva Conventions
GC I	First Geneva Convention of 1949
GC II	Second Geneva Convention of 1949
GC III	Third Geneva Convention of 1949
GC IV	Fourth Geneva Convention of 1949
AP 1	First Additional Protocol to the 1949 GC of 1977
AP 2	Second Additional Protocol to the 1949 GC of 1977
AP 3	Third Additional Protocol to the 1949 GC of 1977
SRM	San Remo Manual on the International Laws



## CHAPTER 1

### THE EVOLUTION OF THE LAWS OF ARMED CONFLICT

#### INTRODUCTION

The LOAC rest essentially on the historical evolution of human psychology and religious influences, as well as on the building of a code of honour within the military profession. The present Chapter aims at providing a basic knowledge of this evolution and at giving the basic notions of international law applicable to the LOAC. We will therefore examine the sources of the LOAC, their aims, their development, the nature of an armed conflict and finally the LOAC's juridical implications. To gain an insight into the spirit of the LOAC, read the following short extract from Victor Hugo's masterpiece on the French Revolutionary War of 1793, *Quatre-vingt-treize (Ninety Three)*, published in 1879. It presents clearly the moral rules and the code of honour transmitted through the LOAC:

"He [the priest Cimourdain, delegate to the Government's Public Salvation Committee of the French Republic] looked Gauvain [an extremely competent commander of the French Revolutionary Forces in French Vendée] in the eye and asked, "Why have you liberated these Catholic sisters at the Saint-Marc-le-Blanc convent?"

"I do not wage war against women," answered Gauvain.

"These women hate the people. As far as hatred goes, a woman is worth ten men. Why did you refuse to send this flock of old fanatical priests to the tribunal, in Louvigné?"

"I do not wage war against elders."

"An old priest is worse than a young soldier. Rebellion is more dangerous when taught by white hair. People have faith in wrinkles. No false pity, Gauvain. The regicides are the liberators. Keep your eye on the tower of the Temple."

"The tower of the Temple! I would leave that for the *Dauphin* [Louis XVI's son]. I do not fight children."

Cimourdain's eye became piercing. "Gauvain, know that one must fight a woman when she is named Marie-Antoinette, fight the elderly when he is Pope Pius VI, and fight children when they are called Louis Capet."

"My Master, I am not a politician but a soldier."

"Ensure that you do not become a dangerous man. Why, during the attack against the Cossé garrison, when the rebel Jean Trenton, surrounded and lost, sword in his hand, attacked alone against your whole army, did you command, 'Open orders! Let him pass!'"

"Because one does not fight another with 1500 others to kill him."

"Why, at the Cailleterie d'Astillé, when you saw that your soldiers were going to kill the Vendéen, Joseph Bézier, then wounded and crawling, did you order, 'I'll take care of him!' and fire your shot in the air?"

"Because a soldier does not kill a man on the ground."

"And you were wrong! Both men are today leaders of fiery bands of revolutionaries. Joseph Bézier is Moustache, and Jean Trenton is Jambes-d'Argent. By saving their lives, you gave two enemies to the Republic."

"Indeed, I wanted to make her friends, not enemies."

"Why, after your victory at Landéan, did you not shoot the three hundred peasants you had captured?"

"Because, Bonchamps having shown mercy to the Republican prisoners, I wanted it to be known that the Republic could be merciful to Royalist prisoners."

"Then, if you would capture Lantenac, you would be merciful to him?"

"No."

"Why not, since you were already so towards three hundred peasants?"

"Peasants are ignorant; Lantenac knows what he is doing."

"But he is a parent."

"France is my family."

"Lantenac is elderly."

"Lantenac is a traitor. Lantenac has no age. Lantenac calls for the English to invade. Lantenac is the enemy of our country. A duel between him and me can only end by his death or mine."

"Gauvain, remember these words."

"It is said." There was a silence as both eyed one another. Then Gauvain said, "It will be a bloody year, this year, '93 that we live."

CONTENT:

- a. the evolution of humanitarian law to the St. Petersburg Declaration of 1868;
- b. the sources of LOAC;
- c. the evolution of LOAC from the St. Petersburg Declaration to the Geneva Conventions of 1949; and
- d. what is an armed conflict and its juridical effects.

RECOMMENDED READINGS

- Best, G., “The Restraint of War in Historical Perspective” in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 3-26.
- Greenwood, C., “The Relationship between *jus ad bellum* and *jus in bello*”, (1983) 9 *Review of International Studies*, pp. 221-234.
- *Lieber’s Code – General Order No. 100*, Instructions for the Government of Armies of the United States in the Field, Washington (DC), War Department, April 24, 1863.

**A. THE EVOLUTION OF HUMANITARIAN LAW TO THE ST. PETERSBURG DECLARATION (1868)**

(1) “Woe to the vanquished!”, as far back as history remembers, is the motto by which warriors have practiced the art of war<sup>1</sup>. This was certainly true during antiquity. Indeed, all recorded history is based on accounts of conquests and the military exploits and massacres of the times. The Iliad, the Siege of Troy, the Peloponnesian War, the glory and fall of Rome, Alesia, the Mongols, and the Crusades are all evidence of the fact that war has always been one of the foremost activities of humankind.

(2) Only a small number of rules determined the conduct of hostilities. It is not a rare occurrence to have populations massacred and soldiers executed. Regardless of the reason or the cause defended, the only effective rule applicable seems to have been the rule of the victor.

(3) However, this is not quite exact. Through the ages, numerous precepts, mainly religious ones, have prohibited attacks on parts of the population such as women and the elderly and forbade fighting on Holy Days. Furthermore, attempts were made to reduce suffering by limiting or prohibiting the use of certain weapons. Still, this “generosity” was itself limited by exceptions. One often-cited example is the crossbow, whose use was forbidden by the Vatican during the *Lateran Second Council* (1139). But while the crossbow’s use between Christians was prohibited, it was permitted against other religions.

(4) The Renaissance was rich with humanism, whereby respect of non-combatants was encouraged, as well as respect for holy sites, public structures. However, the Hundred Years War (1337-1453) and the Thirty Years War (1618-1648) demonstrated how the application of this humanism was still far from perfect. The face of war changed radically during these years as the feudal system created strong loyalties between king and subjects. Laws and moral codes could not act as a check to these.

(5) This situation became even worse with the American (1776) and French (1789) revolutions. The new war cry became “Liberty!” and no act was too barbarous to be committed in its name. The “Terror Regime” and the border problems of the new French Republic with the counter-revolutionary forces of the

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<sup>1</sup> Titus Livius, *The History of Rome*, Volume 1, Book 5, Chapter 48 at electronic page 506, available at <http://www.gutenberg.org/etext/10907>.

Duke of Brunswick (1792) demonstrate to what extremes the “Nation” can go to protect its ideology. The ideal of “saving the nation” became a rallying cry at the Battle of Valmy (1792) and was followed by the imperialist regime of Napoleon Bonaparte. The Nation then became the only guarantor of its own safety. The voluntary system of enlistment in the regime’s first year was quickly replaced by conscription, whereby it was every citizen’s duty to either carry a weapon or build arms for those who could use them.

(6) Such a system resulted in a much larger pool from which armies could be raised *en masse*. This new **levée-en-masse** permitted the creation of the largest armies ever seen to this point. Human power combined with the rapidly developing power of gunpowder created a process by which more casualties could occur and were expected during engagements up to levels never before envisioned. After twenty years of continuous conflicts, the rulers of Europe realized that the effects of war must be limited. It appeared evident to all that the demise of Napoleon was permitting a return to peace in Europe. With his defeat at Waterloo in 1814, significant changes appeared in the legal regime of the laws of war.

(7) The political organization in Europe became subject to the decisions taken by consensus at the **Congress of Vienna** (1815). This congress is *de facto* a European Directory, consisting of the four major victors against Napoleon, namely, England, Prussia, Russia, and Austria. The Congress was founded on the idea of a balance of power in Europe, a system by which no power would be able to be strong enough to attack and defeat another. In order to establish this regime, two basic principles were recognized by all these powers: the **inviolability of state frontiers** and the **legitimate monarchical regimes of states** within those borders. Despite this structure, this regime was not preserved for long. With increasing pressures from revolutionary movements, it was quickly paralyzed and unable to act. It was therefore replaced in 1825 with the **Concert of Europe**, where states met only when the need arose. This organization was even more ill-suited for its purposes since it radically changed the applicable rules. While the Congress of Vienna attempted to avoid war, the Concert of Europe was preoccupied with the timely resolution of crises. Even though relative peace was maintained for some time, the fact remains that war was accepted as being an undisputed right under positive international law.

(8) This is an important point with regards to the LOAC. If some jurists believe that war must be outlawed, most agree that this right is inherent to the nature of the state. This is why the **aim of the LOAC : is not to outlaw war but to regulate the conduct of hostilities and limit inflicted suffering as well as creating favourable conditions for a return to a durable peace.**

(9) This view developed mainly during the latter part of the nineteenth century, during the Crimean War when French and English allies harmonized their rules of the conduct of warfare with the 1856 *Declaration of Paris*<sup>2</sup>.

(10) However, it was with the Battle of Solferino in Italy (1859) that a momentum developed to aid the victims of war. Under the disbelieving eyes of a 31-year-old merchant, Jean-Henri Dunant, over 40,000 French and Austrian wounded were left for dead on the battlefield. Seeing that medical services from both sides were overwhelmed, he decided to dedicate his life to the fate of the victims of warfare. To rally support for his cause, he published his book *Memories of Solferino*. Its impact on the moral conscience of Europe was immediate. Public opinion became much more receptive to the idea of an International Commission whereby all states would recognize basic principles such as respect and care for the wounded and non-combatants. The first of these conferences took place in 1863 and was an immediate success. Doctors from sixteen states adopted all the resolutions of the new Red Cross. From then on, the ideal of

<sup>2</sup>*Declaration of Paris*; April 16, 1856 at <http://www.yale.edu/lawweb/avalon/lawofwar/decparis.htm>.

reducing the suffering and damages of war acquired such importance that the legal sources of the “laws of war” were then recognized and defined in order to give weight to the fate of war’s victims.

(11) Following its the creation of the Red Cross, two branches of the “laws of war,” now recognized as the Laws of Armed Conflicts (LOAC), were identified, their objectives differing:

- a. **International humanitarian law** (Geneva stream). This branch aims at **protecting the victims of war**, especially persons under the control of a foreign power, civilians, the sick and the wounded. Its effects are the amelioration of the condition of life.
- b. **Laws of war** (Hague stream). This branch regulates **the conduct of hostilities** as well as the **means of warfare** to limit collateral damages and unnecessary suffering.

(12) **Two principles** regulate, with religion or psychology, the development of the LOAC:

- a. **sense of honour: which demands the respect of one’s word; and**
- b. **humanitarian considerations: which demands the respect of non- combatants.**

(13) With the development of the means of warfare and the consequent horrors of war during the Napoleonic era, a need to codify rules applicable during armed conflicts arose, as the number of soldiers engaged and wounded in battle increased rapidly with the advent of ever more powerful artillery and musketry and the development of the guerrilla form of warfare. This became most evident with the advent of the machine-gun and trenches during the American Civil War. Confronted with the independent warring activities of the Bushwhackers, Partisans, Armed Prowlers, Scouts and others, the United States’ Adjutant-General, himself a distinguished law scholar asked his friend Francis Lieber for his opinion on the status of prisoner of war to be granted or denied to them. Lieber’s opinion, drafted in the form of a code, was published under General Order No. 100. Now called the *Lieber’s Code*<sup>3</sup>, it contains the first codification of all modern laws of armed conflict. It is the root of many of the conventions we will explore here. It creates the notion of military necessity and that of distinction between combatants and non-combatants. If for no reasons than to explore the evolution of the LOAC from this first codification, the *Lieber’s Code*’s 157 articles defines the LOAC as we know it.

## **B. THE SOURCES OF THE LOAC**

(14) These sources are very important in law, as they determine the legitimacy of any claim to the existence of a right. If a source is identified, a right can then exist. In the absence of a source, no crime can be committed since no law can be broken.

(15) As previously noted, the LOAC rest essentially on the influences of religion and human psychology. It is the ability to distinguish between right and wrong that makes us human. Our conscience constrains us to a certain moral code. The Code of Chivalry is an example of such a code. This was a tradition, an expected behaviour on the part of the warrior class of the society that was self-created and self-imposed to limit the damages of warfare during the proliferation of conflicts during the Middle Ages.

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<sup>3</sup> *Laws of War: Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, LL.D. Originally Issued as General Orders No. 100, Adjutant General's Office, 24 April 1863, Washington 1898: Government Printing Office, at <http://www.yale.edu/lawweb/avalon/lieber.htm>.



This behaviour was passed down through generations and, despite innumerable breaches, certain behaviours are still expected from soldiers. Courage, bravery, and honour are notions that are part of that code. Society expects soldiers to kill without pity towards the enemy, but also expects them to show mercy when this enemy has been rendered *hors de combat*, through wounds, sickness, or loss of consciousness.

(16) This tradition was carried on and leads certain authors to affirm that the LOAC is part of the “*jus cogens*”, an imperative norm of international in general. This means that the norm expressed is recognized by the international community at large, and that to trespass against it is considered as being absolutely prohibited. Furthermore, this norm can only be changed by a new norm of the same character. Respect and care of the wounded has attained the status of a *jus cogens* norm, as much in its *lato sensu* (in general; a wide or liberal sense) as in its *stricto sensu* (restricted and very precise) sense.

(17) With the ratification of Eritrea in June 2000 all nations on earth save two, the Marshall Islands and Nauru, neither possessing standing armies, have signed the *1949 Geneva Conventions*. Therefore, it is widely accepted that many of the principles contained in these conventions are a norm of *jus cogens*, applicable to all. As a result, all are bound by these principles. A clear example of a norm of *jus cogens* is art.3/common GC 1949: the norms it contains restate basic principles of previous conventions and therefore are clearly imperative norms of international law.

(18) Therefore the sources of the LOAC are primarily of an **international** order, and secondly of a **national** order.

(19) **International norms** are those rules that carry on through the centuries without being codified (put in writing). Through word of mouth, all recognized the basic rules applicable to whatever transgression was prohibited. These traditions are the **customs**. They were learned from the recounting of battles by veterans and became the expected behaviour.

(20) These behaviours have become traditions because of two major elements: **continued practice** over time, by which all participants repeated this behaviour because they recognized it as the rule that none could disobey. This latter recognition is what is called the **generalization of the practice**. Customs are composed of general principles that can be widely interpreted, but which everyone knows must be obeyed. As early as the second half of the nineteenth century, States knew that they could not transgress the “right of the people,” that is, the usages and customs between Nations.

(21) Nevertheless, such customs existed before the Napoleonic era and still the horrors continued unchecked. States decided primarily on a bilateral model, and later, on a multilateral one, to codify these customs by treaties. These treaties are more often than not called **conventions**, legal instruments that put into writing the customary rules, or created new rules, to which states agreed to abide. These conventions thus became the **conventional sources** of international law. The *Paris Declaration of 1856* was the first of these to address the rules of warfare that States saw as applicable to all. The *1864 Geneva Convention*<sup>4</sup> became the first to address the international humanitarian laws applicable in times of conflicts. The participation of States’ representatives in their drafting sessions and their subsequent ratification are good examples of the conventional source of written (codified) law applicable to states in general international public law and in the LOAC.

<sup>4</sup> *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. Geneva, 22 August 1864, at <http://www.icrc.org/ihl.nsf/WebFULL?OpenViewt>.

(22) As a last source of the LOAC are the general principles of law as understood by the *Statute of the International Court of Justice* at its article 38(1)(c), whereby the Court applies the general principles of law recognized by all civilized nations. These general principles must not be “discovered” by the international judge; they must exist already and simply be attested to.

(23) As such, the general principles of law would be common to all major legal system, such as the principle by which tribunals must be established under the applicable law. This is why the tribunal for war crimes committed in the Former Yugoslavia is deemed legal under international since it was created by the international legal system under the auspices of the UN Security Council.

(24) In an auxiliary manner, there exist two means of determining the content of the applicable law. These are :

- a. Jurisprudence, or case law: meaning the decision of established tribunals applicable to the case at hand; and
- b. Doctrine: Meaning the writings of the most qualified publicists (legal writers, authors).

(25) For example, in the Christian western hemisphere, the Bible is probably the best example of doctrine. It is an important source in the sense that it is founded on the collection of arguments based on customs and conventions alike in order to prove or disprove the existence of a right. Since the LOAC is largely based on religious and psychological principles to affirm humanitarian considerations and the sense of honour, doctrine serves as a medium in order to translate these principles into coherent legal principles. Although it does not specifically offer treatises on the laws of war, the Old Testament preaches the merciless destruction of the enemy while making reference to grace being conferred on non-combatants. These precepts are therefore predominantly religious at root, but have evolved as recognized customs in warfare, especially during the Middle Ages. Doctrine is very important because it can modify in part or in totality the applicable international law and the LOAC.

(26) Of these three sources, which one precedes the others? The conventional sources, such as the GC 1949, are the ones taught, but conflicts do not always go as planned by these documents. Situations arise where no written rules apply. A soldier’s duty is to put the enemy *hors-de-combat*, not necessarily to kill him. If the soldier has achieved this goal and no conventional right seems to apply to the aftermath, he must rely on the customs and their general principles. Then he must ask whether the next action planned is **“honourable” -- if it shows the general principles of humanity**. A soldier is not expected to risk his safety in such a situation but must act in accordance with humanitarian principles universally recognized by all Nations. For example, soldiers should know that firing on civilians without actually establishing that the target is a potential or known threat goes against these general principles. It is illegal with regards to the spirit of the Geneva Conventions.

(27) Further to the international sources, there exist some **national** sources of the LOAC. The military disciplinary codes of all countries are the prime examples of these sources. The national source is sometimes very important is a country has a dualist juridical system. In such a system, no international treaty can be opposed to that country’s national unless it has been adopted as a law by the legitimate legislative authorities.

(28) In short, there exist two types of sources of the LOAC:

- a. **International** sources, which include **customs, conventions and general principles**.
- b. **National** sources, which are the **laws** promulgated by a country in relation to the LOAC.

### C. THE EVOLUTION FROM THE ST. PETERSBURG DECLARATION TO THE 1949 GENEVA CONVENTIONS

(29) One frequently cited example of a conventional source of the LOAC is the *1868 Declaration of St. Petersburg*<sup>5</sup>. Following the shift in public opinion to a favourable attitude towards humanitarian laws, Russia convened a summit to elaborate rules applicable to the means and methods of warfare. Nineteen states decided of their free will to bind themselves to this treaty, which laid down the basic principles with regards to the respect of non-combatants and the interdictions relative to weapons that create unnecessary suffering or death. Nominally mentioned were projectiles with a weight of less than 400 grams if these are fulminating, incendiary or explosive (*St-Petersburg Declaration of 1868*). Still, this does not mean the sole motive for this treaty was “humanitarian.” One of the important reasons for the agreement was that many countries lacked the technological means to rival British musketry production.

(30) The *St. Petersburg Declaration* is today one of the most important ever written as the point of departure for arms control negotiations. Others followed, such as the *1874 Brussels Declaration*<sup>6</sup>. But the principles elaborated in this particular declaration were not ratified by its fifteen signatories (ratification being the procedure by which a country formally agrees to be bound by a treaty). Nonetheless, its principles served as the source for the drafting of many national legislations on the LOAC. This was especially true in France where it became the basis of study of the *Institut de droit international* when it attempted to create a manual incorporating all rules applicable in time of conflict. These principles also influenced the *Hague Second Convention of 1899*<sup>7</sup> and the *Hague Fourth Convention of 1907*<sup>8</sup>.

<sup>5</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Saint Petersburg, 29 November / 11 December 1868, at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>6</sup> *Project of an International Declaration concerning the Laws and Customs of War*, Brussels, 27 August 1874 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>7</sup> The 1899 *Hague Conventions* are: *Final Act Of the International Peace Conference*, The Hague, 29 July 1899; *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 29 July 1899; *Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864*, The Hague, 29 July 1899; *Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature*, The Hague, 29 July 1899; *Declaration (IV,2) concerning Asphyxiating Gases*, The Hague, 29 July 1899; and the *Declaration (IV,3) concerning Expanding Bullets*, The Hague, 29 July 1899, all available at the ICRC’s web site at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>8</sup> The 1907 *Hague Conventions* are: *Final Act of the Second Peace Conference*, The Hague, 18 October 1907; *Convention (III) relative to the Opening of Hostilities*, The Hague, 18 October 1907; *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907; *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, The Hague, 18 October 1907; *Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, The Hague, 18 October 1907; *Convention (VII) relating to the Conversion of Merchant Ships into War-Ships*, The Hague, 18 October 1907; *Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines*, The Hague, 18 October 1907; *Convention (IX) concerning Bombardment by Naval Forces in Time of War*, The Hague, 18 October 1907; *Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, The Hague, 18 October 1907; *Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*, The Hague, 18 October 1907; *Convention (XII) relative to the Creation of an International Prize Court*, The Hague, 18 October 1907; *Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War*, The Hague, 18 October 1907; *Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons*, The Hague, 18 October 1907 available at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>. It must be stated that these *Hague Conventions* were not perfect instruments: They were usually joined with “*si omnes*” clauses – solidarity clauses – by which they cease to be applicable when one of the

(31) Before pursuing this historical chronology, it is important to mention here the interaction of all the sources of international law. As we can see with the *1874 Brussels Declaration*<sup>9</sup>, a “*jus cogens*” norm of international law, such as the respect of non-combatants that existed in traditions and religious principles, and that became customs regionally and then globally can become codified in a conventional source like a treaty. It then becomes a conventional source that can influence a national source of law, such as internal legislation. Law is not fixed in time and space. It is a human tool that evolves with human society. What is not recognized today might become so tomorrow and elevated to unbreakable status in national law. The LOAC are reactionary laws, responding to issues raised by the most recent conflict and therefore painfully slow to evolve. But they can also evolve quite rapidly, given the right stressors, as we have seen with wars prior to the 20th century.

(32) Between 1859 and 1914, many European conflicts prepared the road to the Great War (1914-1918). The American Civil War (1861-1865), the multiple conflicts of major powers such as the Austro-Prussian War of 1866, the Franco-Prussian War of 1870 and the Russo-Japanese War of 1905 and the Balkan Wars of 1912-1913 all signalled things to come in the Great War, or First World War as it is now known. The invention of the telegraph, the railroad, repetitive-fire guns, and Maxim machine-guns were all enhancers of power that would mean heavy casualties in future conflicts.

(33) The manoeuvres of Germany to create for itself an empire and the British counter-manoevres to stop these attempts were in hindsight clear indications that a major confrontation in Europe was inevitable. The European powers convened in The Hague in 1899 to establish the ground rules of such a conflict with this idea looming in the background. Twenty-six states adopted the declarations whereby they would abstain from using “dum-dum” bullets -- projectiles that, due to an incision on the head of the bullet, deform or separate on impact with the human body, creating a much larger exit wound than would be the case with a normal bullet. Hollow-point bullets are nominally specified in the text. Also excluded from use are asphyxiating gases, although there is a *caveat* (an exemption) by which the victim of a first attack has the right to reply in kind to a first use of gas by another belligerent. Further, if a belligerent is joined in alliance by a state not party to the convention, the prohibition of the use of gases ceases to apply<sup>10</sup>.

(34) After the Russo-Japanese War, new rules were deemed necessary. This led to the creation of the *1906 Geneva Convention on the Wounded and Sick in Field Armies*<sup>11</sup>. The convention was followed the next year by the fourteen *Hague Conventions of 1907*. For the first time, a real codification of all the general rules applicable to armed conflicts were laid down, including the treatment of persons fallen under the power of a foreign power. Even if its terms were limited, every aspect of the means and methods of warfare and the treatment of victims of conflicts were codified.

(35) But if the hostilities on land and sea could be more or less predicted, nobody foresaw the development of the warplane as such a powerful mean of warfare. The invention of the “aeroplane” and its subsequent use during war rapidly convinced jurists that the new technology had tremendous potential for

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belligerents, independently of how many of them there might be, was not party to them. For example, Germany claimed during the First World War that from 8 August 1917, the *Hague Conventions* ceased to be applicable due to the entrance into the war of Liberia, which was not party to them. During the Second World War, the same argument was taken after the entrance in the war of Italy which had not ratified them. This has since disappeared. (See Patrick Dallier et Alain Pellet, *Droit International Public*, 7e ed., L.G.D.J., Paris, 2002 at 969).

<sup>9</sup> *Project of an International Declaration concerning the Laws and Customs of War, Brussels*, August 27, 1874.

<sup>10</sup> This is another example of “*si omnes*” obligations as explained *supra* at footnote 8.

<sup>11</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 6 July 1906 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

destruction and that air attacks could not discriminate between combatants and non-combatants. In 1923 States convened to determine what rules would be applicable to the use of warplanes in air/land or air/sea operations. No treaties resulted from these discussions, but the expert opinions expressed were seen as the rules applicable to the use of the third dimension in armed conflicts. Their force of law is such that on certain items, they acquired the status of customary law.

(36) The real problem illustrated by the example of air weapons is the potential for the invention of ever-new weapons with increased destruction capacities that would not be covered by existing laws. This is especially the case with chemical and bacteriological weapons. The *1925 Geneva Protocol*<sup>12</sup> tried to address this issue. Despite the best of intentions, the political reality of the time made it so that the only wording acceptable to all parties was the application of the principle of “**reciprocity**,” by which the rule of first use applied, but ended as soon as another party breached it. This principle exists in international law and is used as an interpretative instrument to determine the breadth and scope of the treaties.

(37) The First World War radically changed the legal dynamic of the right to the recourse of means and methods of warfare, but also the right to the recourse of war itself as an instrument of national policy. Following the military, social, political and economic catastrophes that engulfed the world during those four years, public opinion was in favour of developing international forums through which conflicts could be avoided.

(38) The creation of the *League of Nations*<sup>13</sup> in 1919 was based on a new idea expressing that a war of aggression was **not** an inherent right resting in natural law. From a moral standpoint such a war was an international crime. This change was radical; since it shattered all the prevailing conceptions that war was an illimitable mean of furtherance of national policies. Where a state had an inherent right to use armed force prior to the war, this same state now had to answer to the international community and justify the reasons for its use. Thus while it was a normal juridical institution prior to 1919, after this time war became contrary to the principle of peaceful co-existence between nations.

(39) The notion of **war of aggression** is included in the peace treaties terminating the multiple conflicts of the Great War such as the *1919 Versailles Treaties*, but would only be defined by the United Nations in 1974. Following the terms of these treaties, the German Kaiser Wilhem II was subjected by section 227, to answer to charges of being the author of a war of aggression before an international tribunal and to be responsible for the war. He was judged in his absence, the Low Countries where he had taken asylum refusing to extradite him. The Commission on Responsibilities, responsible for the examination of the charges, exonerated him of the charges, stating that he did not commit a breach of the laws applicable at the time, not having violated the customs of the laws of war, but was instead guilty of a moral crime. That crime was a prejudice to international morale. It was therefore not deemed an act contrary to positive international law. The question was a moot point in any case and remained an academic question since the Kaiser could not be tried in person.

(40) In spite of this incident, this new interpretation of war had many consequences in relation to the use of armed force, since it resulted in the following principles:

<sup>12</sup> *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, Geneva, 17 June 1925 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>13</sup> *The Peace Treaty of Versaille, The Covenant of the League of Nations*, 28 juin 1919, available at <http://www.lib.byu.edu/~rdh/wwi/versailles.html>.

- a. **the principle of non-aggression:** States cannot in any cases use armed force to resolve their political or economic disputes. Negotiation and mediation are the only acceptable means of resolution;
- b. **the principle of the respect of state sovereignty:** States must respect established borders and abstain from using any means not in accordance with the juridical realm in order to violate the territorial integrity and political independence of another state; and
- c. **the principle of non-intervention:** This corollary of the principle of the respect of state sovereignty prohibits a state from intervening in the internal affairs of another.

(41) This does not mean that the LN was rendering war illegal. It simply means that it was creating two types of war: **legal** and **illegal**. Illegal wars are those that, under the *Pact of the League of Nations*, represent an external aggression against the territorial integrity or the political independence of a state. This is a restrictive statement of facts that one can interpret widely by:

- a. **claiming self-defence**, a right viewed as inherent to all states if under attack;
- b. **refusing to designate as a war a conflict in which it is involved**; this tactic permitted Japan to conquer parts of China during the Manchurian Conflict in 1931-33, and during the “Chinese incident” of 1937-41. During these conflicts, neither of the states would recognize a state of war, preventing any LN intervention since it was deemed an internal conflict and the Pact of the LN prohibited intervention in the internal affairs of states, according to the principle of state sovereignty and of non-intervention.

(42) Of course, pacifists of the time attempted to remedy this by multilateral treaties such the *Draft Treaty of Mutual Assistance of 1923*<sup>14</sup> and the *1924 Geneva Protocol for the Pacific Settlement of Disputes*<sup>15</sup>, but their efforts failed due to the low number of states that ratified these projects. Nonetheless, the *1925 Locarno Treaties*<sup>16</sup> were adopted by ratification that imposed recourse to conciliation to settle international disputes. Three years later, an impressive number of states signed the General Treaty for the Renunciation of War, known as the Pact of Paris or the 1928 **Kellogg-Briand Pact**. This text is the first international treaty whereby states formally expressed the renunciation of the use of war as an instrument of national policy and to resort to conciliation and mediation in order to resolve their international disputes. Although idealistic, the treaty still demonstrates real political desire to end the use of war in the aftermath of the First World War.

(43) The *Briand-Kellogg Pact* had major drafting faults that resulted in deplorable results. Indeed, although very concise and precise, it still accepts reservations to its terms. A **reservation** is an interpretative clause by which a state agrees to ratify a treaty but affirms that certain clauses do not apply to it. Reservations are an accepted procedure of international law, but cannot go against the purposes and objectives of the treaty. If so, that reserve is illegal and therefore without any legal force. In the case of the *Kellogg-Briand Pact*, states formulated such large exceptions that they entirely circumvented the purposes and objectives of the treaty, ultimately resulting in its failure in 1939. States formulated reserves on the

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<sup>14</sup> *Draft Treaty of Mutual Assistance*, Lausanne, September 1923.

<sup>15</sup> *League of Nations Protocol for the Pacific Settlement of Disputes*, Geneva, 15 June 1924 at <http://www.mfa.gov.tr/grupe/ed/eda/eda17e.htm>

<sup>16</sup> *Locarno Pact, Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy*; Locarno, October 16, 1925 at [http://www.yale.edu/lawweb/avalon/intdip/formulti/locarno\\_001.htm](http://www.yale.edu/lawweb/avalon/intdip/formulti/locarno_001.htm)

basis of the inherent right of self-defence, recognized to all states by customary law. Effectively, jurists agree that this right to the self-preservation of the nation-state is **inalienable**, meaning that no state can renounce it by treaty or otherwise. Further to this interpretative problem, others faults were found in the pact. For example, the mechanisms for the settlement of dispute were to be established in a separate treaty, the *General Act for the Pacific Settlement of International Disputes*<sup>17</sup>. More important was the wording of the Preamble of the pact, which affirmed that in cases of violation of the treaty by a state, this state was no more entitled to its protection. Other states could then use armed force against the violator. Despite its faults, the *Kellogg-Briand Pact*<sup>18</sup> has a moral value in that it illustrates the desire to alleviate suffering caused by armed conflict and its causes (the conflicts themselves). It was a fragile and faulty first step, but it still rendered war illegal as an instrument of national policy, except in cases of self-defence, and is still in application today despite claims by some jurists that it may have fallen into desuetude (non-use and non-applicability).

(44) Following this “success” at the time, further progress was made during the Interwar period with the *1929 Geneva Conventions*<sup>19</sup>. The first convention pertained to the sick and wounded in field armies while the second related to the treatment of prisoners of war. These conventions were the ones applicable during the Second World War (1939-1945). A later treaty, the *London Protocol of 1936*<sup>20</sup>, regulated the rules applicable to the conduct of hostility on the seas. This protocol prohibited the sinking of a passenger vessel without first assuring the safety of its passengers and crew as well as its log book. This was the basis of Allied charges against Great Admiral Karl Dönitz for the conduct of his submarines’ **guerre de course** without discrimination, that is, the sinking of any merchant vessel on sight, whether of neutral or enemy character.

(45) The *GC 1929* and the *London Protocol* were used during the six years of war that spanned 1939 and 1945. It must be mentioned that one of the great legal challenges of that war was the fact that certain parties to the conflict, such as Japan, which did not ratify the *GC 1929*. From a legal standpoint, one cannot say these parties violated the terms of a treaty since it did not apply to them and they did not recognize its legality. To apply to one culture the rules and regulation of another is a double standard and unjustifiable in law. However, it was successfully argued that the violated terms of the *GC 1929* were also contained in earlier treaties signed by these countries, such as the *GC 1906* and the *1907 Hague Conventions*, and already part of the *jus cogens* since the great majority of states abided by them, and the international conscience believed the violations to be shocking in any society -- for example, the massacre of at least 20,000 civilians during the “Rape of Nanking” (1937), or the killing of prisoners of war. It is on that basis that the Tokyo War Tribunal judged many senior Japanese officers as criminals of war and condemned them to death.

(46) The Second World War revolted many by the magnitude of the suffering it caused, its many untold massacres, and its character of total war. Prisoners of war were executed without legal basis, whole civilian populations were exterminated, genocide was attempted and almost virtually successfully carried

<sup>17</sup> *General Act of Arbitration for the Pacific Settlement of Disputes*, Geneva, 26 September 1928, 2123 L.N.T.S., treaties series, volume 93, 343

<sup>18</sup> *Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy*, Paris, August 27, 1928.

<sup>19</sup> *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 27 July 1929, and the *Convention relative to the Treatment of Prisoners of War*, Geneva, 27 July 1929 available on the ICRC’s web site at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>20</sup> *Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930*, London, 6 November 1936.

out, and permanent damages were inflicted on the equipment essential to the survival of the civilian population. In this last regard the Holocaust cannot go unmentioned, but other cases such as the Siege of Leningrad, the Battle of Stalingrad, the bombing of London, Cologne and Hamburg were all examples of indiscriminate attacks against civilian populations. In 1945 it became evident that new rules were necessary to ensure effective protection for the victims of war. But these horrors did not go unnoticed until that time. Already in 1939, the treatment of civilians in Poland sounded the alarm with the too-methodical style the national-socialist forces were using to impose their rule. Although it would be unjust to accuse each and every German soldier who served in the war of a crime, there has to be a realization that the actions of the Wehrmacht under the authoritarian ruling of Chancellor Hitler were in total contradiction to the applicable LOAC of the time. While we will not examine here the notion of neutrality, it must be mentioned that at the onset of the opening of the hostilities with Poland, violations were caused by the German forces' commitment to a war of aggression in spite of the *Briand-Kellogg Pact*. The ever more disturbing conduct of hostilities by the Axis led the Allied governments to take harsh legal measures during and at the end of the conflict.

(47) During the course of the hostilities the Allies adopted the *1943 Moscow Declaration*<sup>21</sup>. Two jurisdictions were established within it. First, where a war crime had been committed, it was permitted to extradite on the national territory of its presumed author. The second, in the absence of any prejudice in this first jurisdiction, was over the jurisdiction of all the Allied governments to condemn "major" war criminals whose crime had no precise geographical locations. Wishing to avoid giving the status of martyrs to Nazi leaders, the Allies later adopted the *1945 Declaration of London*. This became the legal basis for the establishment of an *International Military Tribunal*, whose jurisdiction flowed from the two above-mentioned jurisdictions in the *1943 Moscow Declaration* in order to prosecute major war criminals. This aimed at simplifying their prosecution but also at differentiating decision makers and simple executioners. This is important since the *1945 London Agreement*<sup>22</sup> edicts at its section 6 three new categories of crime in international law and the LOAC: against peace, against humanity, and against war crimes.

(48) **Crimes against peace** are those committed by the preparation, planning, organization of and participation in a war of aggression. Following this definition, this category is applicable only to leaders of such wars.

(49) **Crimes against humanity** are those committed, with overlap with crimes against peace, by the direction, preparation, start, or pursuit of a war of aggression in violation of treaties, official assurances, or any other international agreement. They specifically include murder, slavery, deportation, and persecution, as well as any other inhumane act committed against the civilian population before or during a war. Further prohibitions include persecution for racial or religious motives and are applicable in relation to both a state's own civilian population and/or enemy population. Some argue that this category of crime could also be applicable in peace time.

(50) **War crimes** are acts contrary to the applicable conventions and customs of the LOAC, whether they are in relation to international or national law. Following the *1945 London Declaration*, these crimes included assassination, wrongful treatment of civilians and prisoners of war, and deportation.

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<sup>21</sup> *Statement on Atrocities of the Joint Four-Nation Declaration*, Moscow Conference, October 1943, at <http://www.ibiblio.org/pha/policy/1943/431000a.html>.

<sup>22</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* [hereafter the *London Agreement*], August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.



(51) In the political context after the Allied victory of 1945, it appeared even more important to ensure that populations were not targeted and massacred on the basis of their religion, culture, or race. In this spirit the 1948 United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>23</sup> was drawn up and adopted. This convention was followed by the *1949 Geneva Convention*. A total of four conventions were then adopted with relatively strict rules with regards to the LOAC. They deal especially with the treatment of the victims of war, prisoners of war (PW), the sick and wounded, and the shipwrecked, and of the conduct of land and sea operations.

#### D. WHAT IS AN ARMED CONFLICT AND ITS DIVERSE JURIDICAL EFFECTS

(53) Despite the legislative efforts, an essential element still eluded the functioning of the LOAC: the mechanism regulating the beginning and end of a war and its effects. First, one must understand that the terminology that refers to “war,” as seen before in the case of the LN, is now restricted. Indeed, a war can be an armed conflict, but an armed conflict is not necessarily a war. In juridical terms, **war** is “**a situation where two or more states use force against one another.**” To attain this status of war, the historical definition refers to a certain degree of intensity in the engagements between the states. This is why a border incident is not a war proper but could become a part of it. Today, such a definition would not be in accordance with reality, since many “wars” do not involve multiple states but ethnic groups within the same state. This is why the *GC 1949*<sup>24</sup> gave careful scrutiny to the experience of the League of Nations when it incorporated new rules applicable to the LOAC for situations not covered by the old definition of war. Thus the *GC 1949* rules are applicable not only to war proper but also to “any other armed conflict”, as are the (art. 2(1)/common to all four *GC 1949* and art. 1(3)/AP 1). As we will later see, these rules are applied differently in international conflicts than in national conflicts.

(54) Further, the meaning of a **war of aggression** need to be differentiated from the right to self-defence recognized by the *Charter of the United Nations*<sup>25</sup> (art. 51/*Charter UN*) The General Assembly of the UN in 1974 adopted Resolution 3314 to define for the first time what constitutes an aggression in international law. According to this resolution, an aggression is the use of force by a state against its sovereignty, territorial integrity, or political independence, or in any other manner inconsistent with the *Charter of the UN*. This type of war is therefore illegal, as opposed to the right to self-defence whereby a state can use the necessary force to repulse such an aggression.

(55) To avoid here the debate of just and unjust war - that is, the debate of the morality of a war - we will simply state that the doctrine on this matter and on the notion of war itself continues to be very unsettled as it relates to the question of whether a war can be justified on humanitarian grounds or on grounds of humanity. Many states have pleaded for such a right to rally public opinion to their cause. Machiavelli and Grotius laid the basis for such a problem by defending the idea of a people’s right to defend themselves if under the power of tyrannical rule. These theories were accepted for a long time but

<sup>23</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

<sup>24</sup> The *Geneva Conventions* are : *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950), [hereafter *First Geneva Convention*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950), [hereafter *Second Geneva Convention*] ; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereafter *Third Geneva Convention* ] ; and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950), [hereafter *Fourth Geneva Convention*].

<sup>25</sup> *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

rejected in 1945 with the *Charter of the UN*. Under the *Charter*, the applicable international law regime evolved towards a very strict restriction on the use of force under circumstances provided by the *Charter* and the *Charter* only. We will return to this point later on.

(56) At the moment, we will concentrate on the interpretation applicable under the *Charter*. Viewing war from the angle of an armed conflict, it is fundamental to understand when it begins and ends, as well as its juridical effects.

(57) Historically, war has always been an important political activity, requiring formal declaration to avoid perfidious acts. These rules were followed by many different cultures such as the Egyptians, Hebrews, Chinese, and Romans. The Romans first attempted to avoid war by demanding retribution and compensation for a wrongful act; only when this was not answered or was refused was a formal declaration of war made. Leaders at that time believed deeply in the requirements of honour that asked for such a formal declaration, and this was carried on through the Middle Ages, even though it was deemed more an honourable tradition than an actual legal obligation. After the Middle Ages (and even though such a moral obligation was still recognized), only 10 of the 118 known conflicts that occurred between 1700 and 1872 were actually preceded by formal declarations of war. Great jurists such as Vattel (1714-1767) and Grotius insisted on the legal obligation of such a declaration. At the end of the eighteenth and nineteenth centuries, the obligation saw a brief resurgence with the Crimean War that opposed France and England to Russia, to such an extent that the *Third 1907 Hague Convention* included a form for the declaration of war in the preamble of its two first articles.

(58) The bilateral conflicts that started the First World War were preceded by such declarations, but states' practices rapidly changed as the conflict dragged on and more players entered into the game of war conducted on Europe's playing fields. The obligation of a declaration was also refuted throughout the Interwar years. The reason is simple. Before the First World War, preparations for a conflict were relatively lengthy and easy to observe, allowing the enemy time to react. Between 1918 and 1939 this changed radically. The mechanization of the armies of Europe - that is, the use of any and all machines using mechanical power, such as trucks and tanks but also airplanes - permitted a new pace for operations and deep incursion into enemy territory within a very short period of time. The theory of lightning war (*blitzkrieg*) was based in no small part on the exploitation of strategic and tactical surprise offered by new means of warfare to knock out the defensive potential of an enemy over its entire territory and against all its forces. The "shock effect" of such a concept was at least as much psychological as it was the result of actual physical destruction of human resources and equipment, paralyzing the population and government of the country targeted. Only surprise permitted such an effect, and a formal declaration of war would have nullified this military advantage.

(59) However, such a declaration is still demanded. It can be of two forms: *motivated*, citing a time and date at which time a state of war will formally exist between the parties, or *conditional*, in which case it is an *ultimatum*. War will then exist between the parties at a given time and date if the demanded action(s) or abstention(s) to act are not met with. This is an official declaration, but it does not mean that the legal state of existence of a war starts at that precise time. It can actually occur prior to it through the rupture of diplomatic and/or commercial relations.

(60) Even if permitted because not forbidden by any text, a declaration of war is deemed illegal by many jurists since war itself is illegal under the terms of the *Charter*, which states in art.2(4)/*Charter UN* that the threat of the use and/or the use of force are illegal. Whether it is a motivated or conditional declaration, the threat of the use of force is a violation in itself and even if the *Charter* permits the use of

force in special circumstances, this refers mainly to the right of self-defence. But a state that defends itself does not declare war: it is already at war. It was the aggressor that announced the existence of a state of war by illegally committing an act of aggression in opposition to the applicable international law. From that point, many effects take place under the international legal regime.

(61) Since the LOAC rest on custom and their effects can be modified by parties to the conflict, it is difficult to establish general rules. Nonetheless, some scenarios are possible.

(62) Three main effects upon treaties between the parties themselves or with third parties can result from a conflict:

- a. The treaties' **extinction**: they become nullified and as such, dead letters once hostilities end;
- b. Their **suspension**: the treaties are nullified for the duration of hostilities but become applicable once again at the end of the said hostilities; and
- c. Their **keeping in force**: certain multilateral treaties such as the Geneva Conventions or bilateral ones such as agreements on the repatriation of prisoners of war (PW) remain in force throughout the duration of the conflict.

(63) While jurists at one time believed that all treaties became nullified by the state of armed conflict, the opposite idea prevails today. Most treaties still apply. In an armed conflict situation, a state may nullify all its commercial and political treaties, such as Agreements of Friendship and non-aggression, but cannot automatically nullify multilateral treaties. These can be nullified upon demand or suspended for the duration of the hostilities. However they must respect the obligations affirmed in art. 58 of the *1969 Vienna Convention on the Laws of Treaties*<sup>26</sup>. This section states that a suspension is only possible if it is not expressly prohibited by the treaty and if it does not affect the rights and obligations of third party states, and if it is not incompatible with the purposes and aims of that treaty. Outside of these situation, the state must maintain the *ante bellum* (before war) integrity of the treaty.

<sup>26</sup> *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, Vienna, 22 May 1969, available at <http://www.un.org/law/ilc/texts/treaties.htm>. Reserves must therefore be distinguished from interpretative statements, such as "statements of understanding". For example, the Canadian reserves to the *First Additional Protocol of 1977*, state that Canada will not deem itself bound by the provisions of art. 11(2)(c), concerning the removal of organs of Canadian citizens. This is because the rules of organs donations are intrinsically linked with the medical ethics of the Canadian medical world. For example, if you have signed the back of your driver's licence to this effect (in Québec and Ontario), you do permit your organs to be donated upon your death. In the same manner, the Canadian government does not intent to be bound by Article 39(2) concerning the use of enemy emblems, insignia or uniforms. As such, Canadian Special forces are fully permitted by Canadian military operational directive (upon approval by the highest levels of government) to use these to favour, protect or impede military operations. It also allows Canadian personnel to serve disguised as American service personnel in embarrassing conflicts such as Iraq and Afghanistan. By contrast, the Canadian Statements of Understanding concern the interpretation of: the reach of the Protocol as covering solely conventional weapons, thereby excluding its application from nuclear weapons; the respect of any medical emblem use by enemy forces, as long as it is communicated to the Government of Canada; the interpretation of the possibility of recognising insurgents only in occupied territories such as understood in art. 1(4) of the *Protocol*; that command responsibility remains limited to the facts and circumstances by which a commander on the ground can make decisions; the definition of a military objective of art. 57 does not preclude collateral damages if in proportion to the objective and its necessity; the loss of protection for cultural objects and places of art. 53 if used in a military function; the holistic understanding of military advantage in art. 51 as it relates to the conflict and not at an isolated place and time; the general protection of civil defence personnel of art. 62 as applicable at all places and time in Canada; and the reiteration that the recognition of the unilateral declaration of a national liberation movement that it will apply the Protocol does not equate to the recognition of this movement. These can be ascertained on the ICRC's web site at : <http://www.icrc.org/ihl.nsf/0/172ffec04adc80f2c1256402003fb314?OpenDocument>.

(64) A state of war also affects diplomatic relations. Enemy diplomats must be repatriated, and continue to enjoy diplomatic immunity until that repatriation, in accordance with the *1961 Vienna Convention on Diplomatic Relations*<sup>27</sup>. This includes the protection of the offices and archives of the embassies. This protection can be assumed by the state or by a third state named as Protective Power.

(65) As for the material property of *enemy nationals* on the territory of a belligerent, it is also protected under Section 1 of the Third Part of the 1949 GC IV (arts. 27 to 34/GC IV). This is a continuation of the protection previously offered by the *Hague Conventions* of 1899 and of 1907, combined with broadened protection for civilian property. Article 53 of the *1899 Hague Convention* provides a list of property that can be seized, but stipulates that these goods must be returned to their rightful owners at the cessation of hostilities. This is cumulative to art. 55 of the *1907 Hague Convention on the Laws and Customs of War on Land Concerning State Property*. During the hostilities, a state may confiscate and use the enemy's good, but only as administrator and usufructuary (person who has the right to use the goods). This means that the state may enjoy the profits and potential of that good (for example, a machine that produces boots), but only during the duration of the hostilities. The state of war does not confer title of ownership.

(66) These rules are even broader in terms of patrimony (heritage). Whether it be tangible goods (cars, tables, money) or intangible goods (debts, personal rights over a land), private property must be respected.

(67) More difficult to manage in law are human rights. Indeed, in times of conflict, many restrictions are imposed upon the citizens of states, whether friendly or enemy. This varies from one country to another following national legislation. Since 1949, art.35/GC IV edicts that all protected persons, as understood in this convention in art. 4/GC IV, have the right to leave a country, except when national interests are at stake, such as potential for military service and/or the possession of important secrets or inventions. In cases where the security of the state renders it necessary, a protected person may be put under closed guard or interned. The person subjected to this condition has the right to appeal by way of an administrative tribunal and can have this status reassessed periodically. Moreover, if a person loses all sources of revenues due to the conflict, the right to look for other employment is conferred and guaranteed. As for stateless persons, they cannot be judged as enemy citizens on the basis of their last nationality or their lack thereof.

(68) Enemy citizens living in that state cannot be judged as outlawed because of their nationality. Under GC IV, enemy citizens continue to enjoy their full civil capacities. As for protected persons, they have the right to retain all their legal privileges, such as suing another citizen or the government, although that right is restricted to specific cases under the *1907 Hague Convention*. They retain their full complements of rights with regards to their defence in case of an action against them. It is must be noted that the right to sue for matters other than those enumerated in the *1907 Hague Convention* is not extinguished: it is merely suspended until the end of hostilities.

(69) A state of war also influences relations between enemy citizens and those of the state in which they reside. These relations are ruled by national legislation. For example, during the Second World War England declared nullified all contracts made with an enemy citizen during hostilities. Previous contracts made with such citizens were not to be respected, but any right of legal action acquired before the hostilities remained suspended until the end of hostilities.

(70) The exact point of the end of hostilities then becomes an important concept. Cessation of hostilities

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<sup>27</sup> *Vienna Convention on Diplomatic Relations*, 500 UNTS 95, Vienna, 18 April 1961, entered in force 24 April 1964, available at: <http://www.un.org/law/ilc/texts/dipfra.htm>.

depends largely on the political resolution of the conflict and on the type of conflict. In legal terms, we can identify two forms of cessation: **classical** and **non-classical**.

(71) **Classical** forms are of three types:

- a. **Peace treaties:** This is the most common form of cessation. It includes the bilateral or multilateral recognition of the end of the conflict by those states taking part in it;
- b. **De facto cessation (by tacit agreement):** Without concluding a peace treaty, the states decide not to pursue the hostilities and stop their actions. This is not advised since the absence of formal recognition of borders and length of the hostilities is a recipe for the resurgence of conflict. When this method is used, two types of de facto cessation can be used: 1) recognition of the *statu quo ante bellum* (pre-war situation), 2) recognition of the *statu quo post bellum* (post-war situation). This latter type is based of the rule of *uti possidetis*, which affirms in international law that a state possesses what is its own. This form is more practical, since it recognizes the gains and losses of each party. Regardless of the type of cessation agreement used, if a real political solution to the conflict is not reached by political means, the crisis will not be resolved and risk of the conflict flaring up again increases in proportion to the losses or gains as soon as the situation deteriorates;
- c. **Subjugation (conquest):** recognized in international law until the eighteenth century, it became heavily contested at the turn of the nineteenth with such force that by the twentieth century it was deemed illegal. Today, this method is totally outlawed by *art.2(4)/Charter UN*, since this article outlaws the use or the threat of use of force. No occupation of a country can put an end to conflict. It is an illegal invasion contrary to international law. Therefore, only a peace treaty or de facto recognition can now be used as means of cessation of war under their classical forms

(72) As for **non-classical** settlements, two types exist:

- a. **Peace settlement:** This is different from a peace treaty in the sense that it is an act made by a foreign power over another state in the absence of a legal authority with which to establish a treaty. Conditions are then imposed and the state is managed by the victor in order to favour a return to peace and the reconstruction of that defeated state. This was the case at the end of the Second World War, when no authority was recognized in Germany (the Dönitz government not being recognized by any state). Therefore, a separate peace settlement was made over time with the German Federal Republic (GFR) and the German Democratic Republic (GDR). As the state was without legal representation, the Soviet Union acted first to unilaterally establish it, while retaining responsibilities over the control and security of its zone (later a country not recognized by the West). The Allies did the same with the western zone and established the GFR.
- b. **Unilateral acts under municipal law:** Such acts were rare before the Great War but rapidly evolved at its end. Since many states refused to sign and ratify the 1919 *Versailles Treaties*, many of them (especially the United States and China) circumvented this problem by declaring unilaterally the end of a state of war in their own internal legislation. Therefore, it is a national law, but with extraterritorial (outside of the territory of the legislating state) effects.

(74) It must be noted that these forms may vary depending on the conflict. A peace treaty can be preceded by negotiations that result in an armistice. The date of the signature of an armistice may signify

the end of hostilities, but not necessarily that of a state of war. The cessation of the state of war may take years. Indeed, even if the armistice of 8 May 1945 ended the conflict in Europe, the state of war between the United States and Germany did not cease until 1951, while it did not cease between the Soviet Union and Germany until 1955. As a result, if normal relations between formerly enemy citizens are to resume quickly, commercial or political relations may be compromised for a number of years after the last bullet has been fired.

#### **E. THE RIGHT TO ANTICIPATORY SELF-DEFENCE**

(75) On June 1st, 2002, the President of the Republic of the United States of America announced to the graduating class of the United States Military Academy at West Point, and to the world at large, that his Government is determined to guarantee the safety of America and that it is determined to wage preventive wars to do so if necessary<sup>28</sup>. The following *National Security Strategy* released in September 2002 reflected this change of policy<sup>29</sup>. It went from deterrence and containment to first strike against rogue States and terrorists. Its Chapter V stipulates that this is rooted in the changes of circumstances, mainly that terrorists and rogue States will not be deterred from using weapons of mass destruction. Therefore, it argues that the United States can rest upon a long-held option of pre-emptive action to counter a threat to national security. In fact, Chapter V goes as far as to say that this option has long been recognised under international law and that the United States need not suffer injury before they can take action to defend themselves<sup>30</sup>.

(76) However, the legal basis for such a bold policy has not been clearly stated by the United States' government. And of what has been stated, there has been a very one-sided version of the applicable international law of the use of force prior to the suffering of an armed attack. While the Administration has claim high and mighty its right to use force pre-emptively, most scholars have disputed this notion and minimized the reach of the custom that is currently recognised in international law. While a history of the use of force has existed for centuries, the right of self-defence under the *Charter of the United Nations*

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<sup>28</sup> White House, News Release, 20020601-3, "President Bush Delivers Graduation Speech at West Point", (1 June 2002) at [www.whitehouse.gov/news/releases/2002/06/20020601-3.html](http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html) : "For much of the last century, America's defense relied on the Cold War doctrines of deterrence and containment. In some cases, those strategies still apply. But new threats also require new thinking. Deterrence -- the promise of massive retaliation against nations - means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies. (...) Our security will require transforming the military you will lead -- a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives. (Applause.)"

<sup>29</sup> United States, *National Security Strategy of the United States of America*, (September 2002) at [www.whitehouse.gov/ncs/nss.html](http://www.whitehouse.gov/ncs/nss.html) : "In the 1990s we witnessed the emergence of a small number of rogue states that, while different in important ways, share a number of attributes. These states: brutalize their own people and squander their national resources for the personal gain of the rulers; display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject basic human values and hate the United States and everything for which it stands."

<sup>30</sup> *Ibid.*, Chapter V : "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning."

does not support a broad right of pre-emptive actions.

(77) The right of self-defence has always been recognised, whether in municipal or international laws. But the right to anticipatory self-defence has not been expressively incorporated. Indeed, the *Charter of the United Nations* makes a very clear point of trying to limit the right to use force to two instances: self-defence, individual and collective after an armed attack under article 51<sup>31</sup>, and collective measures to restore international peace and security under article 42<sup>32</sup>.

(78) Nonetheless, some States have indeed maintained that there remain within the right of self-defence a right to prevent an armed attack from occurring by using anticipatory self-defence. The United States are one such country, and it is the *Caroline* incident with the United Kingdom in 1837 that gave rise to a formal interpretation in international of what anticipatory self-defence consist.

(79) From this case and its subsequent application, the United States' government bases its new "Bush Doctrine". However, the interpretation of the *Caroline* incident today, even if international law had not changed since, remains to be determined. Furthermore, the application of the *Caroline* incident in contemporary international law after the adoption and application of the *Charter of the United Nations* may also very well not be possible.

(80) To determine the validity of the proposed Bush Doctrine, one must therefore review the doctrine of anticipatory self-defence and examine the application from the *Caroline* incident and its subsequent interpretation. This is what this article will do.

(81) I will first look at the facts of the *Caroline* incident of 1837 and the legal conclusions applicable in international law as determined at the time by the parties concerned. I will then analyse the effects on this concept by the League of Nations and the Organisation of the United Nations. I will finally examine the contemporary development and the application of the doctrine to the cases created by the actions of the United States in the past two years.

(82) **THE AFFAIR OF THE *CAROLINE* AND THE *MCLEOD* CASE.** The *Caroline* incident concerns a steamboat bearing that name used for revolutionary purposes in the rebellion of Upper Canada, a Province of the Dominion of Great Britain ; nowadays the Province of Ontario, Canada. The rebellion of 1837 was rooted in the political system of cronyism that pervaded colonial politics in the British colonies of the Canadas, both Lower and Upper. It flared because of insensitivities of the British authorities towards the complaints of the inhabitants of the Canada and the confrontationist attitude of the Crown<sup>33</sup>. While much have been

<sup>31</sup> *Charter of the United Nations*, *supra*, note 25 at article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>32</sup> *Ibid.*, at article 42 : "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

<sup>33</sup> While much has been made of the democratic and nationalistic issues of the Quebeckers, the rebellion had much to do with a non-representative system and underlying patronage. The *Patriots*, under the leadership of Louis-Joseph Papineau, demanded from their solid voice in the assembly of Lower Canada (Québec) changes to the system. In 1832, the *Patriots* sent to London a list of Ninety-Two resolutions demanding among other things the election of the legislative council and that member of the executive are

made of the democratic and nationalistic issues of the Quebeckers, the rebellion had more to do with a non-representative system and underlying patronage. The rebellion of Lower Canada was over by the end of the summer and that of Upper Canada was in disarray by December 1837. At that time, the remnants of the rebels fled to the United States where they tried to raise support for further continuation of the rebellion in Buffalo (New York). This presence and threat caused to international peace between Great Britain and the United States was known to the American authorities. Instructions were issued to the districts attorneys of Vermont, Michigan and New York stating the President's intention to respect its international obligations and abstaining from any intervention in the domestic affairs of another nation<sup>34</sup>.

(83) On December 13, 1837 the rebel Mackenzie issued a proclamation for rebellion and recruited American help for the invasion of Upper Canada. A headquarter was set up on Navy island, a small island part of British territory across the Niagara River where the shores between Canada and the United States are at a very close point. These movements created enough attention on the British side of the river as to have the Lieutenant-Governor of Upper Canada send a message to the Governor of the State of New York to inform him of the situation. No answer came back. Between the 13th and the 28<sup>th</sup> of December, 1837, up to 300 men under the leadership of an appointed an American 'general' named Van Rausselear were armed and joined the headquarters of the Canadian rebels on Navy Island<sup>35</sup>. By the night of December 29, 1837, this force was seen growing to 1000 armed men. Reinforcements were made through constant movements from the American shore to Navy Island<sup>36</sup>, between three in the afternoon and dusk<sup>37</sup>.

(84) Seeing the use made of the ship, Colonel Allan Napier McNab, the officer commanding the British forces at Chippewa, judged that the destruction of the *Caroline* would prevent further reinforcements to Navy Island and deprive the rebels of their mean of invasion. He therefore ordered an expedition to be sent out for this purpose. According to the master of the *Caroline*, the ship was docked and moored at Fort Schlosser for the night with ten officers and crew on board, as well as twenty-three Americans who asked to be permitted to spend the night as they could not found lodging at the tavern near by. Around midnight, a force of 70 to 80 from several small boats boarded the *Caroline* and commenced warfare with muskets, swords and cutlasses. The vessel was abandoned by all hands, the only efforts of its crew being to flee. Thus captured, the vessel was left to the possession of the British forces that cut her loose, towed her into the current of the river, set her on fire and let her descend the current towards the Niagara Falls, where she was destroyed<sup>38</sup>. Twelve persons were initially said to have been killed or disappeared.

(85) As was established after investigations, it is a force of 45 men in 5 boats under the command of

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chosen by the members of the assembly. This was made jointly with representatives of the assembly of Upper Canada, of which a member of the Reform Party and former mayor of the city of York (Toronto), William Lyon MacKenzie, was part. All resolutions were denied. MacKenzie was defeated in the 1836 elections and became an advocate of open rebellion. In Lower Canada, Papineau, an ardent defender of nationalistic aspiration for Québec, spoke with such fire that popular sentiment was close to rebellion. In early 1837, Great Britain decided to move against the popular base of the *Patriots* by affirming 10 policies directly opposed to the *Patriots*. The people rose in the spring of 1837 in Lower Canada and continued rebellion throughout the summer of 1837. But, despite a victory at Saint-Denis, they were utterly crushed at Saint-Charles and Saint-Eustache. Meanwhile, in Upper Canada, MacKenzie decided to strike in support of the *Patriots*. His force were easily defeated and dispersed. MacKenzie fled to the United States to recruit new forces while Papineau fled to France via the United States.

<sup>34</sup> Moore, *A digest of international law as embodied in diplomatic discussions, treaties and other international agreements*, vol. 3, Washington, Government printing office, 1906 at 919.

<sup>35</sup> *Idem*. This was observed by the collectors of customs and the marshal of the United States for the Northern District of New York who had been directed to Buffalo in order to suppress any violations of the neutrality between the US and Great Britain.

<sup>36</sup> Jennings, R.Y, "The Caroline and McLeod Cases", (1938) 32 *AJIL* 82 at 85, citing the *Law Officers' of the Crown's Report*, dated February 21, 1838, Public Record Office in London, vols. F.O. 83, 2207-2209.

<sup>37</sup> *Idem*.

<sup>38</sup> *Ibid.*, at 84.



Commander Andrew Drew (Royal Navy), acting upon orders of Colonel McNab, that boarded, set fire to and let the ship descend adrift<sup>39</sup>. The place where the *Caroline* was moored was at Schlosser, a small landing point in the State of New York less than 5 kilometres upstream from the Niagara Falls, rather than Fort Schlosser, an old and abandoned American fort of the War of 1812 between the United States and Great Britain which was higher upstream from the falls.

(86) Contrary to the opinions expressed at first, it is not 12 persons that died during that night, but two: Amos Durfee, killed on the docks by a bullet in the head, and a cabin boy known as “Little Billy”, shot while trying to escape the *Caroline*. Two prisoners were made: an American citizen of 19 years old and a Canadian fugitive. Both were let go: the American with enough money to pay for the ferry back to the United States and the Canadian after spending some time in the guard room at Chippewa<sup>40</sup>.

(87) On January 5, 1838, President Van Buren sent a message to Congress to ask for full power to prevent injuries being inflicted upon neighbouring nations by unlawful acts of American citizens or persons within the territories of the United States and General Scott was sent to the frontier with letters to the Governors of New York and Vermont, calling the militias<sup>41</sup>. The rebels were dispersed, but some continued the struggle within secret societies called Hunters’ Lodges. This led to another short-lived rebellion in Canada in 1838, but it was harshly and swiftly dealt with. In Canada, the impact of these rebellions was the *Act of the Union* of both Canadas into a single province of the Dominion, attempting to assimilate French-Canadian to diminish the likelihood of another attempt. The impact on the relations of the United States and the British Crown was one where a true settlement of the North-eastern boundary had to be reached if war was to be averted<sup>42</sup>. While the facts of the incident could be made light of were it not for the death of two persons, they are nonetheless of much importance as the whole doctrine of anticipatory self-defence rest upon them.

(88) The legal argument concerning the case started with the note sent on January 5, 1838 by the American Secretary of State Forsyth to the British Minister at Washington, Fox, expressing surprise and regret for this incident and warning that this incident would be made the subject of a demand for redress. Mr. Fox replied by letter on February 6, 1838 and stated three defences for the actions of the British forces, namely: 1) the piratical nature of the vessel, 2) the fact that the ordinary laws of the United States were not being enforced at the time, and were in fact overtly overborne by the rebels and 3) self-defence and self-preservation<sup>43</sup>. This curt response to the American government marked an attitude of not taking the matter too seriously by the British Authorities. This exchange prompted the report of the Law Officers, but did not move the British Authorities to recognise any wrong-doing. This being judged unsatisfactory by the American government, the matter was brought up by the American ambassador in London, Stevenson, to the British Foreign Secretary, Lord Palmerston, who promised to look into the matter. The

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<sup>39</sup> *House Document no. 302*, 25th Congress, 2d session, serial 329, passim, cited in The Avalon Project at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm>.

<sup>40</sup> Jennings, *supra*, note 36 at 84, citing *N.S. Benton to Hon. John Forsyth*, Buffalo, February 6, 1938, H.Ex. Doc.302, 25<sup>th</sup> Congress, 2d session as well as a dispatch from Governor Head to Henry S. Fox.

<sup>41</sup> Moore, *supra*, note 32 at 920.

<sup>42</sup> The leaders of the rebellion were however well treated. Papineau remained in France until 1845, when the amnesty was proclaimed. He came back to Canada and served again in the legislature from 1848 to 1854. MacKenzie served an eighteen months prison sentence in the United States, returned to Canada in 1849 and served in the assembly from 1851 to 1858. Papineau was the grandfather of Henry Bourassa, the nationalist Premier of Quebec during the First World War while MacKenzie was the grandfather of William Lyon MacKenzie King, one of the most long-serving Canadian Prime Minister.

<sup>43</sup> Jennings, *supra*, note 36 at 85.

matter was indeed looked upon once more by the Law Officers. But their conclusion of March 25, 1838 and added to their report of February 21, 1838, was while the incident was regrettable, they felt that the actions of the British Authorities were absolutely necessary for the future and not retaliation for the past. As a result, they believed that the conduct of the British force had been, under the circumstances, justifiable by the Law of Nations. Arguments and reminders were made back and forth during the ensuing period, but none led to a satisfactory settlement of the question.

(89) Meanwhile, the relations between the two nations remained difficult. The local population at Buffalo seemed inclined toward retaliation and conflict was quite possible. Also, British nationals in the United States suspected of having taken part in the events of the *Caroline* were made to stand Juridical Examination on charges of participating in the attack. A man named Christie was arrested those charges on August 23, 1838<sup>44</sup>. The Queen's Advocate, seized of the case, counselled the British Minister in Washington, Fox, in a dispatch dated November 6, 1838, that such an arrest cannot hold due to the fact that the actions that Mr. Christie is accused of are acts of public persons obeying the orders of superior authorities. Therefore, Mr. Christie could not be held accountable for these acts even if he had taken part in them<sup>45</sup>.

(90) Following this, a Canadian deputy sheriff named Alexander McLeod boasted of his part in the events of the *Caroline* during a passage through Lewiston, New York, on November 12, 1840. Acting on his ill-advised words, the American authorities arrested him immediately on charges of the murder of Amos Durfee and arson in connection of the burning of the *Caroline*.

(91) On December 13, 1840, Fox addressed a note to Forsyth taking again the principles laid in the Christie case and by which public persons could not be held accountable for acts of governments. Forsyth replied that the arrest of McLeod was made by the authorities of the State of New York and therefore infringement by the Federal government in the state's sphere of jurisdiction would not be appropriate. It is important to recall that President Van Buren was a former governor of the State of New York and was vying for re-election at the time of the exchange between Fox and Forsyth. The argument about States' jurisdiction and Federal competences was one of the most sensitive political issues in the American Union at that precise moment. Martin Van Buren lost the elections and the new government of William Henry Harrison took a more pragmatic approach to the problem of relations with Great Britain from its inaugural ceremony on March 4, 1841. Apt Minister, Fox felt the change of Administration opportune to demand the release of Alexander McLeod and sent a demand on March 12, 1841 to the new Secretary of State, Daniel Webster, who took a more lenient view than his predecessor on the matter. Indeed, the Harrison administration was of the opinion that while the Constitution of the United States created very clear fields of jurisdiction, the Federal Government was the one concerned with foreign relations and as a result it is most apt to intervene with the State of New York and obtain the release of a foreign national. Webster replied on March 15, 1841 that the American government is guided by the opinion that an individual who acts as part of a public force cannot answer personally for those acts. This principle applied to criminal lawsuits as well as civil ones<sup>46</sup>.

(92) Nonetheless, a last hurdle had to be crossed before McLeod could be released: that of judicial process. Since McLeod was accused and confined by reason of judicial process, he could only be released in this manner, this meaning that he had to be brought to courts so the prosecutor could enter a plea of *nolle prosequi* – no prosecution. Webster addressed a letter to Fox on April 24, 1841 explaining that while

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<sup>44</sup> *Ibid.*, at 92.

<sup>45</sup> *Ibid.*, p. 93.

<sup>46</sup> *Ibid.*, p. 93-94.

the laws of Great Britain permitted the prosecutor to enter this measure of *nolle prosequi* at any time during procedure, the laws of the State of New York only permitted this during sessions of the court.

(93) This displeased Fox immensely as he pointed out that the whole point was not that McLeod be found not guilty but that he is not judged at all. Still, the Supreme Court of New York refused leave to enter a *nolle prosequi* and also refused a writ of *habeas corpus*. The only manner in which the court could see this done was by trial by jury. The trial of *The People v. McLeod* took place and no evidence of McLeod's participation could be brought to court. He was acquitted in October 1841<sup>47</sup>.

(94) This long delay of releasing McLeod and the still precarious relations between the North American neighbours led Great Britain to send a Special Minister to Washington to negotiate both issues in the person of Alexander Baring, 1<sup>st</sup> Baron of Ashburton. During the course of their negotiations, both he and Secretary of State Webster exchanged a number of letters that formed the root of anticipatory self-defence.

(95) The first such recorded instance is in the letter of July 27, 1842 where Webster expresses the notion that the principle of non-intervention is of a salutary nature and that simple neutrality is not sufficient for the government of the United States<sup>48</sup>, and that it has therefore actively sought to prevent injury to Great Britain in its North American Provinces<sup>49</sup>. Webster position therefore was that since the United States had respected its obligation under the Law of Nations, it was for Great Britain to justify its actions by demonstrating a :

**“necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.** It will be for it to show, also, that the local authorities of Canada,- even supposing the necessity of the moment authorized them to enter the territories of the United States at all,-did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be strewn that admonition or remonstrance to the persons on board the "*Caroline*" was impracticable, or would have been unavailing; it must be strewn that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror.”<sup>50</sup>

(96) It was clearly the belief of Webster that Ashburton could not demonstrate this and that the terms were too strict to be interpreted in such a way as to justify the British actions, therefore preparing the way for reparations to be given to the United States. In this, he was sorely disappointed with the ingenious

<sup>47</sup> *The People v. McLeod*, 1 Hill (N.Y.) at 375.

<sup>48</sup> *Letter of Secretary of State Daniel Webster to Special Minister Ashburton*, dated 27 July 1842, reproduced at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm>

<sup>49</sup> Moore, *supra*, note 34 at 920. Those active measures are indeed numerous even though they have failed to reign in American support. They included the issuing of warrants to be served by Marshals of the United States for arrest of persons aiding and abetting rebels, the dispatching of collectors of customs to help the marshals, the placing of revenue cutter *Erie* at the disposal of the collector of Buffalo for the purpose of seizing any vessel carrying arms, ammunition or nay supplies to help forces against the Canadian government as well as statements of intention by the Federal government to remain neutral and decline to help the rebels.

<sup>50</sup> *Letter of Secretary of State Daniel Webster to Special Minister Ashburton*, *supra*, note 48.

response of Lord Ashburton in his letter of July 28, 1842. Ashburton assented to the conditions presented by Webster as general principles of international law applicable to the case. He fully recognised the inviolability of the territories of independent nations for the maintenance of peace and order amongst nations. **However, he adds that there are occasional practices, including that of the United States, where this principle may and must be suspended.**

(97) Ashburton sets such instances as those where, for the shortest possible time and due to an overruling necessity and within the narrow confines of such a necessity, self-defence may be invoked. He firstly states that **self-defence is the first law of nature and is recognised by every code that regulates the condition and the relations of man.** Doing so, he recognises fully the general principles laid down by Webster and set his argument upon them but establishes a difference between expeditions across national border and the case of the *Caroline*. He presents the example of a situation where a man standing on grounds where you have no legal rights to chase him presents himself with a weapon long enough to reach you. He then asks how long one is supposed to wait when he has asked for succour and asked for relief and none are forwarding. By doing so, he recognised the efforts made by the United States to prevent American taking part in the Canadian rebellion, but underlines the inefficiency of its attempts<sup>51</sup>.

(98) Furthermore, Ashburton includes in his version of the events that the initial efforts to capture the *Caroline* was to seize her in British waters at Navy Island, and not on the American side but that since the orders of the rebel leaders were disobeyed, the *Caroline* went, docked and was moored at Schlosser point. It is only as he passed the point of Navy Island that Commander Drew did not see the ship there but on the American shore and that pursuant with his mission forged ahead. This statement addressed the question by which **not a moment was left to deliberation, that the expedition was not planned with the intent of invading** American territory from the outset by those circumstances and that the necessity of preventing the rebels from further use of the ship as a mean of invasion overwhelmed the normal respect of national territory<sup>52</sup>.

(99) Having recognised the general principles and explained the particulars of the overwhelming immediacy of the decision, Ashburton then turns toward the notion of necessity to answer the claims of Webster that nothing could justify the attack in the middle of the night against men asleep, killing and wounding some, then drawing the ship into the current, setting her on fire and letting her adrift into the current to be destroyed in the falls without knowing if guilty or innocents were on board.

(100) Ashburton responded that the time of the night was purposely selected to ensure that the mission would result in the least loss of life possible and that it is the strength of the current that did not permit the vessel to be carried off to the Canadian side. For this reason, it became necessary to set her on fire and drawn into the stream to prevent injury to persons or property at Schlosser<sup>53</sup>. He finishes the letter by

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<sup>51</sup> Curtis, R. E., "The Law of Hostile Military Expedition as Applied by the United States, II", (1914) 8 *AJIL* 224 at 242: "It was in part the failure of the United States that justified the destruction of the *Caroline* in American waters by the British forces."

<sup>52</sup> *Letter from Special Minister Ashburton to Secretary of State Webster*, dated 28 July 1842, reproduced at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm> : "It appears from every account that the expedition was sent to capture the *Caroline* when she was expected to be found on the British ground of Navy island, and that it was only owing to the orders of the rebel leader being disobeyed, that she was not so found. When the British officer came round the point of the island in the night, he first discovered that the vessel was moored to the other shore. He was not by this deterred from making the capture, and his conduct was approved. But you will perceive that there was here most decidedly the case of justification mentioned in your note, that there should be "no moment left for deliberation". I mention this circumstance to show also that the expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of the United States, but that the necessity of so doing arose from altered circumstances at the moment of execution."

<sup>53</sup> *Idem*.

recognizing that Her Majesty's Government should have apologised nonetheless for the matter, but that it does not make it wrongful in itself. And further continues to support that the treatment of individuals made personally responsible for acts of government was as unacceptable.

(101) Webster responded to this note on August 6, 1842. In his letter, he further reaffirms the criterion laid in his letter of July 27 and while agreeing with the matters of apologies still recognised the general principles debated but still did not corroborate the facts of the case. Nonetheless, satisfied with the apologies, the President stipulated through Webster that this matter would not be brought forward again<sup>54</sup>.

(102) As a result the affair of the *Caroline* in 1837 and the subsequent case of *The People vs. McLeod* have established principles now firmly entrenched in *ius ad bellum* and *ius in bello*. In the case of the laws of armed conflicts, McLeod's case has confirmed the separation between public acts and individual responsibility. With regards to the right to use force in international law, the affair of the *Caroline* case has once again confirmed the right of self-defence and, more importantly, has established clear criterion for its invocation and that of anticipatory self-defence.

(103) **THE CONTINUITY OF THE DOCTRINE.** The right of self-defence has been invoked countless times since this affair; sometimes rightfully, many times as an excuse for aggressive actions. But there is no denying that the right of self-defence has existed prior to this affair and exists since. The difference is that there existed no international institution with a mandate to limit the use of force and to determine whether there existed circumstances to invoke the right of self-defence<sup>55</sup>. The *Covenant of the League of Nations* changed this state of affairs as it introduced not only a notion preventing the use of aggression at its article 10<sup>56</sup>, but also organs whose function were to determine and adjudicate on the right to use force<sup>57</sup>. The League of Nations obviously failed in its attempt to regulate the use of force and the International Military Tribunal for major war criminals in Europe was provided with a test case for anticipatory self-defence.

(104) Despite a treaty of non-aggression between Denmark and Germany on May 31<sup>st</sup>, 1939 and a solemn assurance given to Norway on September 2, 1939 to respect their neutrality and inviolability, the Third Reich's armed forces invaded both countries on April 9, 1940. The responsibility for these invasions was laid at the feet of Admirals Raeder and Dönitz as well as *Reichsleiter* Rosenberg, in charge of the Foreign Affairs Bureau of the NSDAP<sup>58</sup>. The defence made by the accused was that of preventive action.

<sup>54</sup> Resulting in the *Webster-Ashburton Treaty* of 1842, see The Avalon Project, *supra*, note 39. It must be remembered that President Harrison died of pneumonia on April 4, 1842, 30 days after his inauguration. Vice-President John Tyler was sworn in as President on April 6, 1842 and adopted a more conciliatory approach with Great Britain.

<sup>55</sup> Waldock, C.H.M., "The Regulation of the Use of Force by Individual States in International Law", (1952) 81 *Recueil des Cours de l'Académie de Droit International* 451 at 456-457.

<sup>56</sup> *Covenant of the League of Nations*, L.N.T.S. 1 at article 10: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

<sup>57</sup> Kervarec, G., "L'intervention d'humanité dans le cadre des limites au principe de non-intervention", (1998) 32 *Revue juridique Thémis* 77 at 81.

<sup>58</sup> Judgement concerning *The Invasion of Denmark and Norway*, International Military Tribunal, Nuremberg, reproduced at <http://www.yale.edu/lawweb/avalon/imt/proc/juddenma.htm>: "On the 3rd October, 1939, Raeder prepared a memorandum on the subject of 'gaining bases in Norway,' and amongst the questions discussed was the question: 'Can bases be gained by military force against Norway's will, if it is impossible to carry this out without fighting' " (...) three days later, further assurances were given to Norway by Germany, which stated: 'Germany has never had any conflicts of interest or even points of controversy with the Northern States, and neither has she any to-day.' (...) Three days later again, the defendant Doenitz prepared a memorandum on the same subject, (...) On the 10th October, Raeder reported to Hitler the disadvantages to Germany which an occupation by

(105) The Court fully rejected this based on the words of the exchange of letter between Webster and Ashburton during the negotiations concerning the *Caroline*. Based on the notion of such self-defence being justified only in cases where “an instant and overwhelming necessity for self-defence leaving no choice of means, and no moment of deliberation” exist, the Court rejected the contention that the wars with Norway and Denmark were defensive in nature and not acts of aggression<sup>59</sup>. The preparatory nature of the actions taken by the German Reich against the Kingdoms of Denmark and of Norway, involving military considerations and planning as well as political and covert subservience of governments clearly indicated that the German government was ready and prepared to use force while professing intention of peace. Therefore, the right of preventive action to justify a war and the occupation of a country was flatly rejected by an international court on the basis of Anglo-Saxon generally, and American particularly, jurisprudence.

(106) **THE EFFECT OF THE CHARTER OF THE UNITED NATIONS.** While the war provided examples, political and legal development during the war led to the creation of a new international legal standard through the United Nations. The initial United Nations of 1942 were 26 countries united in their fight against the Axis by a joint declaration signed in Washington on January 1, 1942. They stood against savage and brutal forces seeking to subjugate the world. As the war was fought and won, it further developed into a more structure organisation seeking to prevent the scourge of war from being inflicted upon humanity once more. From August 21 to October 7, 1944, a growing membership met at Dumbarton Oak for a conference aiming at the *Establishment of a General International Organization under the title of the United Nations*. The instrument it created, the *Charter of the United Nations*, stipulated a prohibition of the right to use force in international relations, providing only two exceptions: the right of self-defence and collective security actions.

(107) The case for collective security actions arises only under article 42, where the Security Council has determined a situation to be a threat to international peace and security under article 39<sup>60</sup>, does not

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the British would have. In the months of October and November Raeder continued to work on the possible occupation of Norway, in conjunction with the "Rosenberg Organisation." (...) Early in December, Quisling, the notorious Norwegian traitor, visited Berlin and was seen by the defendants Rosenberg and Raeder. He put forward a plan for a coup d'état in Norway. On the 12th December, the defendant Raeder and the naval staff, together with the defendants Keitel and Jodl, had a conference with Hitler, when Raeder reported on his interview with Quisling, and set out Quisling's views. On the 16th December, Hitler himself interviewed Quisling on all these matters. In the report of the activities of the Foreign Affairs Bureau of the NSDAP for the years 1933-1943, under the heading of "Political preparations for the military occupation of Norway," it is stated that at the interview with Quisling Hitler said that he would prefer a neutral attitude on the part of Norway as well as the whole of Scandinavia, as he did not desire to extend the theatre of war, or to draw other nations into the conflict. If the enemy attempted to extend the war he would be compelled to guard himself against that undertaking; however he promised Quisling financial support, and assigned to a special military staff the examination of the military questions involved. (...) On the 27th January, 1940, a memorandum was prepared by the defendant Keitel regarding the plans for the invasion of Norway. (...) On the 28th February, 1940, the defendant Jodl entered in his diary: "I proposed first to the Chief of OKW and then to the Fuehrer that 'Case Yellow' (that is the operation against the Netherlands) and Weser Exercise (that is the operation against Norway and Denmark) must be prepared in such a way that they will be independent of one another as regard both time and forces employed." (...) On the 1st March Hitler issued a directive regarding the Weser Exercise which contained the words: "The development of the situation in Scandinavia requires the making of all preparations for the occupation of Denmark and Norway by a part of the German Armed Forces. This operation should prevent British encroachment on Scandinavia and the Baltic; further, it should guarantee our ore base in Sweden and give our Navy and Air Force a wider start line against Britain . . . The crossing of the Danish border and the landings in Norway must take place simultaneously . . . It is most important that the Scandinavian States as well as the Western opponents should be taken by surprise by our measures." (...) On the 24th March, the naval operation orders for the Weser Exercise were issued, and on the 30th March the defendant Doenitz as Commander-in-Chief of U-boats issued his operational order for the occupation of Denmark and Norway. On the 9th April, 1940, the German forces invaded Norway and Denmark.

<sup>59</sup> *Ibid.*, in fine.

<sup>60</sup> *Charter of the United Nations*, *supra*, note 25 at article 39 : "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in

concern the case of self-defence, therefore the only concern for this essay is the exception of article 51.

(108) The question that arises from article 51 is to know when the right of self-defence begins. Its wording speaks of “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”<sup>61</sup>. From this, the explicit recognition of the right to self-defence as affirmed in the *Caroline* affair is recognised as inherent to a State. But this right is conditional to the occurrence of an armed attack.

(109) Some commentators have argued that the expression “an armed attack occurs” must be construed in the contemporary international and technological context of limited reaction time. In particular, there is a growing tendency amongst American jurists to support exceptions to the principle of non-intervention because of failures of government to act on their international obligation, a need for protecting civilians against terrorist attacks and a need to uphold their sovereignty by striking first against those who menace the international community<sup>62</sup>. Those changes are not new.

(110) Twenty years ago, Dr. Polebaum published an article arguing for a broad interpretation of article 51 to include the right of anticipatory self-defence on the basis that technological advances in nuclear armaments and their means of delivery made a case for a policy of first strike<sup>63</sup>. She presented three criterions to be respected on the basis of the *Caroline*.

(111) Firstly, all alternative means must have been exhausted by attempting to avert war or the threat of war until it is unavoidable and immediate. Secondly, the exercise of the anticipatory right of self-defence must be proportional to the provocation. She defined this as “alternatively as either inflicting no more damage than that inflicted by the initial injury of the offending state, or as remaining within the confines of moral notions of human rights”<sup>64</sup>. Finally, there is a need to demonstrate the immediacy of the threat<sup>65</sup>.

(112) To support the application of these criterion in the contemporary context, she asserted that the broader interpretation of article 51 is far more convincing than a restrictive view because, according to her interpretation, the *Charter* of the United Nations was drafted in a way as to either expressively prohibit a behaviour or to preserve rights. Since article 51 states that nothing shall impair the right to self-defence and that there is no prohibition expressively stated on the matter of anticipatory self-defence, it cannot be said to have been extinguished by the *Charter*<sup>66</sup>.

(113) She argued that the French version of the *Charter* is more carefully drafted than the English one and that the expression “agression armée”, instead of “armed attack”, permits anticipatory self-defence in response to threats of the use of force as an aggression can exist separately from armed attack<sup>67</sup>. She continued by saying that the silence of the *Charter* on the matter of anticipatory self-defence should create a presumption of its existence in international law. Finally, she declared that even if the intention of the

accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>61</sup> *Ibid.*, *supra*, note 4 at article 51.

<sup>62</sup> Murphy, S.M., “Contemporary Practice of the United States: US Adoption of New Doctrine on the Use of Force”, (2003) 97 *AJIL* 203 at 204-205.

<sup>63</sup> Polebaum, B.M., “National Defense in International Law: An Emerging Standard for a Nuclear Age”, (1984) 59 *New York University Law Review* 187 at 200.

<sup>64</sup> *Idem.*

<sup>65</sup> *Idem.*

<sup>66</sup> *Idem.*

<sup>67</sup> *Ibid.*, at 202.

drafters had been to prohibit the use of anticipatory self-defence, such a prohibition would be meaningless today as advancement in weaponry have made immediacy paramount to other concerns<sup>68</sup>. These arguments have been taken in many forms since but have always been rejected by the international community and for good juridical reasons.

(114) Concerning the argument of the French version of the Charter of the United Nations, this interpretation was clearly erroneous. The expression “agression armée” in French is as restrictive as “armed attack” in English. The etymology of the French word aggression comes from the Latin *aggredi*, which translates into the verb “to attack”. While an aggression may be verbal or physical, the expression “agression armée” clearly indicates the physical form: no verbal aggression is equipped with a weapon<sup>69</sup>.

(115) The rejection of the subsequent arguments is also based on proper juridical sense. Article 51 does write expressively that an armed attack must occur. This has been interpreted as situation where an “armed attack has begun or is about to begin”<sup>70</sup>. Even the question of the existence of a customary right has been answered in the *Corfu channel* and the *Nicaragua* cases<sup>71</sup>. As such, it has been found that the right of self-defence was to be narrowly interpreted.

(116) In *Nicaragua*, the United Nations’ *Definition of Aggression* provided the foundation to establish the threshold for an armed attack and of the *Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*<sup>72</sup>. The Court concluded that self-defence could not be invoked if the threshold of actual armed attack was not reach. In the *Nicaragua* case, the provision of weapons and ammunition to El Salvador rebels by Nicaragua was not sufficient to reach that threshold. Therefore, it is clear that the words “an armed attack occurs” speak of the actual commencement of physical violence by armed forces. This has been further restated in the *Oil Platform* case, where the United States pleaded self-defence to justify its use of force against Iranian oil platforms

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<sup>68</sup> *Idem*.

<sup>69</sup> Éditions Larousse, *Le petit Larousse*, Larousse, Paris, 2003 at 47.

<sup>70</sup> Murswiek, D., “The American Strategy of Preemptive War and International Law”, *Albert-Ludwigs Universität Freiburg, Institute of Public Law*, March 2003, at <http://www.jura.uni-freiburg.de/ioeffr3/papers/papers.htm>.

<sup>71</sup> *Corfu channel case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4 and *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, [1986] I.C.J. Rep. 14. In the case of Nicaragua, the court addressed the issue of the extent of the customary right viz that of treaty law and came to the conclusion that there was not a disparity permitting an extension of the interpretation of the concept of self-defence. See O’Connell, M.E., “The Myth of Preemptive Self-Defence”, *The American Society of International Law, Task Force on Terrorism*, August 2002 published at <http://www.asil.org/taskforce/index.htm>. See also Farer, T.J., “Nicaragua v. United States (Merits)”, (1987) 81 *AJIL* at 113: “... anything other than a high and conspicuous threshold between an armed attack justifying the exercise of self-defence and lesser forms of intervention that transiently threaten freedom of choice but not the long-term territorial integrity or political independence of the state, would invite internationalization of essentially civil conflicts.” These cases are therefore not self-defence but intervention.

<sup>72</sup> *Definition of Aggression*, GA Res. 3314, UN GAOR, 29<sup>th</sup> Sess., Supp. No. 31, UN Doc. A/9631 (1974). Article 3 provided clear cases : “Article 3 Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (...) (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. ”. This was interpreted in conjunction with the *Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 25<sup>th</sup> Sess., Supp. No. 28, UN Doc. A/8028 (1970), especially with regards to the *Principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations* and the *Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter*.



following missile attacks by Iran on its ships the Persian Gulf<sup>73</sup>. But as the court pointed out, However, it is true that this does not address the issue of when an attack is about to begin.

(117) There appears to be a very limited right for States to anticipate self-defence that would set the beginning of an attack to a period of time prior to actual physical hostilities. This type of situation is based on the criterion of the *Caroline* affair. But such a right can only be invoked in situations of convincing and overwhelming evidence of an attack being mounted. The evidence must be so clear as to leave no doubt that it is about to occur even if it is still in the territory of another State<sup>74</sup>. In the facts of the *Caroline*, the decision of Commander Drew to cross into American territory to accomplish his mission was based upon a change in circumstances. Only because he was already engaged in his activities did he contravene the principle of non-intervention. Therefore, the criterion of immediacy and necessity must be based upon the very fact that there is no other course available to prevent the threat from being executed. By nature, this excludes planning.

(118) In conventional warfare, this is clearly the case when an invasion force is discovered and a counter-attack is made to prevent it from gaining the advantage of surprise, although it is clear that only tactical surprise may be recovered since strategic surprise has been lost as well as initiative. In the case of nuclear warfare, the signs of preparedness would have to be so overwhelming and generalised that only the definitive intention to use them would logically explain the actions being undertaken. The fuelling of one missile or even of a region's missiles would hardly be enough to justify an attack on the basis of anticipatory self-defence as no country would use a limited amount of nuclear weapons on a first strike: this would leave it open to utter destruction upon a retaliatory strike. Only a full force first strike can give a glimmer of hope to the attacker and that glimmer is much more likely to take the form of giant balls of exploding gases.

(119) In fact, with respect to the criterion of the *Caroline*, very few cases of anticipatory self-defence can be made. Some have stated that the case of the 1967 Six-Days War between Israel and the Arab countries surrounding it is a clear case of self-defence. Israel attacked Egyptian airfields in what it claimed to be an anticipatory self-defence manner. It was clearly stated by numerous governments of Arab countries that they were intended upon the destruction of Israel and that a military alliance existed. But this situation goes more into one of actual belligerency than that of anticipatory self-defence<sup>75</sup>. Israel struck first to gain the initiative as well as the strategic and operational surprise. War already existed *de facto* if not *de jure*. In a war, the choice of the moment of attack is simply a matter of military expediency. And this case was mostly so. At best, the value of the Six-Days War as a test case is arguable.

(120) As for the American bombing of Tripoli in 1986, it hardly meets the tests of necessity and immediacy set forth in the *Caroline*. There may have been a necessity for sending a strong message to Libya for continuous support of terrorism and the killing of US service personnel in a Berlin discotheque, but this is retaliation, not self-defence. There is no value trying to justify a doctrine of anticipatory self-defence in what is clearly an act of vengeance and an assassination attempt. The bombings were strongly criticised by the international community and no support of State practice can be found in this instance<sup>76</sup>.

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<sup>73</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ, judgement of 6 November 2006.

<sup>74</sup> O'Connell, *supra*, note 71 at 8 and 9, citing Waldock, *supra*, note 55 at 498.

<sup>75</sup> Reisman, M.W., "Assessing Claims to Revise the Laws of War", (2003) 97 *AJIL* 82 at 87.

<sup>76</sup> Beard, J.M., "America's New War on Terror: The Case for Self-Defense in International Law", (2002) 25 *Harvard Journal of Law and Public Policy* 2 at footnote 93.

(121) The case that is most interesting with regards to anticipatory self-defence is that of the Osirak nuclear reactor in Iraq in 1981. Some argue that the weight of evidence and the stated intention of Iraq to use it only against Israel make for a compelling argument to justify its destruction. Yet, the Security Council and the world at large condemned the Israeli raid<sup>77</sup> – even though subsequent actions of the Iraqi regime during the 1991 Gulf War have vindicated claims of both the proponents and opponents of this raid<sup>78</sup>. But, under the eye of the criterion established in the *Caroline* case, was there a case for necessity and for immediacy? The answer is absolutely negative.

(122) The existence of a potential right of anticipatory self-defence can be supported. But such a right can only be invoked to support actions in reaction to a first use of force or a clear and imminent threat of such use. In the Osirak case, Iraq was clearly not within a month or even a year of completing a nuclear weapon. Nothing could have prevented Israel from going through the Security Council to address this issue. Evidently, the Security Council would have been deadlocked and Israel would have been caught at its starting point, but then, it would have exhausted all alternative recourses and would have been justified to meet the criterion of the *Caroline* and destroy the reactor.

(123) The simple fact is that anticipatory self-defence has extraordinarily harsh criterion to meet for the simple reason that otherwise it becomes a very convenient vehicle to justify any action supporting national interests against those of the international community.

(124) There is no reason to change the criterion established more than a century and a half ago. They remain absolutely valid. The existence of a right to anticipatory self-defence can be established and there certainly are clear and imminent dangers that must be pre-emptively addressed. But they must be so addressed within the strict and narrow confines of the exhaustion of all alternative means, the necessity of its actions being established by the immediacy of the danger, and must be proportional to the threat. Regardless of the excuses given so far toward the extension of this right, none have either been conclusive or even remotely convincing. None have been accepted so far by the international community and certainly none should be. Which leads the analysis of this concept of anticipatory self-defence toward its latest leap: the Bush Doctrine.

(125) The Bush administration is currently trying to adapt the concept of immediacy to that of mere possession of weapons of mass destruction to justify intervention. It proposes to change international law very rapidly by the weight of practice and *opinio juris*<sup>79</sup>.

(126) This is very efficient because it uses the doctrine of anticipatory self-defence to have a theory of pre-emptive self-defence recognised in international law. The difference is not evident at first, but becomes very important due to its scope and implications. As we have seen, the doctrine of anticipatory self-defence is one that is punctual, answering the threat of the moment immediately.

(127) The theory of pre-emptive self-defence is a much wider concept, aiming at eradicating the source of the problem. The whole theory of regime change is based upon this approach but is neither recognised

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<sup>77</sup> Glennon, M.J., “The fog of law : Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter”, (2002) 25 *Harvard Journal of Law and Public Policy* 539 at 552.

<sup>78</sup> The Scud missiles used by Iraq against Tel Aviv certainly vindicate the hostility of Iraq toward Israel. However, it vindicates also the view that while a Nuclear, Bacteriological or Chemical capacities may have been available to Iraq, it did not use any during the conflict against Coalition forces nor against Israel.

<sup>79</sup> Murswiek, *supra*, note 70 at 10.

nor even remotely assented as being somehow part of international law<sup>80</sup>.

(128) **CONCLUSIONS** The destruction of the *Caroline* and the *McLeod* case that resulted from it have confirmed the existence of a right to anticipatory self-defence in international law in the 19<sup>th</sup> century. The criterion laid in the exchange of letters between the American Secretary of State Webster and the British Special Minister, Lord Ashburton, leading to the Webster-Ashburton Treaty, has clearly established the use of such a right and the very strict and narrow confines within which it can be invoked.

(129) This right has been invoked at the end of the Second World War as a defence and rejected on the weight of evidence proving it to be inapplicable in the cases of the invasions of Norway and Denmark. It has further been argued in post-*Charter* time without any measure of success. In fact, there appears to be no clear example meeting the requirements expressed in the affair of the *Caroline* since the adoption of the *United Nations Charter*. The cases presented as examples for its application are arguable at best and disingenuous misrepresentations in some cases.

(130) The argument that there has been a substantial change in circumstances since 1837 has not been proven nor even remotely established. No case has demonstrated the need for necessity, proportionality immediacy and the exhaustion of all recourses to justify its use. Not even the American invasion of Afghanistan, though sanctioned by the United Nations, represents a case of anticipatory self-defence. It is no doubt a case of self-defence, but one of continuing self-defence after being victims of a terrorist attack, in respect of article 51 of the *United Nations Charter* and supported by United Nations resolutions. As for the invasion of Iraq, it has nothing to do with anticipatory self-defence but rather is the result of a doctrine of pre-emptive self-defence, which has neither basis nor support in international law.

(131) There is no indication of the extinction of the concept of anticipatory self-defence in international law. However, it is to deceive on the basis of a misconception of international law to contend that such a concept supports a doctrine of pre-emptive self-defence and authorises to invade a country. For this, a government may invoke other reason, but anticipatory self-defence is not a broad concept that permits such an interpretation.

#### **CHAPTER'S CONCLUSIONS**

(132) War is therefore first a state of facts, sanctioned then by legal means, not the opposite. It can exist *de jure* (by law), but only after its existence *de facto* (in facts).

(133) This state of facts covers the whole spectrum of conflicts, whether they are formally declared war or any other type of conflict, as soon as there is a threat to the territorial integrity or political independence of a state.

#### **SUMMARY OF TERMS**

**Auxiliary Sources of International Law (interpretative): jurisprudence and doctrine.**

**Conventions:** treaties by which states codify the legal norms.

<sup>80</sup> Reisman, *supra*, note 75 at 87. In fact, as Pr. Reisman points out, this may well backfire as regimes are then set upon acquiring weapons of mass destruction to protect themselves and will try harder until they succeed.

**Customs:** traditions that become, through **continuous practice** in time and **generalized practice of states**, the legal norms that states believe they have to *obey (opinio juris)*.

**Doctrine:** writings, often philosophical, that attempt to codify or modify the legal norms. They can define or attempt to modify the custom or serve as the basis of codification in conventions. Since the LOAC rest essentially on religious or psychological concepts to affirm humanitarian consideration and the sense of honour, they provide grounds for the development of law.

**International Humanitarian Law (Geneva Stream):** regulates the protection of the victims of armed conflicts.

**Jus cogens:** an imperative legal norm of international law. This kind of norm is deemed so important and recognized by states that it is understood by the international community that it cannot be breached under any circumstances. It can only be modified by a new norm.

**Laws of war (Hague Stream):** regulating the **conduct** and **means** of hostilities.

**National sources of the LOAC: laws promulgated by a country** with regards to armed conflicts (i.e., Military Codes of Conduct, National Defence Act, Queen's Regulations and Orders: Volume 2: Discipline)

**Principal Sources of international law: customs, conventions, and general principles of law.**

## CHAPTER 2

### OBLIGATIONS RELATIVE TO PERSONS : PART 1

#### INTRODUCTION

The LOAC forces one to comply with many types of obligations. Those which we will see in the next two Chapters pertain to one of the most fundamental reasons why the LOAC exist: the protection of persons during a time of conflict. These obligations demand that we determine the legal status of a person and thus his/her rights and obligations. We will examine the notion of combatant versus non-combatant. This is the central issue of the LOAC which you must master as it is essential to applying the LOAC.

#### CONTENT

- a. the concept of combatant and the status of Prisoner of War (PW);
- b. the interdiction of attacking civilians;
- c. the interdiction of attacking persons dedicated to the medical, sanitary, civilian or religious protection of victims of an armed conflict;
- d. the interdiction of attacking persons *hors de combat*.

#### OPTIONAL READING

- Herczegh, G., “The Extension of the Notion of Combatants in the Light of the first Geneva Protocol of 1977”, in *European Seminar on Humanitarian Law*, Krakow, Jagellonean University, 1979, pp. 47-60.
- *US v. Lt William L. Calley*, U.S. Court of Military Appeals, 21 December 1973.
- *Regina v. Finta*, 1 R.C.S. (1994).

#### A. THE CONCEPT OF COMBATANT AND THE STATUS OF PRISONER OF WAR (PW)

(134) With the evolution of war to “total war,” whereby all sectors of human activity including human resources as such are focused upon contribution towards the war effort, armed conflicts have blurred the distinction between combatants and non-combatants. This blurring has profound impact on the LOAC, since this precise distinction between combatants and non-combatant is its foremost rule.

(135) Before the eighteenth century it was relatively easy to determine the legal status of a person, since powers could only field a definite quantity of personnel and resources in order to settle their disputes. This changed radically with Napoleon’s Spanish Campaigns (1808-09). To stop the threat that the Emperor created by placing the Crown of Spain upon his brother’s head, naming him regent, Great Britain dispatched an expeditionary contingent under the command of Wellington to defeat the French on the Continent. Wellington, to supplement his forces’ limited manpower, gladly accepted the voluntary help of the Spanish civilian population by way of irregular warfare consisting mainly of small raids on French encampments and supply lines. These civilians, these *guerrilleros*, participated in the conflict without having a legal right to do so, since the laws of war applicable at the time did not recognize a legitimate status of combatant for persons not belonging to an armed force. As a result, they paid a hefty price, since Spaniards were often executed on the spot if captured in an engagement (and as the conflict dragged on, outside of engagements).

(136) The line between combatants and non-combatants therefore needed to be set clearly. Combatants could take part in hostilities, while non-combatants could not. However, this definition of a combatant was very restricted and rested on the customs and usages of war. The first legal definition of a combatant did not appear until 1977 in the *Additional Protocol I* (AP 1), under arts. 43 and 44/AP 1. Its evolution, however, predates the Protocol and goes as follows:

- a. The *Hague Conventions of 1899 and of 1907*; arts. 1, 2, and 3 of the *1907 Hague Convention* recognized only members of armed forces and cases of **levée-en-masse**;
- b. the *1949 Geneva Conventions* (GC 1949); see paragraphs (common) 1, 2, 3, and 6 of article 13/GC I, 13/GC II, and 4A/GC III, that extend the notion of combatant to members of militias, resistance movements, and to population rising spontaneously upon the approach of the enemy (*levée-en-masse*). See also art. 30/GC II: it is the only text of the whole GC 1949 to cite the term “combatant”<sup>81</sup>; and
- c. the *Additional Protocols (1 and 2) of 1977*<sup>82</sup>: this first modern definition of a combatant is finally recognized to include cases of national wars of liberation and dissident forces. The notion of “armed forces” is enlarged to comprise:
  1. All combatants of the armed forces as “organically” construed, including: regular forces personnel, special forces deployed in surprise operations and, during extremely violent operations, volunteers, reservists, constabulary (i.e., RCMP in Canada, CRS in France, etc.), police forces, and any other paramilitary organizations “organically incorporated” in the armed forces of a State. However, in the case of constabularies and police forces, their designation as combatants is not automatic. It is only applicable if they have been officially put under the authority of the armed forces. For example, the RCMP is not as such included in this definition but could be if it were put under the authority of the Department of National Defence. Otherwise, *Mounties* would not be considered as combatants, but as police officers;
  2. If such incorporation is made, notification must be made to all belligerents, as stated by art. 43(3)/AP 1;
  3. This combatant status includes all members of the armed forces of a state, independently of their role, whether it is administrative or combat, with the exception of religious and sanitary personnel. As we will see below, these members of the armed forces are not combatants. They benefit from a double status: first, the inviolability of their persons and, second, the privileges of the PW status if they are captured and not returned to their countries.

(137) As stated, combatant status applies to civilians taking part in a *levée-en-masse* and to members of **resistance movements**. Concerning the *levée-en-masse*, when the population spontaneously takes part in the hostilities on approach of the enemy, they become combatants at the precise moment when they pick a weapon or commit a hostile act. However, once the engagement is over and the enemy has occupied the territory successfully, they cannot continue to fight (art. 4A(6)/GC III). In order to acquire the status of combatants, they must:

- a. take arms spontaneously at the approach of the enemy, without preparations and without having

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<sup>81</sup> The *Geneva Conventions*, *supra*, note 24.

<sup>82</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978 and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

had time to constitute themselves into regular units ;

- b. carry arms openly in a visible manner; and
- c. respect the laws and customs of war, meaning the customs and traditions of war.

(138) As for members of **resistance movements**, they are combatants conducting hostilities outside their national territory, including their own occupied national territory (art. 4A(2)/GC III). They acquire the status of combatants only if they:

- a. are commanded by a person responsible for the action of his/her subordinates (therefore following a disciplinary code);
- b. have a fixed distinguished sign recognizable at a distance;
- c. carry arms openly; and
- d. respect the laws and customs of war during their operations.

(139) Due to the fluid character of combats in those situations, it is recognized that some particular operations may not permit the respect of all the requirements enumerated above (as art. 4(A)(2)/GC III stipulated). In those situations, to retain their status of combatant they must then respect the requirements of art. 44(3)/AP1, that is, to:

- a. carry arms openly *during each military engagement*; and
- b. carry arms openly *as soon as visible to the enemy*, **including** during their deployment in preparation to a military operation.

(140) But why learn the difference between a combatant and a non-combatant? Aside from the obvious distinction, that one has the right to take part in the hostilities and the other one does not, there are tremendous advantages (and disadvantages) in having the status of combatant since it:

- a. Permits the person to take an active part in the hostilities (art. 43(2)/AP 1); and
- b. Confers the status of **Prisoner of War (PW)** upon capture (art. 44(1)/AP 1).

(141) The right to take part in hostilities also gives the right to forfeit this privilege. Therefore, a combatant who has lawfully engaged in a military operation can become a **combatant hors-de-combat (out of action)** (art. 3(1)/GC III), in which case he can no longer be attacked (art. 3(2)/GC III). One becomes a **combatant hors-de-combat** only if he abstains from hostile acts (including evasion) when:

- a. captured;
- b. clearly expressing the intention of surrender;
- c. and/or unconscious or rendered incapacitated and therefore unable to further participate in

hostilities due to wounds or sickness, thus becoming unable to offer any measure of self-defence.

(142) As for the right of Prisoner of War (PW), it lends important privileges. First, a PW is not a “prisoner” as understood under the criminal code of a country. It is a combatant fallen to the authority of a foreign power under the terms of art. 4A/GC III. The individual then becomes a “detainee,” prevented from taking an active combat role in the hostilities.

(143) This person is not a criminal interned for wrongdoing but is simply placed in “preventive custody” in order to prevent him or her from continuing to take hostile actions against another’s forces. Unless proven otherwise, a PW has only done his or her duty.

(144) For this reason, a PW must be treated humanely, as ordered by art. 13/GC III, combined with arts. 3 common/GC 49 and 75/AP 1 in an IAC. Also, one must remember that upon capture, the interrogation of a prisoner follows strict rules preventing his beating or other mistreatments (art. 17/GC III). Not only is the prisoner only bound to give his rank, name, service number (or another equivalent information such as the Social Insurance Number) and his date of birth (17(1)/GC III), but his answering anything more can result in him not being granted the privileges normally attributed to those of his rank and status (17(2)/GC III). In short, a PW giving voluntarily more information than those stated here would be treated as unworthy of the privileges of his rank and status since he betrayed voluntarily his own forces. All soldiers despite traitors and such a rule binds all to abide by the code of honour of one’s nation. In this respect, honour also means for the captor that he will not torture physically or mentally a captive in order to obtain such information (art. 17(4)/GC III).

(145) PWs cannot be denied or reject their own rights to be treated as such. If a member of a military force is captured, he cannot claim to be a civilian and be treated under the *Fourth Geneva Convention*. His being a combatant hors-de-combat at the mercy of a foreign power, he has no choice but to accept his treatment as a PW (art. 7/GC III). This rule is made to protect PWs from having to sign away their rights under pressures, whether physical or mental.

(146) Furthermore, the fact that the PW is not a criminal but an honourable man who has followed his governments’ orders also has repercussions on his continuing to follow his duty in trying to escape. Indeed, it is not because he is captured that his employment as a soldier has terminated. It continues to be all PW’s duty to try to escape when possible and to tie down as many enemy troops and resources for their care as it is possible. Therefore, if a prisoner attempts to escape, the use of weapons against him will be as a last resort only and this only after proper warning have been given (art. 42/GC III).

(147) Once captured, a PW is submitted to all order, rules and proceedings of the detaining power. Any infraction to the law of the land or the rules and regulations of the armed forces of that country is punishable by the detaining power’s laws (art. 82/GC III). For example, camp discipline might require you to salute enemy officers. Not doing so might result in severe penalties in a society where casts are still controlling the armed forces. Also, if you commit a crime under the detaining power’s law, for example stealing food, the penalty could be much more severe than the laws of Canada.

(148) PWs also cannot be criminally accused under national legislation such as a criminal code for actions committed as part of their military duties, unless the actions were crimes committed outside of those duties and only if they were infractions at the time of the commission (art. 85/GC III). If such is the case, a PW can only be accused of a crime already proscribed by the national legislation. For example, a PW using a weapon during an evasion attempt could be accused of illegal possession of a prohibited



weapon and of attempted murder on the person of a representative of peace enforcement, a crime punishable by death in many countries.

(149) There are certain privileges to being a PW. From personal property to hygiene, and including the right to communicate with your relatives through the Red Cross, PWs must receive fair lodging conditions, fair working conditions and altogether be treated in the same manner as a member of the enemy's forces in detention.

(150) Contrary to other detainees such as illegal combatants (non-combatants who have taken up arms without legal right to do so), PWs must be repatriated as soon as the hostilities cease and safety of their return is ensured (art. 118(1)/GC III).

(151) The rules concerning the treatment of PW are of outmost importance for you and for the people you would be entrusted with their care by the chain of command. Killing, brutalizing, torturing physically or mentally an unarmed PW is not acceptable and should be punished in the most severe way. This is for two reasons:

1. **Correct treatment of PW is a strategic weapon:** since PW have the right to communicate with their families, they will report being well and well-treated. This will encourage further enemy personnel to surrender. Otherwise, if they know or suspect worse treatment than the conditions they are fighting under, they will keep on fighting to the limit, increasing your casualties. By treating well PWs, you apply the principle of economy of forces, not having to expand ammunition to win;
2. **Ill-treatment of the enemy conducts to reprisals:** if word of ill-treatment gets to the enemy, treatment of our comrades will worsen. By ill-treating the enemy, you are actually ill-treating your own friends, not to mention your own fate if ever captured.

(152) The knowledge of the Third Geneva Convention is capital to all military personnel, as it gives you the regulations concerning the treatment of PWs. More importantly, it gives your rights if captured. The personnel retained by Serbian forces during the 1994 hostage crisis did know it. By appealing to the sense of professionalism of Serb soldiers and by citing the *Third Geneva Convention*, they were able to improve significantly their conditions while in captivity. (This testimony was given during the June 1998 *JAG's Introduction to the Laws of Armed Conflicts* by a former captive in Kingston, Canada).

**(153) It is therefore important that you read GC III in its entirety to understand all your rights and obligations pertaining to the status of PW.**

(154) Other detainees may be non-combatants. However, many categories of non-combatants exist. These must be differentiated:

- a. **Chaplains:** Non-combatants, they cannot be attacked. If captured, they must be returned to their countries' forces. If detained, it must be only in order for them to fulfill their duties as per their ordination (or other such obligations in relation to the faith they represent). Even if they are non-combatants, in captivity they have the same rights and obligations as PWs (art. 43/AP 1, arts. 4(C) and 33/GC III);

- b. **Medical/sanitary personnel:** Non-combatants, they cannot be attacked. If captured, they must be returned to their countries' forces (arts. 43/AP 1, 4C and 33/GC III). These persons include any medical category such as medical administrators, ambulance drivers, or any *personnel designated for temporary service in medical functions*, such as stretcher-bearers. In this last case, the right to PW status is granted only if the temporary service is for a precise duration (such as the duration of a battle or a campaign). Canada has a policy of not using temporary medical personnel;
- c. **Civilians:** Non-combatants, they cannot be attacked unless they take an illegal part in the hostilities. If they are detained, they do not become PWs. They become "protected persons" (art. 3/GC IV). Art. 50/AP 1 designates as civilians any person not enumerated in art. 4A/GC III;
- d. **Journalists:** Non-combatants, they are considered as civilians. If detained, they become protected persons (arts. 79/AP 1 and 3/GC IV);
- e. **War Correspondents:** Non-combatants, they are authorized journalists who accompany armed forces. Due to the nature of their job and their proximity to fighting forces that are legitimate military targets, they risk being attacked as part of collateral damages. If captured, they acquire the status of PWs under the category "persons who accompany the armed forces without being actually members thereof" (see below) (art. 4A(4)/GC III);
- f. **Persons who accompany the armed forces:** non-combatants, these are civilians, defence contractors, labour units, etc., as long as they are officially authorized by the armed forces. Due to the nature of their jobs and their proximity to fighting forces which are legitimate military targets, they risk being attacked as part of collateral damages. If captured, they become PWs (art. 4A(4)/GC III);
- g. **Members of crews of merchant ships or aircraft:** non-combatants, due to the nature of their job and their proximity to fighting forces that are legitimate military targets, they risk being attacked as part of collateral damages. If captured, they become PWs. (art. 4A5/GC III).

(155) It may seem pointless to be expected to enumerate such a list of different categories, especially since AP 1 attempts through its articles 43 and 44 to reduce differences between the status of combatants and of non-combatants in order to guarantee general humane treatment applicable to all. However, AP 1 does not apply to all countries and only applies in case of **international armed conflicts (IAC)**.

(156) In the case of **non-international armed conflicts (NIAC)**, it is AP 2 that applies. Even though art. 4/AP 2 differentiates the precise guarantees applicable for combatants as opposed to those for civilians (art. 13/AP 2), the number of signatories to this convention still is relatively low. To avoid an absence of applicable laws (a legal black hole), one must rely on the guarantees in art. 3/common GC 1949 for civilians and in art. 4(A)/GC III for those countries that have not ratified AP 2.

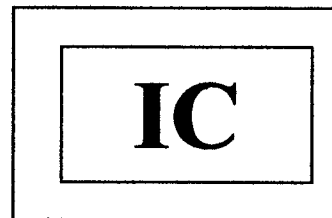
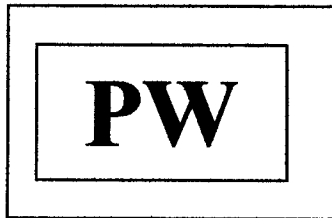
(157) This explains why it is still imperative that military personnel know both GC 1949 and AP 1977 in order to know what is applicable in a country where they might be deployed. Moreover, AP 1977 does not operate *tabula rasa* (putting aside prior treaties and conventions). As the name *Additional Protocols* suggests, they are additional obligations cumulative to the already existing ones. They do not erase the terms of GC 1949.

(158) There exist also categories of combatants that do not have the right to the status of PW: **illegal**

**combatants.** These categories punish the taking part in hostilities by persons expressly forbidden to do so, such as spies, mercenaries, and war criminals. We will return to these notions in Chapter 9. Simply note for now that in no case are these persons authorized to take arms and participate in a hostile action. If captured, they do not acquire the status of PW, and they will be judged and condemned for their actions under national legislations. Needless to say, some African countries, due to their colonial past, do not regard kindly the participation of mercenaries and punish it by death.

(159) PWs and detainees are interned in special camps designed or adapted for this purpose: Internment Camps (ICs). These are normally protected from attack with :

- a. In the case of PW camps, all buildings and uniforms are to have the signs **PG** or **PW, to be visible from heights** (art. 23/ GC III); and
- b. Civilian internment camps may use the signs **IC** or **CI, to be visible from heights** (art. 83/GC IV). These signs are as follows:



## **B. THE INTERDICTION OF ATTACKING CIVILIANS**

(160) As mentioned in Chapter 1, one of the first rules of the LOAC concerns respect of civilian persons in times of conflicts. It is prohibited to attack any civilians as long as they do not commit hostile acts against personnel and/or equipment of a foreign power, as much as is possible (art. 48/AP 1).

(161) This obligation is rooted in the religious grounds and human psychology previously discussed. It recognizes clearly the inviolability of the civilian person's integrity. A **civilian**, according to art. 50/AP 1, is actually defined *a contrario* (negatively) as **anyone who is not a combatant**. This negative definition is based on the interpretation given to the 1868 *St. Petersburg Declaration* and reappears frequently in other treaties and conventions.

(162) Attacks against civilians are prohibited, whether they are on land, in the air, or on the seas (art. 49(3)/AP 1). Attacks are defined by art. 49(1)/AP 1 and take into account offensive acts as well as defensive ones. Therefore this is a very broad definition, and can be interpreted *lato sensu* (in a large or liberal sense).

(163) Up to this point the law seems clear. But its application becomes much more complicated than its theoretical interpretation when specific cases are considered. For example, how do we know if it is permissible to attack a military target near which there are a number of civilians? Is one civilian's presence enough to warrant calling off an attack? The answer is no.

(164) To consider if an attack is legal and if civilian losses are acceptable, due to the effect of collateral

damages, fundamental notions of the LOAC must be applied. These permit us to determine the legitimacy of the target as a military objective. A target is either military or not under the terms of art. 52/AP 1. To know if an attack is legal, one must therefore consider and apply the following two principles:

- a. **MILITARY NECESSITY**; and
- b. **PROPORTIONALITY** between the means used and the desired results with respect to the target.

(165) **MILITARY NECESSITY** is a notion defined in art. 52(2)/AP 1, which edicts clearly that an attack can only be made if it is limited to a military objective by the **nature, location, function, and effective contribution of the target to the military actions of a power**. It is critical to know that in case of doubt as to the status of a target, which would be otherwise civilian by nature if not declared a legitimate military objective, being used to military ends, one must err on the side of caution and presume that it is not militarily used (art. 52(3)/AP 1). This notion is imperative: it determines the legality of the attack with regard to the status of the target.

(166) **PROPORTIONALITY** must further be applied, since the determination that a target must be attacked is not sufficient to make such an attack legal. Indeed, a balance must be reached between the military advantage sought by the attack and the means used to carry it out. The destruction of an objective must, at the precise moment of the attack, **confer a concrete and direct military advantage to the attacker**. In order to do so, discrimination between combatants and non-combatants must be exercised. To determine if an objective is of a military nature, and therefore legitimate, we use the notion of military necessity that we have just seen (art. 52/AP 1). Then, to consider if the attack itself is legitimate, we must consider the proportionality of the attack in relation to the risk of civilians being hit by it. To apply proportionality, the attacker must perform the attack using those methods that offer the same results in terms of success but are likely to result in the least civilian losses, or in the most minimal losses.

(167) This notion springs from the text of arts. 57/AP 1 and 51/AP 1. Art. 57(1)/AP 1 clearly express that civilians persons and civilian populations as well as their property must be protected during military operations. Civilians are also protected from any disproportionate or illegal attack by art. 51(1), (2)/AP 1 and more importantly by 51(4)(a), (b) and (c)/AP 1, which all restrict the use of force if it is not aimed at a military objective and/or if the effects of the force used cannot be limited.

(168) Furthermore, art. 50(3)/AP 1 edicts expressly that this protection is retained even if military elements are amongst civilians or a civilian population. This does not mean an attack cannot be made on an objective due to the presence of civilians near military elements: it means that the attack must be carried out in such a fashion as to prevent civilian losses or keep them to a minimum. It is not the attack that is forbidden, but the lack of discrimination in the attack. Art. 51/AP 1 protects civilians against such attacks (art. 51(4)/AP 1). The attacker has an obligation to establish, when military necessity requires it, a plan that permits the neutralization, or destruction if necessary, of the military elements, while at the same time limiting collateral damages by employing the methods and means least likely to inflict casualties amongst the civilian population. Proportionality is the term that designates the discrimination between a military objective and civilian object. It pertains to the limitation of suffering, not to absolute prohibition of attacks. **For example**, what is expressly prohibited by art. 51(5)(a)/AP 1 is the senseless bombardment of a village without actual knowledge of what is being targeted. This would be an indiscriminate attack since no one knows for sure where the military element is and if it is this element that is being attacked or the civilian population. However, this section does not preclude a bombardment of a legitimate military objective that warrants the use of artillery due to its size (i.e. a battalion), as long as no other means are

available and every effort is made to direct the fire onto the target, thereby limiting or preventing civilian casualties (art. 51(5)(b)/AP 1). Another example would be combating parachutists while they are descending. An urban legend exist in some armies that these cannot be shot down: **this is absolutely false.**

(169) **Airborne troops are absolutely legal target in their planes, during their descent and once on the ground.** The only prohibition is the one concerning personnel abandoning an aircraft in difficulties (art. 42(1)/AP 1). These are to be considered as combatant hors-de-combat, unless once on the ground they attempt to resist capture by force of arms or even more so if they commit an hostile offensive action (art. 42(2)/AP 1). Otherwise, parachutists can and must be shot down before they can organize and overrun your position. If you have 5.56mm C-7 to accomplish this task, you should take this weapon. However, if you are in a Light Armoured Vehicle fitted for reconnaissance with a 25mm canon (LAV-25) and your personal weapon is jammed, then you are warranted to use it. The rule of proportionality is not made to leave you defenceless, but to allow for a logic by which the weapon liable to do the task at end with the least damages is the one that must be used.

(170) The concept is fundamental. Proportionality aims especially at the planning of a military campaign with regards to the actions decided upon for the capture of inhabited, built-up areas. It attempts to prevent cases like the bombardments of Vukovar and Sarajevo in Bosnia where both artillery and tactical aviation targeted the civilian population to create terror and affect civilian morale. Such actions, when they do not target legitimate military objectives, are war crimes. Without going into legal arguments on criminal responsibility, the example of a commander ordering such an indiscriminate attack on the civilian population is guilty of a war crime. Guilty also are those who execute it knowing that the order is illegal, which means **an order so shocking that it is manifestly illegal.**

(171) This rule has been once and for all regulated upon by the Supreme Court of Canada in the case *Regina v. Finta*. In this case, the Supreme Court as ruled that the defendant forcibly seized and imprisoned 8, 617 Jews and caused their death by ill-treatment during transport to extermination camps in Hungary, Austria, Czechoslovakia and Poland, he was guilty of crimes against humanity. Basing their judgment on art. 8 of the *Nuremberg Charter* (pursuant to the trial of major war criminals), the judges decided that:

“The defence of superior order was already addressed in the Nuremberg Charter and the judgment of the Nuremberg Tribunal. The Tribunal stated at p. 221 of their judgment that ‘individuals have international duties which transcend the national obligation of obedience imposed by individual state. He who violates the laws of war cannot abstain immunity while acting in pursuance of the authority of the state in the state in authorizing actions moves outside its competence under international law’.”

(172) This approach is indeed coherent when article 8 of the *Nuremberg Charter* is examined, since it edicts: “The facts that the Defendant acted pursuant to order of his Government or of a superior order shall not free him of responsibility, but may be considered in mitigation of punishment if the Tribunal determines that Justice so requires.”

(173) Let it be clearly known that each and every member of the military must obey orders, but he must obey foremost his morality. When an order feels wrong because of its **moral** implications, then one must definitely consider that this order might be illegal. One does not need much to realize this. An order to charge frontally a machine-gun nest over a barren plain might seem suicidal but might be the only chance of success and must be obeyed if victory is to ensue. But an order to kill an unarmed civilian can never be

right. One's duty is to refuse to obey such an order as international responsibilities do transcend national loyalty. If your personal values ring an alarm that what you are doing is wrong even in the context of a general war, then you can be assured that it is certainly wrong. German soldiers, officers and generals in World War II failed to make this distinction and millions paid for this lack of moral courage. You must not do the same.

(174) To avoid placing personnel in such dilemmas, planners must ensure that all necessary precautions are taken as per art. 57/AP 1. These five paragraphs must be followed. They are not mere recommendations but international and personal obligations for which you are responsible as a commander or the person who executes the command. Protection of civilians goes beyond this, however. More than their lives are protected by the GC 1949 and AP 1977. Civilian protection includes, among other areas, objects necessary to the survival of the civilian population. We will return to this in Chapter 3.

### C. THE INTERDICTION OF ATTACKING MEDICAL, SANITARY, CIVILIAN OR RELIGIOUS PERSONNEL

(175) As seen before, these persons benefit from a special protection. This protection's development is rooted in GC 1864. However, at the time only persons integrated into the armed forces and those working in civilian hospital were entitled to it (arts. 40 and 41/GC I, 42/GC II and 20/GC IV). Between the GC 1949 and the AP 1977, the protection of civilians was greatly enhanced in order to encourage help to the victims of armed conflicts. For example, where GC I recognized chaplains, medical and sanitary personnel, and Red Cross personnel as well as those of other organizations recognized by the states and authorized by them, AP 1 now recognizes Civilian Defence organizations when protected by the blue triangle on orange background. (Read arts. 20, 24 to 27, 36 and 37/GC I, arts. 8(c), (d) and (k), 15(1) and (5), 23(5), 61 to 67 and 71/AP 1.)

(176) As you can read in art. 8(k)/AP 1, since 1977 the notion of temporary sanitary personnel is recognized by convention, even though Canada has published a directive stating that it does not use such personnel. Therefore, temporary nurses and stretcher-bearers are protected under AP 1. However, this must be made more specific. This protection is only applicable if personnel wear the Red Cross insignia in a lasting manner (i.e., during the course of a battle or a campaign). A soldier cannot be an infantryman for a while, then a stretcher-bearer and revert back at his convenience to his infantryman status. The spirit of the law is to aid victims of armed conflicts, not to protect combatants by increasing their chances of survival. To use the Red Cross symbol in such a fashion is not only dishonourable but is a perfidious act and a war crime under art. 38/AP 1 in relation to art. 37(1)/AP 1).

(177) The obligation to respect persons in civilian sanitary and medical units can be found at art. 12/AP 1. In the case of civilian sanitary units, this protection is applicable only if:

- a. It belongs to one of the belligerents;
- b. It is recognized and authorized by the competent military authorities of a belligerent; and
- c. It acts in conformity with arts. 9/AP 1 and/or 27/GC I.

(178) The protection of sanitary, medical, or religious personnel is granted by convention, but is recognizable by the wearing of the signs of the Red Cross and of the Red Crescent such as:



(179) These are the ‘traditional’ symbols of the Red Cross and Red Crescent that we all have seen on our TV screen at some moment or another. On top of these, one other admitted by the Geneva Conventions at art.38/GC 1 and thereafter retaken in the other conventions, is the Red Lion on a Golden Sun, which was admitted at the time of the Shah of Iran. It is mostly seen has having fallen into disuse, since after the 1979 Iranian revolution Iran has chosen the Red Crescent as its emblem. Nonetheless, it remains a legal emblem and looks as follows:



(180) To these emblems must be added a new type, officially called the ‘third Protocol emblem’ and which, since the signature of the *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III)*<sup>83</sup>. This protocol added a new flexible that is also called the ‘Red Crystal’. This is because it is shaped like a ‘diamond’ with an empty center. The reason of this empty center is where its whole flexibility rest. That is because it permits, in accordance with art. 3(1) and (2)/AP 3, which states that the ‘third Protocol emblem’ may be used in combination with a distinctive emblem of the Geneva Conventions (the ‘traditional’ emblems) or with another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties as well as to the International Committee of the Red Cross. The ‘third Protocol emblem’ or ‘Red Crystal’ looks as follows :

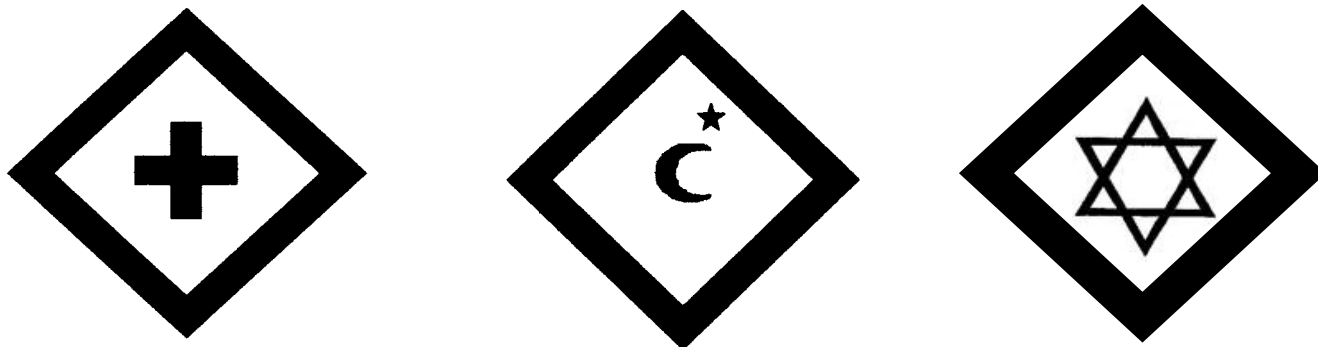


(181) The reason for this change is the perceived religious signification of the Cross and of the Crescent as Christian and Muslim symbols respectively. Therefore, the International Committee of the Red Cross will adopt a new symbol to replace the old ones, but allowing a center space to put any other desired symbol (the Star of David for Israel, the Crescent for Muslim countries, national emblems for countries

<sup>83</sup> *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III)*, Geneva, 8 December 2005. Its entry into force rests on its art.11, which edicts that it will be in force 6 months after two instruments of ratification or accession have been deposited. As of July 18, 2006, only Norway had ratified the protocol and it is therefore not in force at the time of the writing of this passage. It is however expected that it will be in force in the year following, hopefully no later than January 2008.

which do not desire any semblance of religious symbol, etc.).

(182) The basic symbol could look like the image on the left while a symbol for the State of Turkey could look like the image in the middle and that of Israel might look like the one at right:



(183) Whatever the symbol, it **must** be respected if it has met with the conditions of Protocol III concerning its use and communication.

#### CONCLUSION

(184) One objective of the LOAC is to limit conflicts by determining who can participate in hostilities. It is therefore extremely important to understand who is a combatant and who is not. The consequence of the status of combatant in relation to that of PW or protected person must be fully understood.

(185) In the next Chapter, we will continue with *rationae personae* obligations. We will see that times of conflict do not mean the end of humanity in people's actions. Therefore, we will examine how the obligations to provide humane treatment and the obligation to help victims of armed conflicts persist, despite the horrors.

#### SUMMARY OF TERMS

**Civilian:** anyone who is not a combatant as defined by arts. 4 A(1), (2), (3) and (6)/GC III or art. 43/AP 1, but as not a different status or has not forfeited his civilian status by taking up arms.

**Combatant:** member of the armed forces of a power (art. 43(1)/AP 1), other than chaplains or medical and sanitary personnel (art. 33/GC III and art. 43(2)/AP 1). Combatants have the right to take part in hostilities.

**Military necessity** (art. 52(2)/AP 1): attacks are limited to targets that are legitimate military objectives due to their nature, location, function, and use, and contribute efficiently to the military efforts.

**Military objective:** a legitimate target due to its nature, location, function, and use, and contributes efficiently to the military actions of a power.

**Prisoner of war (PW):** any combatant who falls under the authority of a foreign power.



**Proportionality:** balance between the concrete and direct military advantages sought and the means and methods employed to achieve them (art. 51/AP 1).



## CHAPTER 3

### OBLIGATIONS RELATIVE TO PERSONS: PART II

#### INTRODUCTION

This Chapter follows the topic which was begun in Chapter 2, continuing with the attacker's obligations and further discussing the defender's obligations.

#### CONTENT

- a. the attacker's obligation to humane treatment without discrimination;
- b. the attacker's obligation of helping without discrimination; and
- c. the obligations of the defender.

#### OPTIONAL READING

- Meron, T., "Rape as a Crime under International Humanitarian Law", (1993) 87 (3) *American Journal of International Law*, 424-428.
- Gardham, J. "Women, Human Rights and International Humanitarian Law", (1998) 324 *International Review of the Red Cross*, 421-432.

"The captive is your brother. It is by the grace of Allah that he is in your hands and working for you. Since he is at your mercy, ensure that he is fed and clothed as well as you are. Do not demand from him beyond his strength. Help him instead to accomplish his task." - Muhammad (circa 570-632) in *Hadith*.

"One of the basic rules of the Islamic concept of humanitarian law enjoins the Faithful, fighting in the path of God against those waging war against them, never to transgress, let alone exceed, the limits of justice and equity and fall into the ways of tyranny and oppression." – *Ayats* 109 and foll., 2<sup>nd</sup> Surat of the Koran; Instructions of the Prophet to his troops.

#### A. THE OBLIGATION OF HUMANE TREATMENT WITHOUT DISCRIMINATION

(186) The fundamental notion established under this principle is very clear: **Any and all persons, under the control of a foreign power have the right to humane treatment without discrimination.**

(187) This rule is not a privilege. It is an **inherent** right of all humans. **It is a fundamental guarantee affirmed in art. 3/common GC 1949 and applicable at all times under art. 75/AP 1 in times of international armed conflicts.** It is, as are all rights of a person under foreign authority, an **intangible** (art. 6/common to GC I to III and art. 7/GC IV) and **inalienable** right (art. 7/common to GC I to III and art. 8/GC IV). These terms mean, respectively, that these rights cannot be violated (intangible) and that no human being can be separated in any circumstances from these rights, either through that person's choice or anyone else's (inalienable). During a non-international armed conflict, both art. 3/common to GC 1949 and art. 4/AP 2 apply.

(188) The extent of these obligations of humane treatment springs from the religious concepts of antiquity that we have already discussed in Chapter 1. However, a real evolution took place with GC 1949, which established more specific rights. Under GC 1949, both PW and civilian mistreatment are prohibited under arts. 12/GC I and GC II, 13-14/GC III, while under arts. 27 and 31/GC IV obligations are

imposed on foreign powers controlling a territory. For example, the occupying power must protect all civilians from hostile acts or intimidation (art. 27/GC IV).

(189) Not only is this right made precise and specific but it is extended for certain special categories of protected persons. Women and children especially enjoy such rights under the GC 1949 through arts. 25 *in fine* and 108(2)/GC III, as well as through arts. 24, 27, and 50/GG IV. Belligerents must segregate and protect these persons. Moreover, this is reinforced by arts. 76 to 78/AP 1 whereby women and children's protection as well as their evacuation are treated as entirely different matters from the usual civilian protection. We will return later to the special case of children-soldiers, but keep in mind that arts. 77(2) to (4)/AP 1 deal with their special treatment.

(190) The basis of these special cases can be found in the general guarantees of art. 75/AP 1. **These guarantees include, among others:** equal treatment independent of sex, race, language, religion, political opinions, nationality, wealth, or any other status. Everyone has the right to the respect of his/her honour and dignity (art.75(1)/AP 1). Prohibited acts against persons are to be found at art. 75(2)/AP 1. Paragraphs (3) to (7) of art. 75/AP 1 pertains to the judicial rights of persons if accused of a crime by a foreign power controlling their territory. Finally, sub-section 8 edicts that nothing in art. 75 limits the rights of these persons to claim even higher standards of guarantees if such guarantees exist and are applicable to them under international law (i.e., a new additional protocol).

(191) To breach these rules is a war crime. Violations of these rights by committing breaches of these rules against the liberty and life of protected persons through forced labour and malnutrition constitute war crimes and crimes against humanity. This was the case in certain internment camps during the Bosnian conflict in 1992, as was observed through the *BBC's* television coverage. Even for countries that have not ratified AP 1, the rules apply through arts. 13/GC III and 27/GC IV, since **GC 1949 has been universally recognized as customs applicable to all states.**

(192) Up to this point, these notions are simple and precise. However, we need to keep in mind that the spirit of GC 1949 and AP 1 are only applicable to International Armed Conflicts. What about Non International Armed Conflicts?

(193) The application of the obligation of humane treatment still applies in NIACs, but under AP 2. The fundamental guarantees are enumerated at art. 4(2)/AP 2. This section states clearly that any person who has not taken an active part in hostilities, or who has ceased to take such part, has a right to the respect of his/her person, including honour, convictions, and religious practices. Furthermore, it states clearly that to **interdict quarter** (to order that there be **no survivors**) is absolutely prohibited.

(194) Art. 4(2)/AP 2 lists also a number of prohibited actions, while art. 4(3)/AP 2 extends those rules applicable to children. This last article attempts to spare children from lasting trauma so that a durable peace may be attained more rapidly at the cessation of hostilities instead of having a generation of children growing up in a climate of revenge. Treatment of children is certainly a central aspect of the healing and peace process. The example of Rwanda is an obvious reminder of this; there, countless children who have taken part or are accused of having taken part in the hostilities are awaiting trial. As much as possible, these children have been taken from prisons intended for adults and placed in separate internment camps where they continue to be educated and are psychologically monitored to minimize the impact of the massacres upon them.

(195) Thus, each and every human being is entitled to fundamental protections, guaranteed either under

art. 75/AP 1 during IAC, or under art. 4(2)/AP 2 during NIACs, while certain categories of individuals (women and children) benefit from extended protection. All are guaranteed humane treatment.

(196) It is evident that the need for rights to humane treatment arises when individuals fall into the hands of a foreign power. In many cases such a situation does not occur without persons getting hurt. Often, persons may be wounded or sick or in a situation where the occurrence of one or another is extremely high. The LOAC recognizes this and create an obligation to help such persons without discrimination.

#### **B. THE OBLIGATION OF HELPING WITHOUT DISCRIMINATION**

(197) Firstly, who has the right to be helped? Art. 10/AP 1 is formal: Wounded, sick, shipwrecked, whether military or civilian, all have a right to be helped. Formerly these categories were separately announced in arts. 12-13/GG I and GC II, as well as in sects. 4, 16 and 36/GC IV.

(198) This obligation is not restricted to such persons. The LOAC also recognize the right to be helped of all civilians affected or threatened by an armed conflict. In accordance with art. 55/GC IV, art. 69(1)/AP 1 forces the occupying power of a country to provide the necessities for the survival of the civilian population. Moreover, art. 70(1)/AP 1 affirms that in cases in which the occupying power is not able to provide such necessities, international arrangements to provide and distribute help can be made, keeping as a priority protected persons with enlarged protections. This is aimed especially towards pregnant women, women in general, children, and the elderly. Paragraphs (2) to (5) of art. 70/AP 1 give the method by which such arrangements can be made and implemented, while art. 71/AP 1 presents protection measures for the persons working in such humanitarian arrangements.

(199) If there exists a right for these categories of protected persons to be helped, or indeed rescued, someone therefore has an obligation to provide that assistance. Who is obligated? Belligerent **states** have not only the right to help: they **have an obligation** to do so. The edicts of art. 69/AP 1 are not invitations. They are orders given to the signatories of this treaty. These states have freely consented to be bound by these obligations and must abide by them. It is not a gesture of kindness on their part to provide such help: it is a legal obligation. Every state that has signed GC 1949 must at the very least provide the necessary goods related to art. 55/GC 1949.

(200) As well, these states must accept that humanitarian operations are conducted to help a population under its control, if it cannot meet the basic requirements to ensure the survival of the population (art. 59(1)/GC IV). This rule is subject to the decision of the state where its own population is concerned (*ante bellum*, excluding conquered territories). A state can then refuse such help **if** it has valid reasons (art. 70(1)/AP 1).

(201) The situation becomes even more complicated when there is a question of an offer of aid from an impartial organization that offers humanitarian assistance to a belligerent state. An offer of this nature cannot and ought not to be considered as interference in the course of the conflict. Despite the offer, the state is not obliged to accept. The arts. 27(1)/GC I and 9/AP 1 provide all the latitude necessary in this direction. Putting aside the obligations of states, do civilians have an obligation to provide help? The law is imprecise in this regard, since no sections of GC 1949 or AP 1977 stipulate such an obligation in positive law.

(202) The obligation that is imposed upon civilians is more an obligation of abstention than of action. They must refrain from committing violent acts towards wounded, sick or shipwrecked persons but do not seem to have the obligation to actively help them. However, some commentators argue that some conventions, covenants and treaties, such as the *Covenant on Civil and Political Rights*, if interpreted *lato sensu*, contain such an obligation to help victims of armed conflicts. At the present time, this view has not been accepted.

(203) What is certain is that civilians have a right to help others in international conflicts under arts. 18(2)/GC I and 17(1)/AP 1. Theoretically, the exercise of this right (the sheltering of deserters, enemy combatants, etc.) cannot be punished by any party to the conflict, under arts. 18(3)/GC I, 16(1) and 17(1)/AP 1, as long as it is not done in a hostile manner.

(204) However, as we all know, giving aid to an enemy victim can result in heavy retribution, from beatings to death, in certain ethnic conflicts. Certainly the best contemporary example is the fate reserved to moderate Hutus who received the same fate as the Tutsis they tried to protect during the 1994 Rwanda genocide, either for refusing to participate in massacres or because they actively and openly supported a policy of reconciliation. Yet this right exists, although it is sometime neutralized by circumstances. If such is the case at the local level, do third party states (not involved as belligerents in the conflict) have an obligation to help?

(205) Is there an obligation for the states of the world to react to humanitarian crisis such as the Rwanda case to give help? Neither GC 1949 nor AP 1977 seem to contain such an obligation. As for civilians, they may have such a moral obligation, but not a legal one. (Let us remark that the moral aspect of intervention, especially since the Somalian, Bosnian, and Rwandan crises, is an entirely different matter not legally linked to the applicable LOACs.)

(206) Some jurists of international renown vigorously defend this last point and affirm that the English versions of arts. 18(2)/AP 2 and arts. 69(2) and 70(1)/AP 1 clearly state such a right. They support their argument with art. 1/common GC 1949 and art. 1/AP 1, that oblige all parties to respect and impose respect of GC 1949, while at the same time encouraging the coordination and facilitation of international humanitarian aid.

(207) Finally, they justify their argument with the general public international law in the *Charter of the United Nations' Organization* that specifies that all nations signing the *Charter* have taken upon themselves the obligation to respect human rights and fundamental liberties for all. The right to life is covered by this. The world and indeed Canada, have failed to capitalize on an excellent occasion to prove this doctrine in 1997 when M. Laurent Kabila's rebels, progressing toward Kinshasa, created an urgent need to help refugees. Unilateral help by Canada, without the consent of the concerned states, with armed troops to ensure protection, was at that time very seriously considered by the Chrétien government to help the victims of the conflict. If this had happened, it would have created a precedent by which a state recognized its obligation to help and could have had served as a precedent for the creation of a new custom applicable in international law. This crisis was another missed opportunity to enlarge humanitarian international law, due to the abstention of the great powers such as the United States.

(208) Whether this right exists or not remains an academic question since it is a political decision to decide whether or not to apply a treaty. Regardless, the provision and distribution of help must be done without discrimination.

(209) The only justifiable reason to discriminate between victims is the urgency of their situation. The principle of *triage*, known especially in the medical world, can be applied to victims of armed conflicts. The fact that the person may be friend or foe must not influence the decision. This non-discrimination is applicable to all persons who are wounded, sick, or shipwrecked, under art. 3/common GC 1949, arts. 12/GC I and II, as well as art.10(2)/AP 1. In case of NIACs, arts. 2(1), 7 and 8/AP 2 apply. In terms of the civilian population's needs, this non-discrimination has its source in arts. 69(1), 70(1)/AP 1 and 18/AP 2, as already seen.

### C. DEFENDER'S OBLIGATIONS

(210) Under the LOAC, a state that defends against an attack has a double obligation. First, it is strictly **prohibited to use non-combatants to protect works and military operations**. Second, the state must **take all necessary measures to keep civilians away from military objectives**. The first obligation is a negative obligation, meaning one of prohibition of an action. It is clearly explained at arts. 19(1)/GC I, 23/GC III and 28/GC IV. While the first two sections prohibit attacks on sites where non-combatants are located, the last one specifies the prohibition on the use of non-combatants as shields.

(211) These terms are repeated in AP 1 at arts. 12(4), 28(1) and 51(7)/AP 1. Further to the obligation is included the prohibition on the use of medical or sanitary personnel or material to protect oneself against attacks and the obligation of the defender to avoid placing civilians in dangerous situations.

(212) It is particularly important to understand art. 51(7)/AP 1, since the whole legal weight of the prohibition rests upon it. If a state commits an act in contravention of the protocol, the section is clear that the attack does not automatically render the objective free from attacks. The objective still remains a legitimate military objective.

(213) An attacker caught in a situation where he must weigh the impact of civilian casualties can decide if it is vital for the objective to be neutralized or destroyed. He must first try to have civilians evacuated from the area. If this fails, or if the direct military advantage sought does not permit such delays, the attacker can attack, provided he abides by the following conditions:

- a. that he takes all precautions to avoid non-combatants (arts. 51(8), 56(7) and 57/AP 1);and
- b. that if, despite these precautions, the attack is expected to create collateral damages, he must ensure that these damages are not disproportionate to the direct military advantage sought; (art. 51(5) *a contrario* and 52(2)/AP 1). *A contrario* means following the corollary reverse interpretation of the section.

(214) It must be noted that if positive law permits such action, the chances of it being done by a western state are lower than any other. For example, during the second Persian Conflict (1991), the hostage-taking of Saddam Hussein effectively restricted the choice of targets for the Coalition. Even during the 1996 NATO air strikes, hostage-taking again reduced choice. This is because western liberal democracies are faced by a complex decision when faced with such a situation, especially if the number of victims is augmented by their intervention. Support for the war is inversely proportional to the number of victims: the more victims, the less the support. Governments cannot afford to lose such support. This western "complex" can be traced to the Indochina wars (the French in Indochina, the Americans in Vietnam) and

is not necessarily shared by non-western countries.

(215) Added to this obligation is the obligation to keep civilians away from military objectives. This also includes civilian property. **A defender must then ensure that all necessary measures are taken to protect population under its control against dangers arising from military operations.** It is evident that this also includes the obligation not to place civilian populations near military objectives such as bases or headquarters. This obligation begins at the strategic level, when plans are made to build new bases, depots, etc., and continues during actual operations at the operational and tactical level (art. 58(2) and (3)/AP 1).

(216) A *caveat* (warning) accompanies this last obligation. The obligation not to place civilians near danger must not be used as a pretext to displace populations or individual, as in the former Yugoslavia, to justify what is now known as “ethnic cleansing,” which contravenes art.49/GC IV.

### SUMMARY OF TERMS

**Humane treatment without discrimination:** a fundamental guarantee given to all persons under the authority of a foreign power stating that all have a right to a humane treatment without any form of discrimination, regardless of the sex, race, religion, or language.

**Inherent right:** a right that one is born with. Also called “natural law,” it exists from the simple fact that the person exists. The right to life is inherent.

**Intangible right:** a right that must be maintained regardless of circumstances and that cannot be changed. The right to humane treatment is intangible.

**Inalienable right:** a right that cannot be taken away from a person -- not by mutual consent, not by force, not by renunciation. The right to humane treatment without discrimination is such a right.

**Obligation to help without discrimination:** an obligation that constrains a person to provide fast and effective aid of the same quality to any person who has a right to humane treatment without discrimination.



## CHAPTER 4

### OBLIGATIONS RELATIVE TO PROPERTY: PART I

#### INTRODUCTION

This aim of this chapter is to familiarize you with the fundamental notions of the LOAC with regards to civilian property during a time of armed conflicts covered in Chapter 1. As we will see, a state of armed conflict does not mean that material destruction is allowed as an unlimited right. Property must be respected as much as possible.

#### CONTENT

- a. goods of a civilian character;
- b. non-defended localities;
- c. neutralized zones;
- d. safety zones;
- e. demilitarized zones; and
- f. medical units and protected establishments.

#### OPTIONAL READING

- Lavoyer, J-Ph., “International Humanitarian Law. Protected Zones and the Use of Force” in Bierman, W. and Vadset, M. (eds.) *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia*, Aldershot, Ashgate, 1998, at 262-279.
- Pictet, J., “The Medical Profession and International Humanitarian Law”, (1985) 247 *International Review of the Red Cross* 191-209.

#### A. THE INTERDICTION OF ATTACKING GOODS OF A CIVILIAN CHARACTER

(217) As it is stated in the introduction, the existence of a state of armed conflict does not operate *tabula rasa* - the loss of all existing rights. On the contrary, it maintains in place existing rights and even reinforces some. **Patrimonial rights**, those subjective rights of every person, such as the legal rights and powers over property, must be respected in principle. These rights are protected independently of whether they are **corporeal** (goods that can be touched) or **incorporeal** (intellectual property, debts, etc.).

(218) As for the interdiction against attacking civilian property, the rule was first codified in art. 23(g) of The Hague Rules of 1907 (Annex to Convention IV of the Hague Conventions of 1907: “*Regulations Respecting the Laws and Customs of War on Land*”). This section edicts that it is absolutely prohibited to destroy or seize private enemy property, except for absolute military necessity. Today this protection can be found at art. 52(1)/AP 1.

(219) One must note that this type of protection does not cover the nationals of a state when dealing with their own states and that no definitions are offered to explain what is exactly civilian property. Such a definition is fundamental, since it does not encompass military works and materials. Like many others, the definition must then be taken *a contrario*. Thus, civilian property is any good or property not included in the definition of what constitutes a military objective.

(220) The question then is to know what constitutes a military objective. As we have seen, such an objective can be defined by two notions that are found under art. 52(2)/AP 1:

- a. An object that, by nature, location, aim and/or use contributes effectively to the military efforts of a belligerent; and
- b. An object that, if destroyed or neutralized, whether partially or totally, at the moment of the attack, confers a direct and concrete military advantage

(221) This definition creates problems in strategic planning because, if taken *stricto sensu*, it prohibits any pre-emptive strikes, since the attack must confer a direct and concrete military advantage at the precise moment of the attack. Following this definition, a good can only be of a civilian nature until it is used as a contribution to the war effort, unless it is military by nature (i.e., a tank is normally considered as useful only in a military use and is therefore presumed to be a military objective).

(222) This is reinforced by art. 52(3)/AP 1. This section affirms that when in doubt, property must be considered of a civilian character until proven otherwise. Once more, the origin can be traced back to the American policy of “Shoot first, ask afterward” of the Vietnam War. Since soldiers were often in situations where it was impossible to distinguish between civilians and combatants, in order to prevent casualties, they would then use overwhelming firepower without discriminating.

(223) The question that must be asked to avoid attack without discrimination is simple: “Does this good or property contribute to the enemy’s war effort and, if yes, does its destruction provide a direct and concrete military advantage?” If the answer is yes on both counts, it can be destroyed or neutralized. If not, it cannot be. By following these guidelines, you cannot commit a crime under arts. 146/GC IV or 85 to 87/AP 1.

(224) Keep in mind that this interpretation of positive law applies first to strategic planning of an attack, and applies to a lesser degree during an attack. During the fire plan draft, it is the duty of artillery Forward Observation Officers and other fire plan controllers to determine if an objective is of a military character. It is the duty of their commanders at higher levels to ensure this has been done and that the intelligence is confirmed. It is prohibited in cases of doubt to fire at the target.

## **B. THE INTERDICTION OF ATTACKING NON-DEFENDED LOCALITIES**

(225) Within the legitimacy of *rationae materiae* obligations, one must also consider *rationae loci* obligations: that is, the territorial spread of the hostilities. In order to determine these obligations, we must differentiate between the **war region** that encompasses the totality of the territory of a state where it can prepare and/or conduct operations, from the **war theatre**, the actual regions of operations. As we will see, the location of an object can be a determining factor in characterizing an object as a military target or civilian property.

(226) Once the location has been determined, factors differentiating between defended or non-defended localities and/or objects must be taken into account. The LOAC are very precise in this regard. Art. 59(1)/AP 1 solemnly edicts that any attack, by any means, against a non-defended locality is absolutely prohibited. A **non-defended locality** is a locality that cannot be attacked because of its civilian character, and therefore cannot be a legitimate military objective. What must be considered to establish the civilian

character is the military elements in place to resist an attack. Indeed, to be declared a non-defended locality, a city or any other locality must be free of occupation and declared as such (art. 59(2)/AP 1). This declaration may be consensual but can be in itself **unilateral**.

(227) To be legally recognized as a non-defended locality, four conditions must be met (art. 59(2)/AP 1):

- a. The evacuation of all combatants or mobile military equipment;
- b. The abstention from using any fixed military works in a hostile manner;
- c. The abstention by authorities or by the population from committing hostile acts; and
- d. The abstention by the locality from supporting military activities.

(228) It must be emphasized that the presence of police forces to maintain public order is not contrary to paragraph 2. In addition, a declaration of non-defended locality must be defined as clearly as possible, indicating the limits of this locality, the access routes authorized to supply it with food, water, heating materials, etc. Once a power acknowledges receiving such a declaration, it takes effect even when its conditions are not totally respected. In such a case, the infringing locality must receive notification to respect its declaration. If it does not, the locality may be deprived of its non-defended locality status and become a legitimate military objective. However, this does not deprive the other localities of the rights granted by all other dispositions of GC 1949 and AP 1977 (art. 59(4) and (7)/AP 1). Specific details can be worked out in special cases, such as a common accord stating those conditions (art. 59(6)/AP 1). For example, Paris was declared an open city in 1940. Had AP 1 been applicable at the time, it would have been the legal base of such a declaration. A non-defended locality may not be attacked but can be captured and occupied. If this happens, the locality ceases to have a non-defended character because of the military elements present that can resist

### C. THE INTERDICTION OF ATTACKING NEUTRALIZED ZONES

(229) **Neutralized zones** are a part of definite territory located in the **war theatre** where no military activities are engaged in by agreement of the belligerents for a definite or an indefinite period of time. This is a consensual right. These zones have been in existence legally since GC 1949, through its art. 15/GC IV. The use of this interdiction was in place long before but was only legalized then. These zones aim at protecting the sick and wounded as well as civilians in these zones that do not take part in hostilities.

(230) Article 15/AP 1 is rooted in the **asylum rights** of the Middle Ages, when a person pursued by the law could claim asylum on the sacred grounds of the church. As long as they stayed inside the church, they could not be arrested.

(231) This has evolved as a voluntary right from states and has been used time and again by states during times of conflicts. Such zones were used, for example, in Spain during the Spanish Civil War (1936-39). In 1936, a part of Madrid was declared a demilitarized zone to protect the victims of the conflict. Another example would be the “Red Cross Box” established by the United Kingdom during the Falkland War in 1982. A 15-square kilometres zone was established to protect hospital-ships. Art. 15/GC IV permits

similar cases to non-defended localities for neutralized zones, although it establishes stricter rules for the respect of these zones. A **neutralized zone differs from a non-defended locality because of the consensual requirement of neutralized zones**. Non-defended localities can, but do not have to, be consensual. Neutralized zones must have an agreement to be implemented.

(232) The consensual character of the neutralized zone does not have to be written nor explicit: it can be tacit. During the Falkland War the United Kingdom first unilaterally declared a neutral space in an air and a maritime space. It was only later that the Argentinean government formally recognized the zone. However, it was not this recognition that was legally binding from the start: the informal agreement by which both parties respected the zone binding in a tacit way.

#### **D. THE INTERDICTION OF ATTACKING SAFETY ZONES**

(233) The respect of all these zones is one of the main points of all these international legislation. Within all the zones mentioned, two other types of zone were created by GC 1949 and AP 1977. First, there are the **safety zones**, created by arts. 23/GC I and 14/GC IV. These are limited zones, in the sense that only certain categories of persons are allowed to enter them and benefit from them.

(234) As protected persons, only the following are included:

- a. Sick and wounded, whether civilian or military;
- b. personnel affected to the organization and administration of such zones;
- c. the elderly;
- d. children of or of less than 15 years old;
- e. pregnant women;
- f. mothers of a child of or of less than 7 years old;
- g. handicapped persons; and
- h. local population whose residence is within the designated zone.

(235) Other civilians do not have access to this zone, as is the case of demilitarized zones, unless the belligerents agree to other categories of persons. Such an agreement can also be established in peace time in anticipation of a conflict, but can only be recognized with a formal (i.e., written) agreement. To facilitate negotiation of these zones, the International Committee of the Red Cross has annexed a standard agreement to GC I and IV 1949 (Annex I). To protect these zones, belligerents are authorized to use the Red Cross or the Red Crescent on white background (art. 6(2), Annex I /GC IV). To signal their presence and prevent violations, belligerents may use oblique red stripes on a white background painted on the grounds and works covered by the protection (buildings, periphery of the camp, etc.) (art. 6(1), Annex 1/GC IV).

### E. THE INTERDICTION OF DEMILITARIZED ZONES

(236) From safety zones evolved the idea of **demilitarized zones**. These zones are similar to safety zones, but differ in that any non-combatant can be taken within its limits, apart from express exceptions included in the demilitarization agreement. These demilitarized zones have requirements similar to non-defended localities, but differ by their consensual character. Also, demilitarized zones have a *permanent* character. This means that once declared, their status cannot change unless it contravenes the conditions set in art. 60(3) and (6)/AP 1.

(237) This last section was the one used in the famous “safe havens” of Gorazde, Tuzla, Zepa, and Srebrenica during the attack on Bihac in Bosnia-Herzegovina in July 1995, when the Serbian summer offensive crushed all Bosnian resistance on the whole of the front, to be stopped finally in front of Bihac. In May 1993, the UN Security Council had declared these demilitarized zones. Despite this, they were all overrun and “ethnically cleansed,” a diplomatic euphemism meaning: “against whom genocide is committed.”

(238) According to art. 60(6)/AP 1, no belligerent has or will ever have the right to refute unilaterally the status of a demilitarized zone designated as such by an agreement. Yet this is exactly what the Serbian forces did that summer by attacking these zones. However, and contrary to what many journalists said, the law did not fail: it was the political will of western governments that failed.

(239) The LOAC were clear and the UNPROFOR (United Nations Protection Force) had the right to prevent the massacres, by force if necessary. It was the lack of political will by the international community, the lack of resources, both human and material, the lack of effective firepower - in short, the lack of military power and the fear of casualties (the “*Vietnam Syndrome*”) - that was responsible for the death of at least 7079 persons. Some authors estimate that number to be 12 000, including the events following the fall of Srebrenica and the other safe havens. The LOAC is clear. Its policing is certainly not.

### F. THE INTERDICTION OF ATTACKING MEDICAL UNITS AND PROTECTED ESTABLISHMENTS

(240) As we saw in Chapter 1, the creation of the Red Cross in 1863 had a very precise objective: to protect the victims of war. This first convention of 22 August 1864 was specific to the protection of wounded military personnel in the field. In order to accomplish that aim, the Red Cross established the principles of neutrality and inviolability of the Red Cross. These principles were carried on in all the other conventions following after (arts. 6-8/GC 1906, arts. 6-8, 17-18/GC 1929, GC/I, II, IV 1949) and in one Hague convention (art. 27/Hague Rules 1907).

(241) These principles of neutrality and inviolability prohibit any attacks against:

- a. Fixed military sanitary establishments and mobile sanitary units (art.19/GC I et 23/GC II);
- b. Fixed civilian sanitary establishments and mobile sanitary units (art.18/GC IV et 13/AP 1);
- c. Hospital ships; under art. 22(1)(a)/AP 1, these are protected if they abide by the conditions of arts. 22, 24, 25 et 27/GC II; and

- d. Any vehicle, aircraft, or any other sanitary embarkation (i.e., hydroplanes, etc.) (arts. 35-37/GC I, arts. 27, 38-40/GC II, arts. 21-22/GC IV and arts. 21-30/AP 1).

(242) To benefit from the protection of the Red Cross or Red Crescent, the objects must display their symbols. The protection is not in itself conferred by the symbols: it is conferred by law on the grounds of the nature of the object, and therefore is not mandatory. Nonetheless, failing to display these symbols increases the risks of an attack for the personnel involved. (arts.18 and 23/AP 1).

(243) It must be specified that medical personnel have a right to carry light personal defence weapons and that weapons and ammunitions can be under their control due to the procedure of transferring these items toward the rear with the wounded. Possession of these weapons cannot be construed as hostile actions and cannot be used to justify an attack on such an establishment or a unit (arts. 22/GC I, 35/GC II, 19/GC IV and 13(2), 28(2)/AP 1).

(244) As for medical aircraft, their legal use is complex and firmly legislated. A **medical aircraft** cannot fly safely over enemy territory or territory under the control of the enemy unless it has an agreement with that country, in accordance with arts. 36/GC I, 39/GC II and 22/GC IV). Under the GC 1949, it appears that such overpass over the territory of a country not party to AP 1977 without agreement can lead to firing on the aircraft.

(245) Under the AP 1977, especially AP 1, this situation can be avoided by agreement of art. 29/AP 1. If a navigation error occurs, the aircraft loses its immunity but this does not mean it can be shot down since art. 26(1)/AP 1 prohibits such an attack against a sanitary aircraft if it is identified as such.

(246) An aircraft caught in this situation then has a duty to signal its presence and to obey the instructions of the enemy (art. 27(1)/AP1). In return, the enemy has the obligation to make “all reasonable efforts” for the aircraft to land safely (art. 27(2)/AP1). Since it is prohibited to use sanitary aircraft to acquire military advantage (art. 28(1) to (3)/AP 1), the air defence must presume the sanitary character of the aircraft and abstain from shooting it down.

(247) When obliged to land or alight on water in enemy territory or territory that is enemy controlled, a sanitary aircraft must submit to the conditions of art. 30/AP 1 for inspection. If the search reveals a false pretence on the part of the crew and that the aircraft is not of a sanitary nature, the personnel will be interned and the aircraft seized. (art. 31/AP 1). Such an action on the part of the crew can be construed as perfidy.

## CONCLUSION

(248) Here we have covered the general protection of civilian property and of protected zones. We have also covered the case of fixed and mobile sanitary units. These rules are fundamental to the LOAC and must be implemented during all phases of the planning and execution of military operations to avoid or limit collateral damages. As with many other rules, they are generally common sense - which means that you need to stop and think before acting rashly.

(249) We will now continue with the *rationae materiae* obligations. Pay special attention to the enumerated categories since they will have impacts on the strategic, operational, and tactical planning.

**SUMMARY OF TERMS**

**Military objective:** an object that is by nature, location, aim, or use contributing effectively to the war effort of a belligerent and of which neutralization or destruction confers a direct and concrete military advantage at the moment of the attack.

**War region:** a region that encompasses the totality of the territory from which a nation can prepare and conduct hostilities.

**War theatre:** a region where military operation are conducted.

**Non-defended locality:** a city or any other space declared free of any military presence by its authorities.

**Safety zones:** restricted refuges, meaning for a limited number of categories of persons, where military activities are prohibited.

**Demilitarized zones:** areas of territory located in the war theatre where no military presence or activity can be engaged by consensual agreement between belligerents.

**Neutralized zones:** zones similar to safety zones but different in that they welcome all non-combatants, excepting any that are specified in a written consensual agreement, and that are not limited in time since once they are declared, they remain so for the duration of the hostilities.





## CHAPTER 5

### OBLIGATIONS RELATIVE TO PROPERTY: PART II

#### INTRODUCTION

This Chapter continues with the fundamental notions of the LOAC in relation to property during a state of conflict, as seen in Chapter 1. As we will see, the existence of a state of conflict does not result in unlimited power to destroy property, especially with regards to goods necessary to the survival of the civilian population. One of the prerequisites for a quick return to a durable peace is the availability of infrastructures that permit a transition to “normal” conditions of life. This is why property must be respected when possible. *Rationae personae* obligations are two-fold: both attackers and defenders are obliged to respect them.

#### CONTENT

##### **The attacker’s obligations not to attack:**

- a. objects essential to the survival of the civilian population;
- b. and to cause grave damage to the natural environment;
- c. works and installations containing dangerous forces;
- d. civil defence organizations; and
- e. cultural objects and places of worship; and
- f. interpret the defender’s obligations and its sources.

#### OPTIONAL READING

- Boyd, S., “The Applicability of international Law to the Occupied Territories”, (1971) 1 Israel Yearbook on Human Rights, p. 258-261.

#### **A. ATTACKER’S OBLIGATIONS NOT TO ATTACK OBJECTS ESSENTIAL TO THE SURVIVAL OF THE CIVILIAN POPULATION**

(250) As we have seen, the attacker is prohibited from attacking civilian persons or property. These obligations are not limited to simple protection of direct attacks. They include any operations, whether on land, at sea or in the air that can affect the civilian population (art. 49(3)/AP 1).

(251) This includes indirect attacks such as confiscation of goods and property necessary to the survival of the civilian population, as per art. 54(2)/AP 1. This form of waging war was widely used during the Bosnian conflict, particularly during the siege of Sarajevo in 1992-93, and consisted in preventing access to necessary goods such as water and food.

(252) Techniques used to cause suffering for the civilian population during a conflict are to slow considerably or to prevent access to humanitarian aid or the arrival of food, to cut power in winter, or to contaminate water sources. All these tactics are targeted by art. 54/AP 1, as is especially the express intent to create famine (art. 54(1)/AP 1).

(253) The question for military personnel is to know how to subject a population in such a way as to

obtain capitulation, if one cannot cut access of sources of food and water. Napoleon used to say that an army walks with its stomach, and the saying still hold true today. Without food, an army is condemned to unconditional surrender. Bread is as important as bullets, and history is full of experiences proving this.

(254) How then can a commander reconcile his military objectives with the exigencies of the LOAC? The debate is of a legal nature. One must determine if the goods under scrutiny are indispensable to the civilian population or not, as stated in art. 54(2)/AP 1.

(255) Under the law, food solely destined to the civilian population must be allowed to reach the civilian population. However, if part of this food is employed to feed the enemy forces, this contravenes art. 54(2)/AP 1 and then falls under the terms of art. 54(3)/AP 1. It renders these goods subject to confiscation.

(256) However, this confiscation can only be done if it does not result in famine for the civilian population. A reasonable alternative for a field commander would be to acquire information on the portion distributed to civilians as opposed to the military forces and to confiscate the latter part. Another solution would be to arbitrarily confiscate a portion of the food according to an evaluation of the forces estimated to be in the theatre of operations. Of course, we all know that the effectiveness of such half measures is at best uncertain. Nonetheless, this option offers the best legal flexibility while reconciling the military objectives with the humanitarian ones, in accordance with art. 54/AP 1. Such a solution does not create famine or force displacement of the civilian population (which would be illegal under art. 54(3)(b)/AP 1), and it respects the need to protect the victims of armed conflicts while still inflicting hard circumstances on the defenders of the legitimate military objective. If the defenders decide to feed their own forces with the food allowed to reach the civilian population, they contravene the obligation not to create famine, making themselves war criminals.

(257) This method of indirect approach to the civilian population can also be found in both air and sea operations. For example, imposition of blockades or of an exclusive maritime zone (EMZ) are highly contested because they aim precisely at depriving the civilian population of any supplies of food, medicine, petrol, heating resources, etc.

(258) One must, however, note that if art. 54/AP 1 prohibits such sufferings on the enemy population, no comparable rule exists for the protection of the citizens of a country in relation to its own government. Art. 54(5)/AP 1 permits the exemption of a country to art. 54(2)/AP 1 for the defence of its territory or territory under its control. This excludes “annexed,” “incorporated,” or “liberated” territories occupied after the beginning of hostilities. Therefore, during defensive operations on a national territory, a “**scorched earth**” policy - the eradication of any food or shelter along the axis of advance of the enemy - can be employed in the aim to exhaust its logistical resources and its personnel, tactics, and strategies, if required by imperative military necessity (art.54(5)/AP 1). A state can impose much more suffering on its own citizens than the enemy can ever do (art. 54(2)/AP 1).

(259) However, there is a limit to scorched-earth tactics. A state cannot, while employing this means of warfare, commit long and widespread damages to the environment. This would be a violation of the common legacy of humankind.

(260) Furthermore, there is a major problem concerning **reparations – that is, repayment in money or in kind** - concerning the damages done by the application of a scorched earth policy. At the end of a conflict, it is often the case that the victor will demand reparations for damages it has itself done to its own

country in these defensive operations. While some reparations might be indicated, there is a major question as to their legality under international law. What is certain is that the victor cannot demand reparations for damages it has created itself on the territory of its former adversary since the scorched earth policy can only be done on the national territory of the High Contracting Party, excluding all territories not part of its national borders *ante bellum* (before the beginning of the hostilities) (art. 54(2)/AP 1)<sup>84</sup>.

**B. THE ATTACKER'S OBLIGATION NOT TO CAUSE GRAVE DAMAGE TO THE NATURAL ENVIRONMENT**

(261) In terms of respect for the environment, two crucial subjects must be approached: the prohibition against creating grave and enduring damage that would render life impossible or very difficult, as well as the geographic limitations of a conflict with respect to environmental damage.

(262) Let us begin with the geographic limits of the war region that composes the environment. These limitations are artificial more than practical but nevertheless are a concept to which most states adhere.

(263) First, we must understand what is meant by "environment." According to the western understanding of the term, we immediately think of nature, or endangered species -- or alternatively, we think of working conditions, known as "favourable to good working relations between employers and employees." In legal terms, however, the term has a somewhat different and broader meaning.

(264) First, we must extend it to the **natural environment** of our planet, meaning the **circumterrestrial environment**. This is a far-reaching term that aims at covering all layers of the atmosphere of Earth, from the cosmos's vast emptiness to the troposphere and the biota (the ground on which we live). Under the *Stockholm Convention of 1976*, it became prohibited to cause any alterations in this space for military purposes.

(265) Under this, it is prohibited to change the composition of the structure of Earth or of its atmospheric layers in such a way that these changes would be widespread, long-term, and grave. It is commonly understood that damages over many hundreds of square kilometres and/or of duration of a decade or more are covered by these terms.

(266) An example would be the firing of the oil wells of Kuwait by Iraq at the end of the 1991 Persian Gulf War. This ecological crime caused pollution in all layers of the atmosphere with the aim of creating long-range economic damages to Kuwait, while giving the tactical advantage of preventing the use of tactical air power over retreating Iraqi forces. The emanations from these fires have infiltrated the underground basins of water, contaminating all water sources, and polluting large portions of the desert. This is a clear example of a violation of the 1976 *Stockholm Convention*.

(267) Other treaties limit the geographic effects of conflicts. The Treaty of the Antarctic covers the whole of this continent. No nuclear weapons can be used or based there, and the building of any base or fortifications on the continent is prohibited. Military presence or manoeuvres, as well as arms testing, are

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<sup>84</sup> *Convention on the prohibition of military or any hostile use of environmental modification techniques*, Stockholm, 10 December 1976. Article II states: "As used in article I, the term "environmental modification techniques" refers to any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space."

similarly prohibited.

(268) Also protected are the floors of all seas (Mediterranean, Baffin, Black, etc.) and oceans (Atlantic, Pacific, Indian, Artic, etc.). These floors are nuclear-free zones anywhere past the 12 marine miles of the territorial waters of states, following the 1958 *Convention on Territorial Seas*<sup>85</sup>. It is prohibited to store nuclear weapons, construct launching sites, or test nuclear weapons on ocean floors. This was reiterated in the 1982 *Maritime Convention of Montenegro Bay*<sup>86</sup>, during the third United Nations conference on maritime law. As well, this last convention states that oceans floors are now part of the common legacy of humankind, protecting them from any violation.

(269) Regional treaties also create geographical limitations to prejudice to the environment. To this day, only one region of Earth is completely denuclearized: Latin America, with the exception of French Guyana and Cuba. Under the *Tlatelolco Treaty*<sup>87</sup>, any possession, regardless of usage, of nuclear weapons and any acquisition of such weapons are expressly prohibited.

(270) As we can see, the “environment” has a very broad meaning in legal terms. It does not limit itself to natural conditions but also considers geographic factors. However, it would be true to say that such limitations are more concentrated on modifications of the natural environment.

(271) Following the 1976 *Stockholm Convention*, the AP 1977 incorporated two important sections that set the applicable rules for the respect of the environment. Art. 35(3)/AP 1 explicitly prohibits the use of means and methods of combat that can cause widespread, long-term, and severe damages to the environment. As we have seen, this includes all layers of the Earth’s atmosphere, from the nucleus to the cosmos. This evidently incorporates with Art. 35(2)/AP 1 which prohibits the use of means and methods of combat that can cause superfluous injury.

(272) An example is the destruction of all cultivatable lands or vegetation by chemical agents such as Agent Orange (a defoliant used during the U.S. intervention in South Vietnam during the 1960s and early 1970s), which destroys the ecosystem and prevents the growth of food for years, sometimes decades, following the end of hostilities. This effectively creates unnecessary suffering under the terms of art. 35(2)/AP 1 and is prohibited by art. 35(3)/AP 1.

(273) This protection is not limited to the use of certain means and methods of warfare. Belligerents have an express obligation to respect the environment. Art. 55(1)/AP 1 clearly edicts that belligerents have the responsibility not to use weapons that could create widespread, long-term, and severe damages to the environment, or that could cause prejudice to the health and survival of the civilian population.

(274) The use (unconfirmed, but strongly suspected) by soviet troops in Afghanistan of chemical weapons to poison wells would be an example of an infraction to this section. The same would be true of the use of a similar tactic but employing biological weapons, such as the dead rats put in wells by the Viet Minh (the guerrilla preceding the Viet Cong) during the French Indochina war (1949-1954). This aimed at creating epidemics and numerous unnecessary deaths.

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<sup>85</sup> *Convention on the Territorial Seas and the Contiguous Zone*, Geneva, 29 April 1958, 516 U.N.T.S. 205 available at <http://www.un.org/law/ilc/texts/tersea.htm>.

<sup>86</sup> *United Nations Convention on the Law of the Sea*, 3 UNTS 1883, Montenegro Bay, 10 December 1982, entered into force on 16 November 1994, available at <http://www.hri.org/docs/LOS/>.

<sup>87</sup> *Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, with annexed Additional Protocols I and II*, Mexico, 14 February 1967, entered into force on 22 April 1968, at <http://www.unog.ch/frames/disarm/distreat/tlatelol.htm>.

(275) Both above instances would be violations to Art. 55(2)/AP 1. Indeed, this section prohibits attacks against the environment as methods of reprisals. The use of such methods to punish villagers for their allegiance to a cause falls under this section.

(276) The firing of the Kuwaiti oil wells would not fall under this section for a precise reason: Iraq was not a signatory of AP 1977. However, Iraq was still responsible under the terms of the *Stockholm Convention of 1976* of prejudice to the environment.

(277) As we can see, the environment is legally considered under its geographic aspects as well as its natural ones. It must be protected against the pernicious effects of war in the common interest of humankind as a legacy belonging to all. It must be protected in time of conflicts as it is in times of war to avoid unnecessary suffering before, during, or after hostilities. And as we will see in the following teaching point, the fallout of an attack must be considered from its environmental angle as well as from that of the survival of the civilian population.

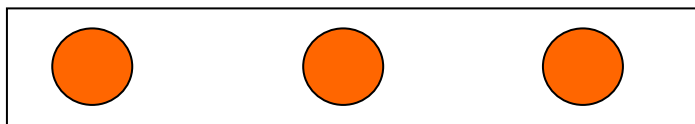
### C. THE ATTACKER'S OBLIGATIONS NOT TO ATTACK WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

(278) Since the beginning of civilization, human beings have always attempted to control the elements that surround them. Already in the Egypt of antiquity, many great irrigation works were undertaken to control water levels. Great endeavours have since been accomplished all over the world. Whether it is the dams in Holland, the dams of James Bay in Canada, or those of the Ruhr in Germany, examples of human achievements are numerous. However, human genius did not take long to understand that control over such potent forces, even if only temporary, could be used in military ways.

(279) For example, during the Battle of Ypres in 1914, Allied forces opened wide the locks of Nieuport to swamp the plain below to try to prevent German forces from advancing. While this action did prevent the German advance and thwarted their offensive, it also created a very real and present danger for the civilian population.

(280) Another example is the exploits of Canadian Squadron 687, the “Dam Busters” of World War II. During the last months of 1944 this squadron was designated for a special mission: to destroy the Ruhr’s dams, thereby flooding the military industrial complex of Germany and stopping the country’s war production in its tracks.

(281) It is undeniable that the success of this action had profound military impacts. Nonetheless, the civilian population was put in danger in a way disproportionate to the direct military advantage sought. This is why art. 56(1)/AP 1 edicts that works containing dangerous forces, such as dams, nuclear power plants, etc., cannot be attacked in order to release the elements they contain if that action risks causing grave losses in the civilian population. Such installations are signalled by three bright orange circles on a horizontal axis (art. 16, Annex 1/AP 1 – *in the previous version of this Annex, art. 15 applies*).



(282) An exception applies to this rule, under art. 56(2)/AP 1. An attack is permitted **if these works are**

**used as supports for military operations and if incapacitating them is the only and sole feasible way to stop this support.** (art. 56(2)/AP 1).

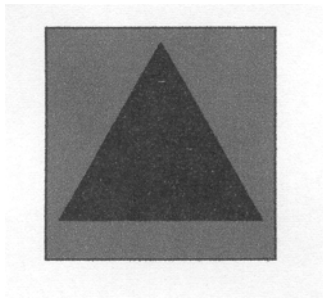
(283) If this is the case and an attack is ordered, the civilian population must be protected. All precautions, as stated in art. 57/AP 1, must be taken. We will see its application in Learning Point B of Chapter 6. If an attack takes place on such works, art. 56(3)/AP 1 states clearly that all efforts must be undertaken to prevent the release of the dangerous forces they might contain.

**D. THE ATTACKER'S OBLIGATIONS NOT TO ATTACK CIVIL DEFENSE ORGANISATIONS**

(284) First, a CDO -- Civil Defence Organization -- is constituted under art. 61(a)/AP 1. Its mission is to accomplish humanitarian tasks for the civilian population during natural disasters or periods of armed conflicts. CDOs are not military by nature.

(285) Their tasks are precise and grouped in 15 categories, from warning apparatus to rescue, including decontamination and medical care. To be a CDO, the organization must be operated by the competent authority and perform only the enumerated tasks. A CDO cannot contribute to the military effort, only to the protection of the civilian population (art.61(b)/AP 1).

(286) Personnel belonging to CDO, and their equipment, are protected under both arts. 61(c) and (d)/AP 1. To be effective, personnel and equipment must be identified by the CD (Civil Defence) symbol of art. 66(4)/AP 1, the equilateral blue triangle on orange background as shown in art. 16, Annex 1/AP 1.



(287) The personnel of CDOs are protected persons, in the sense of both GC 1949 and AP 1977. They must be permitted to accomplish their tasks, except in the case of absolute and imperative military necessity (art. 62(1)/AP 1).

(288) This protection is also extended to civilians responding to the call of the authority for volunteers to accomplish such tasks as those of CDOs, even if they are not formally part of a CDO. Whereas a formal member possesses an identification card, under art. 15, Annex 1/AP 1, as ruled in art. 62(2)/AP 1, an informal member does not.

(289) As for materiel and buildings of CDOs, these cannot be destroyed or used by any other than the power to which they belong (art. 62(3)/AP 1).

(290) If the territory of a state is under the control of another, art. 63/AP 1 edicts clearly what rules then apply to CDOs. Under these rules, CDOs can continue their work and must not be submitted to undue constraints that would be incompatible with the interests of the civilian population. The foreign power can, however, disarm the CDO for security reasons. If detained, CDO personnel have protected person status.

(291) Nonetheless, all goods and personnel of CDOs must be respected. If a foreign power requisitions these resources, it must do so following the rules of art. 63(5)/AP 1, meaning:

- a. To insure that these goods are necessary for other needs of the population; and
- b. To insure that the requisitions last only as long as the need to achieve them exists.

(292) However, in no case can shelters (bombardment, nuclear, etc.) be requisitioned. Only the civilian population has a right to use them (art. 63(5)/AP 1).

(293) These rules apply also to the CDOs of neutral powers that are in place to help the civilian population. As we have seen in Chapter 3, even if the obligation for a third power to provide help has not been proven, the right to so has been proven. It is the duty of the occupying power to permit the access of humanitarian aid from neutral powers to the civilian population of a country occupied. Art. 64/AP 1 edicts the rules that one must follow in such a case.

(294) The protection of CDOs is not unconditional. It can be terminated if certain acts are committed, such as the use of CDO-identified transport to carry troops or military material. However, this termination can only take place after a formal warning given with a reasonable delay.

(295) Art. 65(2) defines some actions that are not considered as hostile actions that would result in the loss of protection of the CDO. For example, the execution of humanitarian tasks by CDO personnel under military control is not a hostile act but a co-ordination action.

(296) In the same manner, the carrying of firearms for personal protection by CDO personnel is not a hostile act, even in the theatre of operations (art. 65(3)/AP 1). In this case, it is suggested that these weapons only be pistols or revolvers and to ensure that personnel wear uniforms clearly identified with the CDO symbol, distinguishing them from combatants.

(297) One sector of activities that is complex to regulate with regards to CDOs is the designation of military personnel in support of humanitarian operations.

(298) Indeed, armed forces members can be designated to help a CDO, but under precise conditions only. If military personnel are designated to help a CDO, they must remain as integral parts of the CDO and must only act in the tasks enumerated in art. 61/AP 1, and this for the duration of the conflict. They must carry the CDO symbol as well as their identification card and only carry personal defence light arms (art. 67(1)/AP 1).

(299) If captured, such persons nonetheless become Prisoners of War (art. 67(2)/AP 1).

(300) The same applies for materiel and buildings of CDOs. They must also be clearly identified and serve only to protect the civilian population (art. 67(4)/AP 1).

#### **E. THE ATTACKER'S OBLIGATIONS NOT TO ATTACK CULTURAL OBJECTS AND PLACES OF WORSHIP**

(301) Since the 1907 Hague Rules, cultural objects are protected by legal edicts, in this case art. 27.

(302) The spirit of this section was expressed in art. 5 of the IX Hague Convention of 1907, and restated numerous times in many treaties, including arts. 25 and 26 of the Hague *Rules of Air Warfare*<sup>88</sup> and in the *Washington Treaty* of 1935 for the protection of historical monuments. More important, it was stated in art. 27 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>89</sup>. This treaty in its arts. 4 to 9 attempts to limit the damages to cultural property and places of worship.

(303) However, not all property of the kind mentioned above is protected: only that which is considered as falling into the category of art. 1 of the 1954 *Hague Convention*, that is, those which are a great cultural heritage (e.g., the Notre-Dame Cathedral in Paris, , the Strasbourg Cathedral), the buildings protecting such cultural property (the Acropolis, etc.) or a centre containing a large proportion of cultural properties (Québec City's "*Vieille Ville*," etc). Some places are self-evident: the Vatican, Mecca, etc. The list of these sites can be found at <http://www.unesco.org/whc/heritage.htm>.

(304) Through art. 4 of the 1954 *Hague Convention*, the signatories have given their word of honour that they will respect and protect the cultural properties of their territories and of other states, except in a case of absolute military necessity. This obligation is restated in art. 9, which edicts that as soon as cultural properties are inscribed in the international register, they become protected, with or without the presence of the protection symbol that follows below.

(305) Art. 9 states also that a cultural property retains its protected status even if it is close to a legitimate military target. Arrangements can be made to forego the use of the zone and/or activity can be detoured around it.

(306) As stated before, a cultural property becomes protected as soon as it is inscribed in the international register. But, how can military personnel know of all those protected properties? The surest way is the protection symbol that is installed on the building. This symbol is described by art. 16(1) of the 1954 *Hague Convention*.

(307) The symbol is a shield composed of a royal blue square and a royal blue triangle, the base of which is the top of the shield and the point of which joins the point of the square. The spaces on the right and left are left in white. In short, it looks like this:



(308) The 1954 *Hague Convention* certainly represents a step forward in the limited protection of cultural property. As for cultural properties that are not identified as a great heritage for a people, they still retain a measure of protection as civilian objects, against which attacks are forbidden except in the case of absolute military necessity.

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<sup>88</sup> *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*, Commission of Jurists at the Hague, December 1922 - February 1923 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>89</sup> *Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954, creating the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954, with the *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954 and the *Resolutions of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict*, The Hague, 14 May 1954 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.



(309) The problem with the 1954 *Hague Convention* is that it keeps a criterion of military necessity that is still somewhat broad. Furthermore, this protection disappears if the cultural property is used for military purposes.

(310) To make the rule more precise, art. 53/AP 1 states formally that no attacks can be made on such property.

(311) For states that are signatories to the 1954 *Hague Convention* and to AP 1, the excuse of military necessity can still be invoked. But for states only party to the AP 1, military necessity is no longer an excuse and attacks are prohibited against cultural property.

(312) One must wonder who has the upper hand in this legal game, since the 1954 *Hague Convention* necessitates the authorization of division-level authority to attack a cultural property protected by the convention (art. 11/1954 *Hague Convention*). For Canadians, it is therefore as important to protect cultural property as it is to guard a bridge designated for demolition.

#### F. THE DEFENDER'S OBLIGATIONS

(313) As we have seen so far, the attacker has a great number of legal responsibilities during operations. This is also the case with the defender. Again, we return to the distinction between civilian objects and legitimate military objectives.

(314) Here we must be precise that if civilian property is not to be attacked, except in case of military necessity, this prohibition must not be exploited for military ends. Indeed, this distinction is fundamental. It does not mean that because a property is of a civilian character a state cannot use it for its defence. If the church tower in a village is the only and/or best place for an air traffic controller to command air strikes, it can be used for that purpose.

(315) As a consequence, however, the enemy cannot be expected to abstain from attacking that position, since it becomes a legitimate military objective (art. 52(2)/AP 1).

(316) The same principle would apply in the case of artillery pieces or ground-to-ground missile batteries positioned on the rooftop of the historical center of a city that intends to defend its approaches. These properties, civilians before their military use, become legitimate military targets due to their use. This would obviously put the civilian population at great risk, which is why the defender must also respect some elementary obligations.

(317) A defender must therefore ensure that he respects art. 58/AP 1 and that, when possible and without prejudice to art. 49/GC IV concerning force displacements of populations, he ensures:

- a. That civilians are withdrawn from the close proximity of military objectives in the theatre of operations;
- b. That he avoids placing military objectives near concentrations of population; and
- c. That he ensures all possible precautions are taken to protect the civilian population from the dangers resulting from a military operation.

(318) This last point is restated in relation to works and installations containing dangerous forces in art. 56(5)/AP 1. Only anti-aircraft defences and small arms for personal protection are allowed in these installations.

### CONCLUSION

(319) On the subject of *rationae materiae* obligations, keep in mind that the most important thing you can retain from Chapters 4 and 5 is that your actions as a planner and as a manager of violence on the ground are your responsibility and yours alone.

(320) During your military operations you are personally responsible for the protection of civilians, whether they be friends or foes. This does not mean you must put yourself at risk every time a civilian is near. It means that the rule of “common sense,” meaning logic, applies.

(321) When planning or executing an attack, the first question should always be to ascertain whether your target is a legitimate military objective. If not, does military necessity demand that you neutralize or destroy it, or would attacking another give the same result and be legal?

(322) If the attack is the only way to achieve your objective, are you taking proportional means with regards to the direct and concrete military advantage you are seeking? Or, do the expected civilian losses of life far outnumber the military advantage?

(323) Many will say that when one has not slept or eaten in two days and has been on a prolonged operation for the past four months under enemy fire, stress is so high that one cannot be held responsible for decisions which are only partly our conscious choices. That may be so. Combat stress, fatigue, and human psychology make us fallible. Nonetheless, this is not an accepted defence in front of a court of law to sanctify wrongful and illegal decisions. Military personnel are paid and trained to do this job. If they cannot live under the strain, what are they doing in the arms profession? As with any employment, the profession of arms has inherent risks and particular responsibilities that are accepted by signing on the dotted line.

(324) Keep in mind that these rules are largely self evident: “One does not destroy without reason,” “One does not kill unarmed civilians,” etc. These are rules of logic that spring from human psychology and religious values. They will not stop you from accomplishing your mission. On the contrary, if followed, they will permit you to achieve it with a better economy of your forces. Apply yourself to follow them and you will likely not only reduce the duration of the conflict but also reduce risks of poor treatment in case of capture.

### SUMMARY OF TERMS

**Civil Defence Organization:** civilian defence body that accomplishes humanitarian tasks for the benefit of the civilian population during natural disasters or in times of armed conflicts.

**Scorched earth:** the eradication of any food or shelter along the axis of advance of the enemy with the aim of exhausting its logistical resources and its personnel; such tactics and strategies can be employed if required by imperative military necessity.

## CHAPTER 6

### OBLIGATIONS RELATIVE TO MEANS OF WARFARE PART I

#### INTRODUCTION

There exist many principles of law directly related to the use of weapons and methods of warfare. There are times limitations on their use, and sometimes pure prohibitions. In both cases, the aim is the prevention of unnecessary suffering. We must always keep in mind that the aim of the LOAC is to limit the suffering of the victims of armed conflicts and to create favourable conditions for a quick return to peace as soon as hostilities cease. These are the notions we will now explore.

#### CONTENT

- a. differentiation between limitations and interdictions concerning the means of warfare;
- b. the mandatory precautions to avoid collateral damages and unnecessary suffering;
- c. Responsibility of War Crimes : Canada's Prevention and Repression of War Crimes;
- d. the categories of weapons whose uses are limited or prohibited due to their effects or their nature.

#### OPTIONAL READING

- Aubert, M., "The Question of Superior Order and the Responsibility of Commanding Officers in the Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts", (1988) 263 International Review of the Red Cross, pp. 105-120.
- US v. William Calley, Jr, US Court of Military Appeals, 21 December 1973.

#### **A. DIFFERENTIATION BETWEEN LIMITATIONS AND INTERDICTIONS WITH REGARDS TO THE MEANS OF WARFARE**

(325) Before discussing these obligations, certain notions related to means and methods of combat must be explained.

(326) First, some will profess that it is ridiculous to attempt to limit the use of certain weapons since, in their opinion, war is a violent business with the aim of destroying the enemy. In their view, whether this is accomplished after two hours of agony by phosphorous burns or by the total reduction of mental ability through the use of low intensity microwaves, the important thing is that the enemy be destroyed.

(327) This reasoning shows a total lack of comprehension of what is an armed conflict, and what is war in general. The real aim is not the eradication of the enemy. The aim is to prevent the enemy from desiring to take part in the conflict and/or to physically prevent him from doing so.

(328) Armed conflicts do not aim at the physical destruction of the enemy as an end in itself. Armed conflicts and war are a method used to destroy the **will** of a state to resist another. This difference is fundamental. Armed conflicts are a method of power by which a state imposes its will upon another or upon an armed group and forces the acceptance of its **own** will.

(329) Wars are not simply people fighting. Philosophically speaking, the notion of war encompasses all conflicts from economic conflicts to total war, including hit-and-run operations, proxy and cold wars.

(330) **The aim of war is the imposition of one's will upon the enemy.** Therefore, it is not the physical capacity of the enemy to resist that is the real target; the enemy's **will** to resist. If a state decides to resort to armed force, **the only legitimate goal it can have is "to weaken the military forces of the enemy," as stated in the second "consideration" of the *St. Petersburg Declaration*.**

(331) Evidently, if one destroys the enemy's military capability, he augments his chances of destroying the enemy's will; but it is true that this is not an absolute result. The United States' Vietnam experience and USSR's Afghanistan experience certainly illustrate that military power does not guarantee victory.

(332) Passive resistance can be a potent mean of combat and lead to great victories. India's 1947 independence is one of the best examples of this. After a movement of national strikes and pacific demonstrations, the Hindu nationalist movement under the *Mahatma* Gandhi secured independence for a divided India. India could not rival the British military might, but it could fight Britain's will to impose its power on India and so succeeded in that fight.

(333) The destruction of materiel and personnel is not an end in itself. It can be necessary to resort to this violence, but it is not obligatory. If enemy forces can be defeated without having to resort to their destruction (surrender, refusal to fight, etc.), you have accomplished your mission with the best possible economy of your forces.

(334) The reasoning which maintains that war aims at the physical destruction of the enemy itself is a sophism, a logic flawed by a wrong premise. War and armed conflicts aim at the destruction of the will of the enemy, not its physical forces. Again, it might be necessary to destroy those forces in order to destroy the enemy's will, but not necessarily so. Always remind yourself that the aim of the LOAC is to prevent unnecessary suffering on the part of the victims of armed conflicts and to create conditions that are favourable for a quick return to a lasting peace.

(335) For this reason, the LOAC have been developed in such a way that the choice and use of weapons and means of warfare are limited. Indeed, these elements are restricted by either.

- a. limitations of use; or
- b. prohibition of use.

(336) In accordance with the logic explained above, certain weapons are **prohibited** for three reasons:

- a. because they **render death inevitable**;
- b. because they **uselessly aggravate the sufferings of disabled persons (unnecessary sufferings)**; and
- c. because they **cannot discriminate in their use between civilians and combatants**.

**a. Prohibition of use of weapons rendering death inevitable**

(337) The prohibition of use of weapons rendering death inevitable can be found first in the *St. Petersburg Declaration*. This declaration states in its third consideration that "it is sufficient to disable the greatest possible number of men" to defeat the enemy, which leads us to conclude that this consideration would be exceeded by weapons that would aggravate uselessly the suffering of disabled persons and

render their death inevitable (fourth consideration). This 1868 text is still applicable today, since it has never been abrogated. The case of nuclear weapons is fiercely disputed under this declaration. Further, there is no unanimity on whether weapons creating asphyxia (napalm, neutron bombs, etc.) in a large zone also fall under this category.

**b. Weapons that uselessly aggravate the sufferings of disabled persons**

(338) As for use of weapons that **uselessly aggravate the sufferings of disabled persons (unnecessary sufferings)**, this is prohibited in conjunction with weapons rendering death inevitable in the fourth consideration. This obligation has been reiterated numerous times, especially in the 1899 Hague Convention and in the 1907 Hague Rules of Land Warfare, etc. Today this prohibition is expressly stated in art. 35(2)/AP 1. Therefore, the employment of any weapon, projectile, material, and method of warfare uselessly aggravating the suffering of disabled persons is strictly prohibited by recent applicable law. As an example, the uses of a “dented” bayonet or of soft-jacket bullets (that expand in the body, thereby creating greater wounds) are illegal under both the St. Petersburg Declaration and art. 35(2)/AP 1.

**c. Weapons that cannot discriminate in their effects between combatants and civilians**

(339) Finally, the prohibition of the use of weapons that **cannot discriminate in their use between civilians and combatants** can be found in the second consideration of the *St. Petersburg Declaration*. Indeed, if the only legitimate endeavour of states at war is to weaken the military forces of the enemy, how does one justify the imposition of suffering upon civilians? Nothing could be more illogical.

(340) It is on the basis of this declaration that the obligation to discriminate between civilians and combatants has been legislated. If a weapon cannot be used in such a way, then it is illegal to use it if other means that would permit such discrimination are available. This has resulted in an obligation to discriminate in the planning of the attack as well as during the attack. We will see these obligations in the following learning point. Without giving precise descriptions of the use of such weapons, art. 51(4) and (5)/AP 1 prohibit any attack without discrimination between civilians and combatants. To this must be added the obligation of the *St. Petersburg Declaration* that can only lead to the conclusion of the illegality of such weapons.

**B. THE MANDATORY PRECAUTIONS TO AVOID COLLATERAL DAMAGES AND UNNECESSARY SUFFERING**

(341) These precautions are stated at art. 57/AP 1, which has a very broad reach. Its first sub-section states that particular care must be given to safeguard the civilian population and civilian property. Paragraph (2) presents three types of precautions that must be observed:

- a. **during planning of an attack** (art. 57(2)(a)(i), (ii) and (iii)/AP 1);
- b. **during the execution of an attack** (art. 57(2)(b)/AP 1); and
- c. **before the attack** (art. 57(c)/AP 1).

**a. During planning**

(342) With regards to the obligation to take precautions **during planning**, it is first necessary to determine the nature of the target (art. 57(2)(a)(i)/AP 1). The planner must determine precisely whether the potential target is a legitimate military objective in accordance with the dispositions of arts. 51 and

52/AP 1 concerning military necessity and proportionality.

(343) Once the target has been identified as a legitimate military objective, planners must take all possible precautions as to the choice of means employed in order to prevent or reduce collateral damages to civilian persons or their property (art. 57(2)(a)(ii)/AP 1).

(344) If these steps have been completed and lead to the conclusion that collateral damages would be disproportionate when compared to the direct and concrete military advantage sought, planners have a **duty**, a legal and moral obligation, to refrain from launching that attack (art. 57(2)(a)(iii)/AP 1). To order such an attack is an illegal order. To execute it can also be illegal.

(345) The defence of the execution of an order from a superior is not valid in a court of law against the accusation of war crime. Military personnel are managers of violence and as a consequence are responsible of their own actions. If they cannot make critical decisions on matters of life and death, then they evidently have no competence to be members of the military and even less to have the privilege of command. The defence consisting of non-guilt based on the responsibility of an order given by a hierarchal superior (*defence of a superior order*) has long been decimated under the eye of the law. From Nuremberg to Bosnia, this defence has constantly been refuted by the courts as a motive for the commission of a criminal act<sup>90</sup>. The first trials dealing with the defence of superior order destroyed entirely the arguments of the defence. This was decided because even the German Military Criminal Code did not refute responsibility under the eye of the law for criminal acts. Article 47(2) of the German Military Criminal Code provided that whoever committed an offence against criminal law through obedience of his superior is punishable as an accomplice to the said crime. This was also applicable to both the SS, including the *Einsatzgruppen* charged with exterminating humans in such places as Treblinka and Auschwitz-Birkenau, as well as the *Waffen SS*. Therefore, Adolf Eichmann was deemed criminally responsible for the death of more than a million individuals placed in his power and hanged.

#### **b. During an attack**

(346) In the same manner, **before or during an attack**, one must refrain from either launching or continuing the action when it becomes apparent that the target is not a legitimate military objective or that collateral damages inflicted on civilians will be disproportionate when compared to the direct and concrete military advantage sought (art. 57(2)(b)/AP 1).

(347) On this last point, it is important to consider two examples. The first concerns the civilian character of a target during an attack as well as basic notions of social psychology that apply during combat. The second concerns social psychology in relation to stopping an illegal action.

(348) Let us first recall the tragedy of March 16, 1968, in the small village of My Lai (PINKVILLE) in

<sup>90</sup> *In Re Goëring and Others*, Annual Digest, 13 (1946), p. 203; *In Re Altstötter and Others (Justices Trial)*, Annual Digest 13 (1946), p. 278 and more importantly in the *In Re Ohlendorf and Others (Einsatzgruppen Trial)*, United States Military Tribunal at Nuremberg, Annual Digest, 15 (1948), p. 667. Furthermore, this was clearly upheld by Israel District Court of Jerusalem and Israel's Supreme Court, respectively in *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israel, District Court of Jerusalem, December 12, 1961 and *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israel, Supreme Court (sitting as a Court of Criminal Appeal), May 19, 1962. In this last case, the Supreme Court upheld the conclusion of the District Court that following article 114(b) of the *Allied Control Council for Germany Law No. 10* and article 8 of the *London Charter* under which the *International Military Tribunals* were founded, the plea of superior order was rejected. Indeed, these article specified that the dispositions of article 19(b) of the 1936 *Criminal Code Ordinance of Germany*, namely that "A person is not criminally responsible for an act or omission if he does or omits to do the act in any of the following circumstances, that is to say : (...) (b) In obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly illegal. Whether an order is or is not manifestly illegal is a question of law." shall not apply.

the Republic of South Vietnam. According to the indications of the intelligence branch, My Lai, objective PINKVILLE was a Viet Cong resistance nest. In accordance with his orders, Lieutenant Calley invaded the village with his platoon. It appears that the platoon, having sustained casualties in the preceding days, became more and more nervous the longer they stayed in the village. Under pressure, they began assembling civilians and executing them. Officially, the platoon murdered 109 unarmed civilians (many sources present much higher figures)<sup>91</sup>.

(349) The only thing that stopped the massacre was the intervention of a helicopter pilot who noticed that the situation seemed to be degrading on the ground. He landed his aircraft between the civilians and the platoon, menacing them with his M-60 on board machine-gun. It seems that during the whole time of the incident, only this pilot had realized what was happening. This demonstrates that the determination of the character of a target can become blurred in the thick of an operation and that it becomes harder and harder to think clearly during an operation due to cumulative pressure.

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<sup>91</sup> Wikipedia, *My Lai Massacre*, available at [http://en.wikipedia.org/wiki/My\\_Lai\\_Massacre](http://en.wikipedia.org/wiki/My_Lai_Massacre): “Charlie Company, 1st Battalion, 20th Infantry Regiment, 11th Brigade, Americal Division arrived in Vietnam in December 1967. Their first month in Vietnam passed without any direct enemy contact. During the Tet Offensive of January 1968, attacks were carried out in Quang Ngai by the 48th Battalion of the NLF. US military intelligence formed the view that the 48th Battalion, having retreated, was taking refuge in the Son My village. A number of specific hamlets within that village - labelled My Lai 1, 2, 3 and 4 - were suspected of harboring the 48th. US forces planned a major offensive on those hamlets. On the eve of the attack, US military command advised Charlie Company that any genuine civilians at My Lai would have left their homes to go to market by 7 a.m. the following day. They were told they could assume that all who remained behind were either VC or active VC sympathizers. They were instructed to destroy the village. At the briefing, Captain Ernest Medina was asked whether the order included the killing of women and children; those present at the briefing later gave different accounts of Medina's response. The soldiers found no insurgents in the village on the morning of March 16, 1968. Enraged because fellow platoon soldiers were killed on previous occasions, they gave little thought to the consequences of their actions that day. It is rumored by Vietnamese that the soldiers asked the villagers where the Viet Cong were and that the villagers either didn't know or refused to reveal their location. Many suspected there were VC in the village, hiding underground in the homes of their elderly parents or young wives. Nevertheless, the American soldiers, one platoon of which was led by Lt. William Calley, killed hundreds of civilians – primarily old men, women, children and babies. Some were tortured or raped. Dozens were herded into a ditch and executed with automatic firearms. At one stage, Calley expressed his intent to throw hand grenades into a trench filled with villagers. The precise number reported killed varies from source to source, with 347 and 504 being the most commonly cited figures. A memorial at the site of the massacre lists 504 names, with ages ranging from 1 year to 82 years of age. According to the report of a South Vietnamese army lieutenant to his superiors, it was an "atrocious" incident of bloodletting by an armed force seeking to vent its fury. The soldiers said they were convinced any and all villagers could be a threat. One general said he even suspected mothers carrying babies of having loaded hand grenades. A US Army helicopter crew saved some civilians by landing between the American troops and the remaining Vietnamese hiding in a bunker. The 24-year-old pilot, Warrant Officer Hugh Thompson, Jr., confronted the leaders of the troops and told them his gunship would open fire on them if they continued their attack on civilians. On April 1, only a day after Calley was sentenced, President Richard Nixon ordered him released from prison pending appeal; on August 20, 1971, the convening authority — the Commanding General of Fort Benning — reduced his sentence to 20 years. Next the Army Court of Military Review affirmed the conviction and sentence (46 C.M.R. 1131 (1973)). Next the Secretary of the Army reviewed the sentence and findings and approved both, but in a separate clemency action commuted confinement to ten years. On May 3, 1974, President Nixon notified the Secretary that he had reviewed the case and determined he would take no further action in the matter. Ultimately, Calley served 3½ years of house arrest in his quarters at Fort Benning, Georgia. Calley petitioned the federal district court for habeas corpus on February 11, 1974, which was granted on September 25, 1974, along with immediate release, by federal judge J. Robert Elliott. Judge Elliott found that Calley's trial had been prejudiced by pretrial publicity, denial of subpoenas of certain defense witnesses, refusal of the House of Representatives to release testimony taken in executive session of its My Lai investigation, and inadequate notice of the charges. (The judge had released Calley on bail on February 27, 1974, but an appeals court reversed that and returned Calley to Army custody June 13, 1974.) The Army appealed Judge Elliott's decision to the Fifth Circuit Court of Appeals and asked an appeals judge to stay Calley's immediate release, which was granted; however the full Court upheld the release pending appeal and decided that the entire court would hear the appeal (normally not done in the first instance). In the event the Army won a reversal of Judge Elliott's habeas corpus grant and reinstatement of the judgment of the court-martial with, however, 5 judges dissenting. (Calley v. Callaway, 519 F.2d 184, 9/10/1975).”

(350) In the same manner, the torture of a young Somali boy by members of the 2nd Commando, Airborne Regiment of Canada in 1993 illustrates that once committed to the perpetration of an illegal act, those involved find it very difficult to perceive its illegality and to stop it; this is as true for those who commit it as for those who observe it or hear it. Responsibility is then very difficult to attribute, allowing individuals to believe that they cannot be identified for their actions or that it is not their role to intervene.

(351) In terms of social psychology, this is called the **witness effect**<sup>92</sup>: **in a group, our personal capacity to take responsibility or to intervene becomes limited.**

(352) This was demonstrated in a classic case of social psychology involving the rape and murder of a young woman, Catherine Genovese, in New York in 1964. Thirty-eight identified witnesses saw the victim stabbed or heard her cries. They saw or heard her cries when her aggressor raped her and fled. They saw or heard her when he came back to rape and stab her a second time before finally fleeing again. They heard her cries in between. Yet despite all her pleas for help and her cries over a period of three hours, Ms. Genovese received no help whatsoever. Nobody even bothered to call the police.

(353) Our reflex is, of course, to judge these witnesses on their inaction. Yet this is exactly what happened in the makeshift jail of a Canadian camp in Somalia in 1993 or in a village in South Vietnam in 1968. This is because the witness effect is a major force of social psychology. During an action, or under cumulative pressure, members of a group do not feel personally responsible. They all think it is somebody else's duty to intervene. This effect is even more pronounced in a hierarchical system: everyone thinks that the leader knows what he is doing and that if he orders an action, he is the only person responsible. The capacity of intervention requires individuals who have an honour code, a personal integrity that is above peer pressure. This is integrity of an extremely high level.

(354) The application of the LOAC often means the practical application of personal beliefs in order to make difficult choices. If an illegal order is given or an illegal action is committed, it is **YOUR** duty to intervene, your moral and legal obligation, nobody else's. There are no defences or excuses. It cannot be said often enough: **YOU ARE RESPONSIBLE**.

(355) This responsibility is valid under both national law, which means in the Canadian legal jurisdiction under the *Queen's Order and Regulations - Volume II Disciplinary*<sup>93</sup>, as defined by the *National Defence Act of 1994* at article XXX<sup>94</sup>, and under international law as incorporated in the Canadian legislation, through the ratification and incorporation in the Canadian law by the Federal Parliament of the *International Criminal Court*.<sup>95</sup>

### **c. Before an attack**

(356) The third precaution under paragraph (2) is **precaution before the attack**. If it is decided that an attack is justified by military necessity, despite the important collateral damages it will inflict, then all

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<sup>92</sup> The *Witness Effect* is also known as the 'Bystander Effect' or the 'Genovese Syndrom' or "Genovese Effect". It is further discussed in J. M. Darley & B. Latane. (1968). Bystander intervention in emergencies: Diffusion of responsibility. *Journal of Personality and Social Psychology* 8, 377-383 and in subsequent experiments reported in Latane, B., & Darley, J. Bystander "Apathy", *American Scientist*, 1969, 57, 244-268 proving that in cases of emergency as well as more empirical and pointedly in Gladwell, Malcolm, *The Tipping Point: How Little Things Can Make a Big Difference*, 2000.

<sup>93</sup> *Queen's Regulations and Orders for the Canadian Forces - Volume II - Disciplinary*, art. 103.10 Desertion, available at [http://www.admfines.forces.gc.ca/qr\\_o/vol2/ch103\\_e.asp#103.10](http://www.admfines.forces.gc.ca/qr_o/vol2/ch103_e.asp#103.10), referring to Art. 77 of the National Defense Act of 1994.

<sup>94</sup> *National Defence Act* ( R.S., 1985, c. N-5 ), available at <http://laws.justice.gc.ca/en/N-5/text.html>.

<sup>95</sup> *Crimes Against Humanity and War Crimes Act* ( 2000, c. 24 ), implementing the Rome Statute of the International Criminal Court on June 29, 2000.



means to warn the civilian population must be taken when possible and the weapons chosen to use in the attack must be those which will give the same result (destroy or neutralize the target) with the least damages to civilian life and property.

(357) A way to circumvent the problem of the determination of means is to consider whether another target or targets would yield the same results. It is an obligation to choose the target that will result in the least damages (art. 57(3)/AP 1).

(358) It must be specified that art. 57 does apply to all ground, air, or sea operations. Art. 57(4)/AP 1 clearly states that in all these types of engagements, all precautions applicable under international law must be respected to prevent or reduce civilian losses or damages to civilian property. Nothing in this article can be used to justify an attack on a target that is not a legitimate military objective (art. 57(5)/AP 1).

### C. RESPONSIBILITY OF WAR CRIMES : CANADA'S PREVENTION AND REPRESSION OF WAR CRIMES

(359) These responsibilities during planning, before or during an attack translate into the judicial prosecution of persons committing such war crimes or crimes against humanity. However, when dealing with matters of war crimes, no country wants to see its image smeared by the blood of its victims of war crimes. A country as sensitive as any to this perception is Canada.

(360) Canada tries very hard to maintain the image of a welcoming and tolerant land, where values of respect and human rights are inculcated to its population in general and to the members of its Canadian Forces in particular. Despite this, it is unavoidable that through their implication in conflicts such as the First and Second World War, Korea, as well as peacekeeping and peacemaking missions in Rwanda, Somalia, Kosovo, Cyprus, Bosnia and Herzegovina and countless others, bad situations breed wrongful actions from individuals in the Canadian Forces and result in the commission of war crimes.

(361) At the other end of the spectrum, Canada is known throughout the world as a safe haven for terrorists, criminals of all stripes and war criminals. Due to its welcoming immigration policies, Canada has always had a tendency to grant the benefit of the doubt first and let claimants in rather than have them wait and risk murder in their country of origin.

(362) As a result, Canada has been given a reputation as a safe haven for war criminals, '*génocidaires*', and other terrorists. It is therefore necessary to analyse Canada's record on war crimes from two perspectives. First, from the point of view of the commission of war crimes by members of the Canadian Forces, and then from the perspective of Canada's record with regards to its evaluation of claims, refusal and grant of refugee status and prosecution of war crimes resulting from these inquiries. This will lead us through a circumvallated legal path of problematic policies and flawed legislation to a sense of progression, but with much left to be done.

(363) **CANADA'S RECORD AT WAR.** Canadians have committed war crimes. Even before we argue the notion of applicable laws of armed conflicts and laws of war at the time of their commission, there is no doubt that massacres and attempted genocide against aboriginals are as much a part of Canadian history as it is part of the American one. The fact that these acts were committed first by Dutch, French, Spanish and English colonials do not take away their repercussions in history, or the collective responsibility of the Nations related to these commissions. There is ample evidence of British attempts to have Canada

eradicate its aboriginal populations through neglect and assimilation policies during the 19<sup>th</sup> century, including after the Confederation of the four founding provinces of Canada in 1867 and the following federation of further provinces, up until 1949 and the creation of territories up to the creation of Nunavut in 2002.

(364) However, no Canadian was ever brought to trial for these actions as the notions of crimes against humanity and war crimes had not permeated the collective consciences of the so-called ‘civilised’ Nations and most were committed not during wars but during periods of peace. As such, the notion of war crimes did not apply with the laws of the time.

(365) The Canadian participation in the Great War (1914-1918) changed this perception tremendously. To urge their civilians to enrol, the Allies created some much pervaded propaganda accusing the German and Austrian troops of committing the most incredible aberrations, such as the crucifixion of nouns of the impaling of babies<sup>96</sup>. To simple country boys enrolling and city dwellers desiring to avenge their European forebears and cousins, this type of psychological incitement to commit acts not in accordance with the *Hague Conventions* of 1899 and of 1907 have been said to be successful to a limited extent. To which, no one will never know, but to this that of the 500,000 Canadians who served in the Great War none have committed any sort of war crimes is pure delusion.

(366) Prisoner of war camps and civilian internment camps, such as Fort Henry in Kingston, have acquired a certain aura of ‘none-too-tasteful’ behaviour for its treatment of detainees. As well, testimonies of war veterans, even if not corroborated, tend to certain transgressions. Nonetheless, considering the scope and intensity of the conflict, there is no doubt that any happenstance of war crimes by Canadians during the Great War was reduced to individual department and isolated incidents.

(367) The Second World War (1939-1945) does not lend itself to such a clear slate. A relatively known incident occurred in Normandy shortly after D-Day. Oral tradition has transmitted in military circle that Canadian prisoners of war made on June 6 and following days by the 12 SS Panzer HitlerJugend were executed at the Abbey d’Ardennes and that, in reprisals, the Commanding Officer of the Régiment de la Chaudière declared one day without quarters for each Canadian killed. It supposedly resulted in a week without quarters given by Canadians in this sector. This oral tradition has endured since and influenced the writing of a relatively known book from French-Canada in military literature called *Les Canadiens Errants*, where this incident and the fanaticism of the HitlerJugend is presented in all its horror as opposed to the silent glory of Canadian soldiers<sup>97</sup>.

(368) The facts are less romanced than this oral tradition. The trial of SS Brigadeführer Kurt Meyer under Canadian jurisdiction brought forth other elements regarding this case. The first is that Meyer only became the commanding officer of the 12 SS Panzer Division on June 14, 1944 as the General Commanding had been killed in an air raid that day. Meyer previously commanded the 25<sup>th</sup> regiment of this division and did not have effective command immediately<sup>98</sup>. Furthermore, what prompted the massacre is not the same story depending on the research. According to historian Howard Margolian in his book *Conduct Unbecoming*<sup>99</sup>, it was solely German fanaticism that prompted it. But, further research in

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<sup>96</sup> Richard, Jean-Jules, *Neuf jours de haine*, Montréal, CFL Poche Canadien 1968, 361p.

<sup>97</sup> Vaillancourt, *Les Canadiens Errants*

<sup>98</sup> On <http://overlord44.free.fr/php/elargissement.php>.

<sup>99</sup> Margolian, Howard, *Conduct Unbecoming: The Story of the Murder of Canadian Prisoners of War in Normandy*, Toronto, University of Toronto Press, 2000.

*Meeting of Generals*<sup>100</sup>, by Tony Foster, son of Canadian Major-General Harry Foster who presided over Meyer's court-martial, the massacre was prompted by the fact that a German officer had been shot in cold blood after surrendering and because a Canadian officer was captured with written orders to give no quarters to the Germans<sup>101</sup>. Whichever was the case, 11 German prisoners of war were executed in retaliation by Anglo-Canadian forces on June 17, 1944. Ironically, it is said that the commanding officers of both the German and Allied forces were not only strenuously opposed to such actions but also reprimanded them severely<sup>102</sup>.

(369) An indication of the muddling of the facts regarding which crime came first and which was retaliation, is the fact that General Meyer saw his sentence reduced on appeal from shot by firing squad – which is usually not granted to war criminals as they are hung from the neck until death ensues – to a commutation of life imprisonment. He served 5 years in a Canadian prison and a further 3 in a German prison. He was released in 1954<sup>103</sup>.

(370) Another 'urban legend' of the Canadian military concerns the much known picture, enlarged and exposed in 'live format' at Normandy Hall of Fort Frontenac (Kingston), of a German officer being captured and searched by Canadian soldiers. According to the 'legend' after seeing this photo in the press during the war the mother of this officer said: "But they [the Canadians] told me he died in battle!"

(371) Yet another case is that of veterans telling the author that he had been told during the war to escort prisoners to the rear. As they were escorted, prisoners were conveniently "shot while trying to escape". Whether these stories are embellished or not has no bearing on the question. The burden is that Canadians have indeed committed war crimes. The difference is perhaps that those crimes were not authorised or encouraged by the chain of command but a matter of individuals acting out of revenge or any emotional urge.

(372) Past offences of Canadians committed prior, during or after the heat of battle have been somewhat substantiated, among other by the award-winning miniseries of the Canadian Broadcasting Corporation (CBC) entitled "*The Valour and the Horror*", in which a veteran testified that while posted in Hong Kong in 1941, prior to the Japanese invasion of the island, he was counselled by his sergeant that if he was to run his armoured car into a Chinese civilian, to stop and verify that he was dead. If he was still alive but badly injured, it was advised to back up the armoured car on him because it cost less to bury one than to pay the hospital fees<sup>104</sup>. In the same manner, Canadian participation to area bombings remain a forgotten aspect of civilian targeting that took place on express orders of Allied High Command during the war which does not meet the standards of even the *St-Petersburg Declaration*.

<sup>100</sup> Foster, Tony, *Meeting of Generals*, Toronto, Authors Choice Press, 2000.

<sup>101</sup> On <http://www.ukar.org/mccl116.html#Canadian>.

<sup>102</sup> *Supra*, note 98.

<sup>103</sup> Brode, Patrick, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions, 1944-1948*, Toronto, University of Toronto Press, 1997, <http://www.windsorpubliclibrary.com/digi/macdonald/kurt.htm>.

<sup>104</sup> Canadian Broadcasting Corporation, "The Valour and the Horror, Episode 2: A Savage Christmas Hong Kong, 1941", 1992 at <http://www.valourandhorror.com/HK/HKsyn.htm>. There is no indication of actual commissions of such actions, but such testimonies are circumstantial evidences of the attitude of part of the Canadian troops deployed during the war and the prejudice that accompanied racial differences. These factors led to a very bloody war in the Pacific theatre of operations and no Anglo-Saxon literature differs on accounts of atrocities being committed by Allied forces. Books like Norman Mailer's *The Naked and the Dead*, and other such work of veterans demonstrates the viciousness of the fighting and Canadians were no more immune to these psychological pressures than any other troops.

(373) While American cases are being discovered from Korea, Canada's 26,000 men contribution has been mainly forgotten and no report of war crimes have been described although it is known that this conflict was conducted in extremely difficult conditions.

(374) Since then, Canadian participation to some actions during the Second Gulf War of 1991 has been deemed devoid of such violations and the participation of NATO countries to the bombing of Serbia and Montenegro during the Kosovo intervention of 1999 are still pending while Canada has argued the following:

“The Government of Canada requests the Court to adjudge and declare that the Court lacks jurisdiction because the Applicant has abandoned all the grounds of jurisdiction originally specified in its Application pursuant to Article 38, paragraph 2, of the Rules and has identified no alternative grounds of jurisdiction. In the alternative, the Government of Canada requests the Court to adjudge and declare that:

- “- the Court lacks jurisdiction over the proceedings brought by the Applicant against Canada on 29 April 1999, on the basis of the purported declaration of 25 April 1999;
- the Court also lacks jurisdiction on the basis of Article IX of the Genocide Convention;
- the new claims respecting the period beginning 10 June 1999 are inadmissible because they would transform the subject of the dispute originally brought before the Court; and,
- the claims in their entirety are inadmissible because the subject matter of the case requires the presence of essential third parties that are not before the Court.”<sup>105</sup>

(375) While this would be a question of technicality and not of the merits, it appears that U.N. Resolutions following the intervention and continued support in the international community, while limited would be sufficient to justify the actions and have them not considered as war crimes but application of necessity and proportionality. This, however, was never adjudicated nor judged upon as the International Court of Justice found that Serbia and Montenegro was not a State member to the United Nations nor eligible to the jurisdiction of the ICJ at the time of the operations nor at the time of its filing for relief under the Statute of the International Court of Justice <sup>106</sup>.

(376) Where the question of war crimes being committed by Canadians during international mandates comes into questions, two cases are of actual use. One springs from the Canadian peacekeeping mission in UNPROFOR II in Bosnia during the 1994 siege of Sarajevo while the other concerns a torture and murder case in Somalia in 1993.

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<sup>105</sup> *Legality of the Use of Force (Serbia and Montenegro v. Canada)*, Press Release 2004/18, The Hague, 3 May 2004 at <http://www.icj-cij.org/icjwww/idocket/iyca/iycaframe.htm>.

<sup>106</sup> *Legality of the Use of Force (Serbia and Montenegro v. Canada)*, judgement of 15 December 2004, available at <http://www.icj-cij.org/icjwww/idocket/iyca/iycaframe.htm>. However, the court did judge the case solely on the merits of the rights to access the court, concluding : “90. For all these reasons, the Court concludes that, at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.” Further, the court stated that even under the Genocide Convention there was no grounds from which Serbia could refer a case to the court as it did in 1999 since : “113. The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute (see paragraph 112). The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.”.

*Somalia 1993*

(377) The case of Somalia is extremely well documented because revelation of this murder and cover-up attempts by the military and politicians led to extraordinary measures being taken in the Canadian Forces and a profound shakedown of the government.

(378) The U.N. intervention in Somalia in 1992 was the first such operation following the crumbling of the Berlin wall and the Second Persian Gulf War of 1991. As such, it reflected a new approach to humanitarian operations by which peacekeeping measures of Chapter VI of the *U.N. Charter*<sup>107</sup> were reinforced with a strong mandate to use force under Chapter VII to “establish a secure environment for humanitarian relief operations in Somalia as soon as possible”<sup>108</sup>. As such, the confusion between the use of force to secure humanitarian operations and for the protection of the troops on the ground appeared to have been muddled in legal terms to start with, leading to a problematic interpretation of the rules of engagement. But, more importantly, the background that led to the death of Shidane Abukar Arone was a tragedy of errors and incompetence on the part of the military and political leadership of Canada.

(379) It is also the most heart-wrenching case as it soiled the good name of the 1988 Nobel Peace Prize Winner - namely the Canadian Forces as a whole for their contribution to peacekeeping – and for the tragedy that brought about the death of a 16 years old Somali while pleading: “Canada! Canada!” as expectations of mercy and fair treatment. All this was caused by the events following his capture at around 2045 hours on 16 March 1993, by a Canadian patrol in an abandoned American military compound adjacent to the Canadian one. This capture was the result of a deliberate attempt by Canadian to capture Somalis engaged in looting. Captain Sox, commanding 4<sup>th</sup> Platoon, 2<sup>nd</sup> Commando was charged with implementing a trap to capture such a person and succeeded in his attempt

(380) Arone was brought to the Canadian compound and detained in a bunker with his wrists and ankles bounds. Then, a baton was place through his elbows behind his back, and from this he was suspended from the ceiling. After suffering random physical abuse from Master Corporal Clayton Matchee and Private Kyle Brown, Arone was systematically beaten and burned with cigarettes as well as ‘pistol whipped’. Arone died at approximately 0014 hours on 17 March 1993 from repeated blows to the head.

(381) The *Somalia Inquiry Commission* produced a 1292 pages, five volumes report on every aspects pertaining to the events that led to this debacle and is available and exploring in depth the dysfunctions of the military system<sup>109</sup>. Its main analysis and conclusions can be found in Volume 2, where it analyses in details the problems of the personnel screening, the leadership inadequacies and the general attitude of the troops on the ground.

(382) But this report was not the first to be done. Previously, a Board of Inquiry led by Major-General de Faye had already explored the issues and concluded on 23 April 1993 that while discipline in the unit under discussion – the 2<sup>nd</sup> Commando, Canadian Airborne Regiment – had flaws, it was prepared to meet the needs of its mission and its training was adequate<sup>110</sup>. However, this was not fully satisfactory and consisted only in the first phase of the examination of structural problems leading to the commission of war crimes.

<sup>107</sup> SC Res. 775, UN SCOR, 47<sup>th</sup> Sess., 3110<sup>th</sup> Meet., S/RES/775 (1992).

<sup>108</sup> SC Res. 798, UN SCOR, 47<sup>th</sup> Sess., 3145<sup>th</sup> Meet., S/RES/798 (1992) at par. 7.

<sup>109</sup> *Somalia Inquiry Report*, 2 July 1997, at [http://www.forces.gc.ca/site/Reports/somalia/index\\_e.asp](http://www.forces.gc.ca/site/Reports/somalia/index_e.asp).

<sup>110</sup> *Somalia Inquiry Report*, 2 July 1997, Volume 1 at 277, at <http://www.dnd.ca/somalia/vol1/v1c14e.htm>.

(383) At the end of September 1993, as reports of attempted cover-up were surfacing in the press, the Minister of National Defence ordered the creation of a *Somalia Working Group* with a mandate to “collate all ongoing departmental activities associated with the Somalia Affair”<sup>111</sup>. This *Somalia Working Group*, under the command of Major-General Jean Boyle, submitted its report in July 1994 and, contrary to the conclusion of the *de Faye Inquiry*, found “significant discrepancies in the de Faye’s Board’s findings and recommendations”<sup>112</sup>. This prompted the creation of a *Commission of Inquiry into the Deployment of Canadian Forces to Somalia* on 20 March 1995<sup>113</sup>. From this time, the *Commission* held a series of public hearings and collected over 600,000 pages of documents.

(384) On 1 January 1996, now-promoted to Lieutenant-General Boyle was promoted to full General rank, with the title of Chief of the Defence Staff making him the overall commander of the Canadian Forces. He was plagued with the *Commission*’s inability to get hold of documents of major importance, especially the computer logs of the 1<sup>st</sup> and 2<sup>nd</sup> Commandos of the Canadian Airborne Regiment, which were in effect the equivalent of their war journals. The first were said to have been lost due to water damages during ship transport, while the second had simply disappeared. Conveniently, both sets concerned the incidents in questions.

(385) The logs of 2<sup>nd</sup> Commando were finally recovered in a file cabinet at Canadian Forces Base Petawawa, and these had proved to have been altered. On 17 April 1996, the Minister of National Defence, David Collenette, enlarged the mandate of the *Commission* to “look into a cover-up. The Inquiry is to look into the destruction of documents. The Inquiry is to determine if there is wrongdoing...”<sup>114</sup> Yet, delays and poor results left the distinct impression of a government dragging its feet and the military obstructing the conduct of the inquiry through a wall of silence.

(386) In an extraordinary step, General Boyle sent a message to all Canadian Forces personnel and civilian defence employees to “stand down all but essential operations and to conduct a thorough search of all their files, to identify and forward to NDHQ/SILT any Somalia-related document not previously forwarded”<sup>115</sup>. This resulted in a further 200,000 pages in 39,000 documents sent to the *Commission*.

(387) On 4 October 1996, the Minister of National Defence resigned his appointment, but remained in Parliament as a Member of the Liberal Party elected for Toronto. General Boyle resigned his appointment as Chief of Defence Staff on 8 October 1996 and retired from the Canadian Forces. From the *Commission*’s report, it became clear that the long road to light being shed on the events of 16 March 1993 was a string of leadership fumbles, legal miscomprehensions and political meddling.

(388) The *Commission* found that the training received by the members of 2<sup>nd</sup> Commando had been inadequate to prepare them for peacekeeping or peacemaking. Also, the choice of 2<sup>nd</sup> Commando to deploy in such a mission had been extremely ill-judged, as the main purpose of this unit was to parachute behind enemy lines and conduct very aggressive operations against a well-trained and professional enemy. Even more so, in terms of aggressiveness, 2<sup>nd</sup> Commando was renowned for a level over and above any other unit in the Canadian Forces. It was furthermore affected with deep structural and disciplinary problems, as well as a weak leadership. Incidence of racism were rampant, the Confederate flag being

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<sup>111</sup> *Ibid.*, at 280.

<sup>112</sup> *Ibid.*, at 281.

<sup>113</sup> *Ibid.*, at 283, [hereinafter the *Commission*].

<sup>114</sup> *Ibid.*, at 287.

<sup>115</sup> *Ibid.*, at 284.

used as a rallying symbol<sup>116</sup> and a least four of its officers were under reprimands or under careful observations for lack of leadership, incompetence and/or disciplinary problems<sup>117</sup>.

(389) To these inadequacies must be added the fact that these over-aggressive troops were committed to an environment of intense frustrations as the UN mandate was unclear and the constraints imposed on the troops severe. The *Commission* accounted for this in its finding<sup>118</sup>. The inadequacies of the chain-of-command translated itself also in the incomprehension of the Rules of Engagement. These are the soldiers' only directive to their use of force. As such, it is interpreted and passed to them through training.

(390) In the case of the Somalia Rules of Engagement, their inadequacies were signalled from the start but the procedure to amend them was so taxing that changes only came well after the deployments and its incidents. Furthermore, once the review got underway, the person responsible for it was its original drafter, who found nothing wrong with his initial submission. Furthermore, their interpretation on the ground by Lieutenant-Colonel Mathieu authorised "the use of deadly force against Somalis found inside the Canadian compound or absconding with Canadian kit, whether or not they were armed"<sup>119</sup>

(391) This is truly an interesting enlargement of their Paragraph 7(C)(a) permitting the use of force only when: "An opposing force or terrorist unit commits a hostile act when it attacks or otherwise uses armed force against Canadian forces, Canadian citizens, their property, Coalition forces, relief personnel, relief materiel, distribution sites, convoys and non-combatant civilians, or employs the use of force to preclude or impede the mission of Canadian or Coalition forces."<sup>120</sup>

(392) Even to the more obtuse of soldier, this would definitely induce the question of what is meant by an attack. Some soldiers were left under the impression that anybody penetrating the perimeter of the Canadian compound was a legitimate target, which was absolutely not the case. Attempts to clarify by authorising to aim at the legs were not helpful as soldiers are trained to shoot at the center of the visible mass, which usually mean the area comprised between the chest and the lower belly. Most of the troops did act with sound judgment by giving fair warning, ordering to stop and being cautious about the use of fire against unknown targets. Still, this climate of confusion and frustration, coupled with the disciplinary problems and aggressiveness of the 2<sup>nd</sup> Commando's sub-culture did not wait long to assert itself.

<sup>116</sup> *Somalia Inquiry Report, supra*, note 99, Volume 2, at 55 and 66.

<sup>117</sup> *Ibid.*, at 86 and 139 and Of these, Brigadier-General Beno, Commander of Land Forces Central Area, asked for the relief of the Commander of the Canadian Airborne Regiment, Lieutenant-Colonel Morneau for failure in the application of training and discipline. His replacement, Lieutenant-Colonel Mathieu, was deemed as feeble and was mistrusted by his officers. The Officer Commanding the Second Battalion, Major Seaward, was deemed incompetent and one of his main officer, Captain Rainville, was already under investigations for actions unbecoming and usurpation of his authority during an exercise conducted in Québec the year prior. LCol Morneau was indeed relieved, LCol Mathieu was relieved of command in September 1993, Major Seaward would be court-martialed for his actions (or lack thereof) and Captain Rainville got away with a reprimand for all his actions.

<sup>118</sup> *Ibid.*, at 267, in a section entitled 'Soldier Mounting Resentment' at not being able to fight back to the thieving and the injuries and insults to which they were submitted. Testimonies given to the Commission spoke of a: "mounting resentment of continuing thievery and their confusion about the proper application of the ROE became an increasingly dangerous mix. Maj Mansfield, as OC of the engineer squadron, found that Somalis who penetrated the Canadian compound frustrated his men greatly and he was worried about retaliation. WO Ashman believed that Somali infiltrators caused CF members to feel violated. MWO Amaral asserted that Somalis spat on various CF members and hurled rocks at them. On March 3, 1993, an American soldier died when a U.S. vehicle struck a mine near the village of Matabaan, approximately 80 to 90 kilometres north-east of Belet Huen, and Cpl Chabot testified that the American's death engendered a thirst for revenge against the Somalis. Perhaps it is not mere coincidence that Mr. Aruush perished on the following day."

<sup>119</sup> *Ibid.*, at 266.

<sup>120</sup> *Idem.*

(393) The interpretation of the Rules of Engagement by Lieutenant-Colonel Mathieu confused the criminal intent of looting with the hostile intents of armed forces against Canadians. This led his immediate subordinate, Major Seaward, the Officer Commanding 2<sup>nd</sup> Commando, to give a formal order to “abuse” intruders. Major Seaward’s subordinates included the commander of 4<sup>th</sup> Platoon, Captain Sox, who passed this order to his troops and set about capturing a Somali for that purpose. Once the capture was successful, the prisoner was brought under the guard of Sergeant Boland, who then charged Master-Corporal Matchee, Privates Brown and Brocklebank with the direct watch of the prisoner at 2200hrs.

(394) From this point, it took 2 hours to kill Arone through beating. After Arone was found dead, Master-Corporal Matchee was ordered arrested on 18 March 1993 by Major Seaward. At around 1300 hours on 19 March 1993, Master-Corporal Matchee was found hanging by a bootlace off the beam of the ceiling of his bunker where he was detained in an apparent suicide attempt.

(395) As a result of this war crime, court-martials were ordered against a string of officers, non-commissioned officers and lower ranks members, all mentioned above, as well as a Sergeant Gresty, who was on guard duty in the command post about 25 meters away from the bunker where Arone was held.

(396) Lieutenant-Colonel Mathieu was brought twice to court-martial, once in May 1994 and again on retrial in January 1996. He was acquitted of all counts of negligent performance of duty from giving an order allegedly on the use of deadly force and contrary to the Rules of Engagement.

(397) Major Seaward was charged with unlawfully causing bodily harm and negligent performance of duty. He was acquitted of the first charge but held accountable to the second as he should have realised that his order to “abuse” intruders was contrary to the law and would cause soldiers under his command to harm prisoners. He was at first sentenced to a severe reprimand. But, the Prosecution asked permission for appeal to the Court Martial Appeal Court of Canada for review of the sentence. The Court agreed and Major Seaward was condemned to three months imprisonment and release from the Canadian Forces. Major Seaward left prison in August 1996.

(398) Captain Sox was charged with unlawfully causing bodily harm by passing along an order permitting abuse, with negligent performance of duty and with an act to the prejudice of good order and discipline. He was acquitted of causing bodily harm, but convicted of negligent performance of duty. He was reduced to the rank of lieutenant and given a severe reprimand.

(399) Sergeant Boland pleaded guilty to charges of negligent performance of duty but not guilty to torture. He was on guard duty in the bunker before Master-Corporal Matchee’s turn at the guard. Sergeant Boland passed along the order of Captain Sox to “rough up” the prisoner, to which Master-Corporal Matchee answered: “Oh Yeah!”<sup>121</sup> This prompted Matchee to go in the bunker and beat the prisoner with Private Brown. But, when Brown asked him to stop, Matchee answered “no” because he believed that “Captain Sox wants him beaten for when we take him to the police station tomorrow.” Upon leaving the bunker, Sergeant Boland had said to Master-Corporal Matchee: “Just don’t kill him.”, thereby giving him latitude in his treatment of the prisoner. Sergeant Boland was initially sentenced to 90 days’ detention, but on appeal the Court Martial Appeal Court of Canada increased the sentence to one year’s imprisonment.

(400) Sergeant Gresty was acquitted on all counts of negligent performance of duty even though he was 25 meters from the bunker where Arone was being beaten and did not respond when told of the treatment

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<sup>121</sup> *Her Majesty The Queen v. Major A.G. Seaward*, Court Martial Appeal Court of Canada, CMAC-376, cited in Sassoli, Marco and Bouvier, Antoine, *How Does Law Protect in War?*, Geneva, International Committee of the Red Cross, 1999 at 1080.



of the prisoner. No appeal was made.

(401) Private Brocklebank, present during the beating and torture of Arone, was acquitted of the charges of torture and negligent performance of duty. Private Brown was charged with second degree murder and torture. He was found guilty of torture and of the lesser charge of manslaughter. Ironically, he was convicted exactly one year after the death of Arone on 16 March 1993 and sentenced to 5 years imprisonment, as well as dismissal from Her Majesty's service. No appeals were granted. Brown was transferred from his military jail to a civilian penitentiary on 24 May 1995. He was released on parole in November 1995.

(402) Master-Corporal Matchee was left brain-damaged from his suicide attempt and therefore unable to stand trial. The charges against him remain and he could be tried if he became competent to stand trial, but this is highly unlikely.

(403) The lesson from all this has clearly been that officer commanding rarely get the blame, even when their incompetence is such that their commanding officer demands them relieved and their subordinate mistrust them. This was the case of Lieutenant-Colonel Mathieu.

(404) Major Seaward got his just deserves but even that does not complete the lack of accountability given to the senior officers in the chain of command who failed to assess and communicate clearly the importance and interpretation of the rules of engagement.

(405) The acquittal of Captain Sox, save for a reduction in rank to a lesser charge, Sergeant Gresty and Private Brocklebank demonstrates a lack of severity to a definitely important aspect of modern soldiering: accountability regardless of the rank.

(406) With the suicide attempt of Master Corporal Matchee, the only person deemed as directly participating was Private Brown, the lowest denominator in the chain of command. For that, he was given a stiff sentence indeed. But even then, he only served a year of it in military prison, whilst the usual standard is of two years minus one day, and followed by a few months in a civilian penitentiary.

(407) Of all the participants of this sad episode, the only person who took responsibility for his actions is Sergeant Boland who pleaded guilty and recognised his negligent performance of duty, but not to torture. While Sergeant Boland's contrition will never give life back to Mr. Arone, it does demonstrate that he understands that he failed his duty as a non-commissioned officer. It must be stated that the Court Martial Court of Appeal did recognise that even demoted and awaiting trial, then-demoted-to-Private Boland was given good evaluation reports and showed a positive attitude after his initial sentence and detention and was rapidly promoted again to Corporal in light of his performance before being given a year in prison.

(408) Of all the persons implicated from far and away to being close by on the ground, the torture and murder of a young Somali boy destroyed many lives, forced a powerful minister and the top general of the Canadian Forces to resign and gripped both the military members and the civilian population of Canada in such a way that the issue is now unavoidable in teaching the laws of armed conflicts. Indeed, when the author built the first course on the laws of armed conflicts given to the Officer-Cadets of the Royal Military College of Canada, the issue was pervasive and demands of the respect of the Geneva Conventions and the military ethos were constantly put forward to avoid a repetition of these events.

(409) As a result, such course are becoming mandatory training and the Office of the Judge-Advocate General are more implicated then ever in training Canadian officers so the accountability of the Officer Corps is brought forth. But, what of Canadian citizens not submitted to the Canadian interpretations and jurisdictions of the laws of armed conflicts?

*Bosnia 1995*

(410) Such a twisted and convoluted story would have been a Hollywood scenarist's dream. And yet, it is the reality where two Canadians are pitted one against the other and one commits a war crime against the other.

(411) In 1992, Nicholas Ribic, an Edmonton native of Serbian ancestry, left Canada to fight for the Bosnian Serb Army (*Vojaska Republika Srpska* (VRS)). In 1995, he was in Pale, the capital of the self-declared *Republika Srpska*. During that time, a Canadian officer, Captain Patrick Rechner, was acting as a U.N. military observer. Ribic and Rechner had met in May 1995 through social contacts in Pale.

(412) At about 1000 hours on 26 May 1995, it is alleged that Mr. Ribic and several other armed men entered the UN office in Pale and, outraged at the recent NATO bombardment of 25 May 1995, they took the UN personnel hostage and moved them to a military compound 10 kilometres away. There, Capt Rechner and 2 other UN observers were chained to lightning rods and other places next to a bunker filled with mortar rounds and used as hostages against NATO bombardments. Despite warnings of executions, the hostages were finally released unharmed on 18 June 1995. Mr. Ribic was captured in Mainz, Germany, on 20 February 1999 and later extradited to Canada. He was held in an Ottawa jail on arrival and released on a 50,000\$ cash and 150,000 bond bail. He was forbidden to own a passport and subjected to a geographical limit of 80 kilometres from his residence outside of Edmonton<sup>122</sup>.

(413) He was the first Canadian to be subjected to the latest legislation amending the *Criminal Code of Canada*, permitting the prosecution of Canadians accused of committing hostage-taking, and which carries a maximum sentence of life imprisonment<sup>123</sup>. The trial started on 23 October 2002 and lasted only eight days before a request for mistrial was presented to the Ontario Superior Court of Justice, arguing that the case could not proceed until the Federal Court of Canada dealt with issues of national security upon which the prosecution's case rests, creating unusually long delays whereby the jurors were under the court's sequestration for too long. The request was granted and a mistrial declared. A date of 7 March 2003 was set for a new trial but nothing ever came of it. The only case concerning Ribic that is left on record is the disbursement of his travel fees for court attendance due to the fact that the government elected to press charges in Ottawa yet imposed the injunction of residence in Edmonton. As a result the Crown was ordered to disburse all cost incurred for travel and decent lodging and meals for Mr. Ribic, but no trial took place<sup>124</sup>.

**THE CANADIAN REPRESSION OF WAR CRIMES AND CRIMES AGAINST HUMANITY.**

(414) There is little pride to be had so far in the efficiency of the Canadian repression apparatus when it

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<sup>122</sup> "Mistrial declared in Canadian's hostage case", Canadian Tele-Vision (CTV.ca), 20 January 2003 at [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/104308\\_5937904\\_151?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/104308_5937904_151?hub=TopStories).

<sup>123</sup> "Case collapses against Canadian Serb soldier", National Post, 22 January 2003 at <http://www.balkanpeace.org/hed/archive/jan03/hed5436.shtml>.

<sup>124</sup> *R. v. Ribic*, [2000] 45 W.C. B. (2<sup>nd</sup>) 352 (Ontario Superior Court of Justice).

comes to punishing war crimes and crimes against humanity. From its very first case since the issue came to the forefront of international politics in the 1980's until 2004, the Canadian Attorney-General's Office has met with a succession of delaying tactics and an extraordinary inability to anticipate and prevail over the defendant's legal challenges. *The Queen vs. Imre Finta* has demonstrated this lack of capability and set the tone of the following prosecutions.

*The Queen v. Imre Finta*

(415) This case was yet again a missed opportunity of the Canadian legal system to prosecute a war criminal coming under its jurisdiction. In fact, the matter of the prosecution of war criminals by Canada can be summed up as a non-event. The first war crimes related trial to take place was that of a naturalized Canadian of Hungarian origins, Imre Finta, who immigrated to Canada after the Second World War and who was accused of:

“alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the Criminal Code, 1927, while the other count was characterized as a war crime or crime against humanity under the predecessor of s. 7(3.71) of the present Criminal Code)”<sup>125</sup>

(416) Basically, then-Captain of the Royal Hungarian Gendarmerie Imre Finta was accused of implementing a “barbarous policy” of the Hungarian Ministry of the Interior, known as the *Baky Order*, by which he sequestered in a brickyard in Széged, stripped of their valuables and deported to concentration camps 8,617 Hungarian Jews<sup>126</sup>.

(417) At the trial, 19 witnesses who were so detained and deported testified against Finta. Six knew the accused before the events and attested to his actions. Three others who did not know him beforehand identified him as the culprit. Three others identified him through hear-say accounts, which were nonetheless deemed admissible as evidences, and eight other witnesses testified to the events in the brickyard, but not to the identity of Finta<sup>127</sup>. The Court also relied on the physical and expert evidences presented to it, comprising expert and documentary evidences establishing the historical context, the command structure in Hungary in 1944 and the state of international law in 1944. The statements and testimonies of three witness presented to the Hungarian trial following the end of the war were presented and accepted despite a certain nature of hear-say to one of them. Yet, despite a previous conviction of ‘crimes against the people’ *in absentia* by a Hungarian Court and even benefiting afterward of a general amnesty, both the conviction and the amnesty were deemed *nullities* under Canadian law [the Court's euphemism for the non-recognition of Communist laws] and therefore the trial processed as a new trial without reference to the pleas of *autrefois convict* or *pardonné*, and against the weight of evidences and

<sup>125</sup> *R. v. Finta*, [1994] 1 S.R.C. 701 at 701: “Imre Finta served during the Second World War as commander of the investigative subdivision of the Gendarmerie et Széged, Hungary. He became a Canadian citizen in 1956. In 1988, he was charged under alternate counts of unlawful confinement, robbery, kidnapping and manslaughter (one count of each pair fell under the Criminal Code, 1927, while the other count was characterized as a war crime or crime against humanity under the predecessor of s. 7(3.71) of the present Criminal Code). These allegations arose from the deportation of Jews from Hungary in 1944. In a pretrial motion, Finta challenged the constitutionality of the war crimes provisions in the Criminal Code. The trial judge found that these provisions did not violate the Charter. The jury subsequently acquitted Finta on all counts. The Crown's appeal of this conviction was dismissed by a majority of the Ontario Court of Appeal with two dissenting judges in favour of ordering a new trial. The Court of Appeal was unanimous, however, in upholding the constitutional validity of the war crimes provisions in the Code.”

<sup>126</sup> *Ibid.*, at 702.

<sup>127</sup> *Ibid.*, at 703.

testimonies, this trial was a non-event as the respondent was acquitted of all counts<sup>128</sup>. After 6 years of legal wrangling, Imre Finta was declared not guilty by the Supreme Court of Canada.

*The effects on Canadian legislation*

(418) How the Finta case came to its end in such a way is based in a large part on the nature of the Canadian judicial system. As a constitutional monarchy, Canada has a dualist system for the incorporation of international law in its national legal system. It is only by an act of Parliament that international legal norms become part of Canadian law. In matters of war crimes, Canada had been known to be a common safe haven for war criminals and those having committed crimes against humanity.

(419) To remedy this situation, a *Commission of Inquiry on War Criminals (Deschênes Commission)* was instituted by the Federal Parliament, alongside with a War Crimes and Special Investigations Unit of the Royal Canadian Mounted Police as well as a Crimes against Humanity and War Crimes Section of the Department of Justice. On 30 December 1986 the *Deschênes Commission* recommended changes to the *Criminal Code*<sup>129</sup> as to contain a Section 6 providing a vehicle to prosecute war crimes. This came into effect on 17 September 1987, with *Bill C-37* amending the *Criminal Code* in this manner.

(420) It is of interest that while the *Deschênes Commission* initially listed 774 suspects<sup>130</sup> and put forth an addendum of 38 other names plus 71 German scientists, the total amount of suspected war criminals was nowhere near the ‘thousands’ claimed in the medias. In fact, on the 774 initial suspects on the list, the *Deschênes Commission* found that 341 had never landed or resided in Canada, 21 had landed in the country but had left it for other places, 86 had died while residing in Canada and 4 could not be located. It further had not found any *prima facie* evidence of the commission of war crimes in 154 cases. As a result, 606 of these initial suspected cases were closed. In 97 of the remaining cases, the *Deschênes Commission* had no *prima facie* evidences of the commission of war crimes, but had indications that such potential evidence might exist in Eastern European countries. Another 34 cases were left pending because of the answers not being forwarded by foreign services and the cases of German scientists was not examined in depth. As such, on the initial 883 list of suspects, only 20 cases had *prima facie* evidences of the commission of war crimes.

(421) From these, four cases were brought to court between 1987 and 1994, none resulting in a conviction, due to the acquittal of the *Finta* case and the reasons given by the Supreme Court of Canada, where only Canadian citizens were concerned with the extra-territoriality of the law, therefore necessitating changes to the current legislation of the time.

(422) Section 6 was therefore amended to Section 7 whereby a person who commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at that time shall, subject to the conditions set out in s. 7(3.71)(a) and (b), be deemed to commit that act or omission in Canada. Section 7(5) provides that proceedings may be commenced against such a person in any territorial jurisdiction in Canada. This includes crimes committed by or against a Canadian citizen even if this person became a Canadian after the fact, thereby granting jurisdiction to Canadian courts.

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<sup>128</sup> *Ibid.*, at 702 *in fine* and 703.

<sup>129</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

<sup>130</sup> *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at <http://canada.justice.gc.ca/en/dept/pub/cca/cwcp.html>.

(423) Regardless of these legislative efforts, it appeared clearly that the length and costs of investigations and trials were not effective in timely stopping them from gaining entry in Canada or in securing convictions. As a result, another mechanism was put in action through the Department of Immigration and Citizenship. On 30 October 1987, the *Immigration Act* was amended to refuse admission to persons believed on reasonable grounds of having committed war crimes or crimes against humanity. This was further enhanced on 1 January 1989 to provide a clear mechanism of such determination and on 1 February 1993 to prohibit the admission of senior members of regimes known for widespread abuses of human rights. In April 1996, a Modern War Crimes Unit was set up within the Department of Immigration and Citizenship. As a result, by the end of March 1998, a total of 440 cases had been investigated, resulting in the exclusion of 300 persons from the refugee determination process, a further 80 persons were removed from Canada and 40 visas were refused overseas<sup>131</sup>.

(424) Since 1999, progress has been marked. In 2000, the Canadian Parliament passed the *Crimes Against Humanity and War Crimes Act*<sup>132</sup>, which incorporates the notions of the *Rome Statute of the International Criminal Court*<sup>133</sup>, and extends the power of extra-territoriality to include anyone who, before or after the entrance in force of the statute, commits genocide, a crime against humanity or a war crime outside Canada<sup>134</sup>. Interestingly however, the *Act* is silent on the crime of aggression, which is not defined but is mentioned at Article 5(1)(d) of the *Rome Statute*<sup>135</sup>, and which is not exactly a coincidence due to the pending case on the *Legality of the Use of Force (Serbia and Montenegro v. Canada)*<sup>136</sup> at the International Court of Justice.

(425) This omission does not take away the forcefulness of the *Act*, in that it also make the obstruction of justice in such a case, including bribery, perjury, fabrication of evidence and intimidation, stiff punishment of up to 14 years' imprisonment. It further creates the financial means to prosecute such persons through the establishment of a 'Crime Against Humanity Fund', legislated upon at Section 30<sup>137</sup>.

(426) However, it is not because special investigative teams are created and that laws are put in place that effectiveness is guaranteed. The question is therefore to look into the numbers since the establishment of all these mechanism to discover is a preventive disposition is in place to prevent war crimes from being committed and if the mechanism to repress those who have committed them have borne any fruits.

(427) Of course, one must always be circumspect about a government's own numbers. Nonetheless, since the amendments to the *Immigration and Citizenship Act* in 1999, there have been a number of revocations of citizenship and deportations, signalling efforts and a rise in efficiency.

(428) From the inability of the Canadian judicial system to obtain conviction in the 1987 to 1999 period, the following amendments to the applicable legislations and the creations of special units seem to have had positive effects. By the time of the *Fifth Annual Report of Canada's Crimes Against Humanity*

<sup>131</sup> *Ibid.*, at 3.

<sup>132</sup> *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. C-24 [hereinafter the *Act*].

<sup>133</sup> *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), entered into force July 1, 2002, [hereinafter the *Rome Statute*]

<sup>134</sup> *Ibid.*, Section 6.

<sup>135</sup> *Ibid.* at Article 5(1)(d).

<sup>136</sup> *Legality of the Use of Force (Serbia and Montenegro v. Canada)*, *supra*, note 106.

<sup>137</sup> *Crimes Against Humanity and War Crimes Act*, *supra*, note 132 at Section 30.

and War Crimes Program<sup>138</sup>, seven important cases were presented to the courts and numerous revocations of citizenship and deportations have taken place. Of 59 removal orders issued, 46 were made. Still, the cumulative number of unexecuted removal orders climbed to 157 since the program's inception. Of these 157, 91 did not report for removal and were the targets of warrants, 22 were awaiting travel documents from a foreign government, 6 were under review by the Federal Court, 28 were under appeal at the Appeal Division of the Immigration Review Board and 10 were stayed because of the requirement of the person to judicial proceedings. In total, between 1997 and 2002, 2011 persons deemed complicit in war crimes or crimes against humanity were refused visas to Canada while 233 were deported from Canada to stand trial in their country of origins or of commission of war crimes<sup>139</sup>.

(429) But, by the *Sixth Annual Report of 2002-2003*, the numbers seemed to have reached a *plateau*: while all the legislative processes are in place and the number of cases investigated is on the rise, success with the case engaged earlier has been of a limited nature. In fact, when one looks at the cases springing from the Second World War, 19 revocation of citizenship and deportations cases have been initiated since 1995. Of these, the government reports as having been "successful in six denaturalization cases before the Federal Court of Canada"<sup>140</sup>. What the report omits is that of these six cases, none have completed the rounds of appeals to the Federal Court, the Immigration Review Board of the Department of Immigration and Citizenship or the Supreme Court of Canada.

(430) Of the remaining 13 cases, 1 is still referred to the Federal Court, 2 are awaiting decisions from the Federal Court, 2 left Canada voluntarily, 1 awaits a decision of the Immigration Review Board. In fact, the delays in the legal procedure almost seem to be deliberate as of the 19 cases, 6 have had the privilege of dying while the procedures were still ongoing<sup>141</sup>. While nobody argues for kangaroo courts, it is obvious that the number of appeals granted to the defendants borders on the ridicule and that these delays give the oldest war criminal the privilege of dying in peace instead of being incarcerated as they should be.

(431) Nonetheless, the Canadian government has published a press release on 4 May 2004, expressing pride at investigating 86 modern war crimes allegations and "it is expected that several WWII investigations will also be completed this year"<sup>142</sup>. Cynics could be tempted to show dissatisfaction as some of these cases will be 10 years in the making.

(432) **CONCLUSIONS ON CANADA'S PREVENTION AND REPRESSION OF WAR CRIMES.** The prevention and repression of war crimes, crimes against humanity and the crime of genocide is difficult everywhere in the world, but nowhere is it more difficult than in a liberal democracy that prides itself for its human rights record and a welcoming and tolerant society.

(433) This tolerance is one of the hallmarks of Canada and justly so: its immigration policy of multiculturalism has permitted a century-long development of the second largest national land-mass in peace and prosperity. However, the price for this is a tendency to be blind to the possibility that members

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<sup>138</sup> *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at <http://www.cic.gc.ca/english/pub/war2002/section04.html>.

<sup>139</sup> *Ibid.*, at 4.

<sup>140</sup> *Canada's War Crimes Program Activities for the Period of April 1, 2002 to March 31, 2003*, Department of Justice, Canada at <http://www.canada.justice.gc.ca/endept/pub/ccareport0203/05.html>.

<sup>141</sup> *Canada's War Crimes Program Annual Report 1998-1999*, Department of Justice, Canada at [http://www.canada.justice.gc.ca/en/news/fs/2004/doc\\_31174.html](http://www.canada.justice.gc.ca/en/news/fs/2004/doc_31174.html).

<sup>142</sup> *Canada's War Crimes Program Continues Progress*, Department of Justice, Canada at [http://www.canada.justice.gc.ca/en/news/fs/2004/doc\\_31172.html](http://www.canada.justice.gc.ca/en/news/fs/2004/doc_31172.html).

of this society could also be war criminals. The attempted cover-up of the Somalia affair was such a case where both the military and the politicians attempted to hide the fact that the dark side of individuals can surface in conditions of stress and hardship. By attempting to protect the image of righteousness and tolerance, both groups of leaders actually demonstrated the worst of Canadians when rigorous attempt to meet the reality face on should have been the course to follow.

(434) The inability to prosecute a Canadian citizen, in the case of the Pale hostage-taking, and Canadian naturalized citizens known to have been condemned for their participation to war crimes demonstrate a further lack of will and means to meet this reality. This inability is further more extraordinary even after so many amendments to the legislation, the creation of a punishment-heavy *Crimes Against Humanity and War Crimes Act*, as well as the creation of inter-department teams to prevent entry and prosecute such crimes.

(435) To the credit of the Canadian military, justice was handed down, even if not to the full force it should have been and programs to deal against racism, anti-Semitism and white supremacists were put into place in such a stringent way that such persons are given a short probation and dismissed from Her Majesty's service in a hurry.

(436) Furthermore, military training encompasses ever more legalistic comprehension of the laws of armed conflicts and the ethos expected of members of the Canadian Forces. This author has had the privilege of laying some of those foundations at the Royal Military College of Canada, but it was by no means the only effort. The Office of the Judge-Advocate General of the Canadian Forces has instituted a program to further increase the training of officer on the laws of armed conflicts. And others have developed even more the first efforts of education and training. Awareness, reporting procedure and regulations has been amended to reflect the duty to act to the honour of the profession of arms, not to its discredit.

(437) As for the legislative and procedural efforts of the Department of Justice, the Royal Canadian Mounted Police and the Department of Immigration and Citizenship, it is to hope that 2004 will be the year when progress is truly made. Until then, one can nonetheless say that Canada has progressed since 1985 and is now in a position to refuse access to potential war criminals to Canada and to communicate information about those known to have committed war crimes so they can be judged by the International Criminal Court. It comes of this that the long arm of justice may be very slow in catching up with the individual committing a war crime. Nonetheless, **YOU ARE PERSONALLY RESPONSIBLE**.

(438) **Be conscious of the witness effect. The simple knowledge of the factors affecting you can allow you to be able to realize the situation and to react while others remain frozen.** Do not underestimate the witness effect. Recognize first the pressure of group dynamics. Accept its reality, but adopt an attitude that will allow you to rise above these constraints in order to take the initiative.

#### **D. WEAPONS WHICH USES ARE PROHIBITED DUE TO THEIR EFFECTS OR NATURE**

(439) As we have seen in teaching point A of this Chapter, the use of certain weapons is prohibited due to their effects, because they render death inevitable, because they cause unnecessary suffering, or because they cannot discriminate in their effect between military objectives and civilians.

(440) Another restriction that exists is the limitation or prohibition of use of weapons “**mentioned by name**”- that is, weapons that are expressly categorized in conventions or texts of law as being limited or prohibited as to their use. Let’s begin with prohibited weapons mentioned by name.

(441) The category of prohibited weapons “mentioned by name” is comprised of seven (7) types of weapons and ammunition expressly mentioned. They are:

- a. certain projectiles;
- b. poisons;
- c. bacteriological and chemical weapons;
- d. anti-riot weapons;
- e. **blinding LASERS** (*Light Amplificator by Stimulated Emission of Radiation*);
- f. weapons whose employment does not permit discriminating between civilians and combatants (**blind weapons** ); and
- g. antipersonnel mines; however, due to the recent treaty on this particular weapon system, we will look further at its prohibition in Chapter 11.

**a. Certain projectiles**

(442) As for **certain projectiles**, three (3) types of ammunition are legislated on by this category:

- **projectiles of which the weight is inferior to 400 grams and which contain explosives or inflammable or fulminating (exploding) matter.** The international conventional source of this interdiction is rooted in the *St. Petersburg Declaration* and is repeated in many military training manuals;
- **bullets that flatten on contact with the human body or change shape upon entry into the human body**, like *hollow point* bullets, which are pierced at the point to facilitate distortion on contact, in order to cause greater injuries due to its shape or its fragmentation on impact. This prohibition was introduced in art. 23 of the 1899 Hague Declaration and can now be found in many military training manuals;
- **poison covered bullets.** The international source of this prohibition can be found in art. 23(a) of the 1907 Hague Rules of Land Warfare. It has been reiterated in many military training manuals. The commander of German Commandos during the Second World War, Otto Skorzeny, was accused of employing such projectiles but was acquitted. The charge rested on the green coloured jackets of the bullets which were said to be poisoned. The defence successfully proved that the bullets used, independently of the color of the jackets of the bullets, were in fact normal projectiles (standard issues).

**b. Poisons**

(445) It is evident that this last rule concerning the employment of poison bullets is not unique. It exists in concert with the prohibition against using **poison** in any form. Indeed, the principles of the *St. Petersburg Declaration* apply to any use of poison. One must also keep in mind that even without a formal



and express regulation prohibiting the use of poison, it would remain illegal as such, since it either renders death inevitable, causes unnecessary suffering, and cannot discriminate between civilians and combatants. For example, the poisoning of a well used for irrigation can cause the death of civilians and/or military through the water itself or through the foodstuffs contaminated by it, or by the use of the water to clean wounds. This tactic was used repeatedly in Vietnam by both the Viet Minh and Viet Cong guerrilla during the French and American interventions.

(446) Thus the use of poison is forbidden under any form. Whether the form of a liquid projected in the face of the enemy in close combat, on a bayonet, on a bullet, in food, or in water, the use of poison is forbidden.

**c. Bacteriological and chemical weapons**

(447) **Bacteriological and chemical** weapons are also prohibited from use. These weapons normally only affect living things. Their prohibition is not new. It is the result of a long legal development that dates back to the art. 2 of the fourth part of the *Hague Declaration of 1899*. Of course, this was based on the principles of the *St. Petersburg Declaration* regarding unnecessary sufferings.

(448) Despite these limitations in place at that time, the First World War saw the first extensive use of chemical weapons on the Western Front as a desperate measure to break the deadlock of the immobile front, dug in from the English Channel in the south-western corner of Belgium to the south of Switzerland. Canadians were among the first to suffer the effects of gas during the second Ypres battle of April 22, 1915, when the use of chlorine asphyxiated a good many of them. This created a four-mile wide breach in the Allied front. The Allies replied in kind with gas attack of their own in subsequent operations.

(449) In the face of the failure of the Hague Declaration to prevent the use of such weapons, it became apparent that a new legal regime had to be developed to control them. This is why art. 171 of the *Versailles Treaties of June 28, 1919* between Germany and the Allies, as well as many following treaties, prohibited expressly the use of such weapons. But their use was not prohibited for all: art. 171 of the *Versailles Treaties* prohibited their **use, import, and production** by Germany **only**.

(450) However, these bilateral “agreements” did not permit extending the control regime to other countries. This is why a convention was organized in Geneva in 1925. Its result was the *June 17, 1925 Geneva Protocol*. It was a wider regime that prohibited by name the use of **asphyxiating toxic or similar gases**, as well as any chemical weapons. It must be pointed out that bacteriological weapons, those composed of living things that contaminate organisms like the human body and those composed of living or inanimate things that liberate toxins in other organisms, are also included in this protocol. Therefore, this protocol is the first general norm of international law, a custom concerning the use of bacteriological, chemical, and toxic weapons prohibiting their use in a universal way from the practice of nations.

(451) Nevertheless, it soon became apparent that states were concerned about the weakness of this legal regime since between 1925 and 1933, the year of the last convention on the subject before 1989, many treaties regarding these weapons were signed. Indeed, it was only on the February 11, 1989, that a global approach to chemical weapons was taken again with the *Final Declaration of the Paris Conference on the Prohibition of the Use of Chemical Weapons*. This declaration finally condemned any use of chemical weapons by any parties to a conflict. Its terms were rendered more clear and specific in the following 1993 convention.

(452) Entitled the *1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*<sup>143</sup>, this convention addresses the issues referred to in its title. Since 1995, when it came into force, the following are prohibited for the signatories, including Canada:

- a. the development, or the improvement, of a chemical weapon already in existence;
- b. the construction, or the creation, of such a new weapon;
- c. the stockpiling;
- d. the transfer, to or from other countries, independently of the source;
- e. the possession; and
- f. the use of chemical weapons as understood in the convention, with the exception of anti-riot chemical weapons (which we will discuss further on).

(453) These stipulations are very different from the *1925 Geneva Protocol*, since what was a limited prohibition now becomes an absolute prohibition. Indeed, under the *1925 Geneva Protocol* the use of chemical weapons was permitted for retaliating against a first strike. This was considered the **right to retaliate in kind**, springing from *si omnes obligations*. A breach by one party to the conflict permitted counter-measures in kind, thereby the use of chemical and bacteriological weapons. A state could renounce that right, but there was no constraint to do so. This right of retaliation rested not on the specific terms of the *1925 Geneva Protocol*, but on principles on Public International Law, namely that on **reciprocity**. Under this principle, a state can reply in kind to an offence committed against it. Therefore, if a state used gases against another, the latter one could reply with the use of gases. This principle still exists in Public International Law today, but it is much more restrictive and it is codified in article 60 of the *1969 Vienna Convention*. Article 60 provides that states can reply to an offence by means comparable to the said offence. However, article 60(5) does limit this to a proportional retaliation and one that cannot outset the offence.

(454) With the *1993 Paris Convention*, the situation changes radically. Section 1 edicts clearly that all signatories pledge to never use chemical weapons. This means that regardless of circumstances, the prohibition is absolute. The problem is that some states have signed the *1989 Paris Declaration*, but not the *1993 Paris Convention*. For these states, the right of retaliation still exists because the text of the *1989 Paris Declaration* “reaffirms” the obligations the *1925 Geneva Protocol*. Therefore, for these states the prohibition is not absolute; indeed, since the 1989 declaration reaffirms the *1925 Geneva Protocol*, it reaffirms the right of retaliation. This should change with time as more and more states ratify the *1993 Paris Convention*. The prohibition will then become absolute to all. As a result the right of retaliation on grounds of reciprocity as disappeared. However, retaliatory measures of other kinds, proportional to the offence, can still be implemented.

#### **d. Anti-riot weapons**

(455) The other problem of the 1993 Paris Convention is the use of chemical weapons in other than military situations, excluding military training purposes. The terms of the convention prohibit the use of

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<sup>143</sup> *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, Paris 13 January 1993 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

anti-riot chemical weapons as a means of warfare. The logical deduction is that the use of these weapons, such as cayenne pepper or CS gas, is legal when used by police forces during a police operation. Therefore, one could **not** accuse the Royal Canadian Mounted Police of illegal use of cayenne pepper during the APEC summit in Vancouver in 1997 under the terms of the *1993 Paris Convention*. The very liberal use of this anti-riot weapon to disperse protesters was not in itself a contravention to the terms of the 1993 convention. The degree of force used is open to discussion, depending on personal opinion (and those of the courts), but its use in itself was legal.

(456) Another example of a chemical weapon that is legal under the *1993 Paris Convention* during training or during police operation is the use of CS gas, or tear gas. The use of such gas in combat could be misinterpreted for a much deadlier gas and tempt the enemy to retaliate with deadly gas, even in contravention to the convention. This is why it can only be permitted in training for military use.

**e. Blinding LASER**

(457) If the long and dreadful history of chemical weapons makes them the subjects of huge debates, progress does not stop there. The new battlefield has a new generation of weapons -nothing other than the **LASER**, meaning *Light Amplificator by Stimulated Emission of Radiation*. This acronym describes a system where light is amplified in a ray, concentrated and directed in order to make use of its radiation to stimulate the emission of light particles.

(458) The wonders of this technology permit an extraordinary degree of precision on the battlefield for weapons systems such as aircraft, armoured fighting vehicles or artillery. Strike can be as precise as one meter from the target, as was repeatedly seen on television during the second Persian Gulf War (1991).

(459) The down side, and it is a perverse effect of this technology, is that the Laser amplifies light in such a way that its radiation is capable of burning the retina of the human eye. Before long, researchers discovered the potential of this “clean” weapon, in which the battlefield would not be littered by corpses and wounded and burning vehicles, but by whole armies of blinded men and women. By traversing its arcs from right to left at the rhythm of its advance to contact, one could thereby succeed in incapacitating vast number of personnel before anyone started to comprehend what was happening. This is why the *1995 Protocol on Blinding Laser Weapons (Protocol IV)*<sup>144</sup> prohibits the use of such weapon systems.

(460) It is important to understand that the use of Lasers on the battlefield as part of a fighting system is **not** prohibited. Nor is a blinding Laser made to render blind people using vision enhancing apparatus (such as binoculars and targeting systems). Also, Laser guidance systems and range finders are legal and legitimate means of combat. Nothing prohibits them. What is prohibited is the deliberate use of Lasers to intentionally blind. Art. 2 *Protocol IV* clearly specifies the prohibition to employ such weapons with the aim of inflicting permanent blindness. Art. 4 defines this blindness as any and all irreversible loss of vision under 20/20 on the Snellen scale. A “little zap” against the naked eye is therefore illegal.

(461) More precision is important, because even this last statement has to be explained. Indeed, art. 1 of the protocol prohibits the use of such weapons systems with the intention to blind the naked eye and the eye protected by corrective eyeglasses. However, a system that tries to blind personnel using binoculars or light amplification devises is not prohibited. Art. 3 is clear on the question. Therefore, any collateral blindness due to such a situation is legal. It is not an infraction to the protocol. This is why you will see that the new Canadian Forces binoculars are covered with an anti-Laser filters.

<sup>144</sup> *Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)*, 13 October 1995.

(462) What renders the Laser illegal is not so much the fact that its use on a large scale would provoke unnecessary suffering (although one can easily imagine what more than 20,000 people rendered blind while performing their duties would think of such a statement). What renders it illegal within the LOAC regime is that it cannot discriminate in its use between civilians and combatants.

**f. Blind (indiscriminated) weapons**

(463) In this sense, Lasers are also part of the last category of weapons categorized as “**blind weapons**” -- not because they can blind, but **because they cannot discriminate between civilians and combatants**. It is important not to confuse the two. ***A blinding weapon can be a blind weapon, but a blind weapons is not necessarily a blinding weapon.***

(464) Blind weapons include all weapons that cannot discriminate between civilians and combatants such as biological and/or chemical weapons, Lasers, poisons, and antipersonnel mines, in accordance with the second consideration of the *1868 St. Petersburg Declaration*.

(465) Any weapon that fits this definition is by nature a blind weapon, and therefore illegal. Human imagination to create new weapons appears to be limitless. This category is a “cover-all” category permitting the limiting of the destructive activity of humankind.

**g. AP Mines**

(466) The last category of weapons mentioned by name, which we will discuss at greater length in Chapter 11, is comprised of antipersonnel mines. At this stage, it is sufficient to keep in mind that their use is prohibited for all signatories of the *Ottawa Treaty* of 1997.

**CONCLUSION**

(467) In this first Chapter on *rationae conditionis* obligations, we have discussed three principles that categorize weapons because of their effects. These principles characterize weapons that render death inevitable, cause unnecessary suffering, or do not allow for discrimination between civilians and combatants.

(468) We have also seen the obligation to avoid collateral damages during planning of an attack, before an attack, and during an attack. Always keep in mind the witness effect. Never forget that the most important factor in a weapon system is the human factor. It is the use of the weapon, not the weapon itself, that is often the cause of a war crime.

(469) Finally, we have discussed six of the seven categories of weapons of which use is prohibited by name. Remember that the total number is seven (7): certain projectiles, poisons, bacteriological and chemical weapons, anti-riot weapons, blinding *LASERs*, and antipersonnel mines. Also remember that any weapons that cannot discriminate between civilians and combatants are blind weapons and as such illegal.

(470) In this last case, obligations are created with regards to the development of new weapons. We will discuss those obligations in Chapter 7. We will also discuss the use of the nuclear option and the methods of warfare prohibited by name.

**SUMMARY OF TERMS**

**Aim of war:** imposition of one's will over that of the enemy by weakening him in order to have him answer our demands.

**Bacteriological weapons:** weapons composed of living organisms that contaminate other organisms.

**Blind weapons:** weapons that cannot discriminate between civilians and combatants when used.

**Chemical weapons:** weapons that only affect living things.

**LASER** (*Light Amplificator by Stimulated Emission of Radiation*): system in which light is amplified in a ray, concentrated and directed in order to make use of its radiation to stimulate the emission of light particles.

**Witness effect:** reduction of one's personal capacity to take responsibility to intervene in a group due to group dynamics.



## CHAPTER 7

### OBLIGATIONS RELATIVE TO MEANS OF WARFARE PART II

#### INTRODUCTION

Many principles of the LOAC are directly related to the use of certain weapons and means of warfare. Sometimes, principles are related to question of the use of weapons in specific circumstances. These are called “restrictions.” At other times, weapons are banished outright due to their effects or their use. These are called “prohibitions.” In both cases these obligations are established in order to reduce the sufferings imposed by weapons or means of warfare. We must therefore always keep in mind that the aim of the LOAC is **not to outlaw war but to regulate the conduct of hostilities and limit the suffering inflicted as well as creating favourable conditions for a return to a durable peace.** These are the notions we will study in this Chapter.

#### CONTENT

- a. the limited means of warfare;
- b. the prohibited means of warfare;
- c. the weapons which uses are limited;
- d. the case of nuclear weapons;
- e. the juridical implications of the invention of new weapons; and
- f. the Martens’ clause.

***NB:* Even though mines fall within this category, they will be examined in Chapter 11 due to the Ottawa Treaty on the question.**

#### OPTIONAL READING

- Abi-Saab, R., “The ‘General Principles’ of Humanitarian Law According to the International Court of Justice”, (1987) 259 *International Review of the Red Cross*, pp. 367-375.
- David, E., “The Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, (1997) 316 *International Review of the Red Cross*, pp. 21-34.

(471) For many centuries war has been recognized as an art, although some insist that it is a science, and others believe it is a mixed discipline. Indeed, since the 4th century B.C., there have existed manuals on the art of war. Sun-Tzu’s was the first known, even if the existence of Sun-Tzu is today contested. Regardless of whether or not he lived, war has developed through customs - meaning, by the traditions passed in the practice of “regular” or “fair” combat.

(472) Whether Sun-Tzu’s manual was the first such military manual or not is irrelevant: since humankind has had the knowledge to do so, it has acted within a frame based on rules of honour. If these have been relative to historical periods, some being very inadequate and cruel, it remains that a certain way to act is expected from the “warrior class” of societies. Whether it was the Mongols’ motto of “No Quarter!”, the Code of Chivalry of the Middle Ages, or the *fair play* at the birth of aviation during the Great War (1914-1918), each period has had a framework within which soldiers knew their obligations in times of conflict. Today it is the same. War may be a dirty business where people endure horrendous deaths; yet that doesn’t exclude the expectation of honourable conduct from those who wage it.

**A. THE LIMITED MEANS OF WARFARE**

(473) To restrict atrocities and reprehensible conducts and to maintain a certain degree of humanity, the LOAC limit (restrict) or prohibit certain means of warfare in time of armed conflicts. The limited means of warfare are:

- a. ruses;
- b. sabotage; and
- c. espionage.

**a. Ruses of war**

(474) A **ruse of war** consists of misleading the enemy so that he makes mistakes. Many methods can be used in this aim. For example, during Operation “Desert Storm” in 1991, Coalition Forces put all their efforts into misleading Iraqi forces to believe that Operation “Desert Sabre,” the land invasion, would take place in an amphibious landing of U.S. Marine in the south-east of Kuwait. The disposition of troops and the use of media to misinform the Iraqi military staff were all employed to force Iraqi troops to counter this threat, leading them away from the real intended route of invasion along the southern border of Iraq, along the Saudi Arabia border. This vast lie permitted the envelopment of the major part of the Iraqi army and their destruction in less than 100 hours between February 24 and 28, 1991.

(475) This ruse was “honest” and legal. A ruse that would be contrary to the LOAC would be the use of treachery or perfidy. We will return later to this notion in the prohibited means of warfare. Simply keep in mind at this stage that any ruse of warfare that does not abuse the “good faith” of the enemy is legal. Art. 37(2)/AP 1 explains this rule.

**b. Sabotage**

(476) The second category of limited means of warfare is **sabotage**. Sabotage is defined as **the act of destroying, deteriorating or divert documents, material, constructions, installations, technical dispositives [devices] or automatic data treating systems that cause prejudice to the fundamental interests of a nation.**

(477) As is the case with ruses of warfare, sabotage is not prohibited: it is restricted. And this limitation only goes as far as the absence in a target of the character of legitimate military objective. Therefore, a commando operation or the *Special Air Service* against an Argentine air base during the Falkland War (1982) in order to destroy planes on the ground was a legitimate act of sabotage. However, the act of such a commando to destroy a list of members of a political parties of the enemy would not be considered under the expression “legitimate act of sabotage,” since its target would not be of a legitimate military nature. Sabotage is considered only once in the GC 1949; that is at art. 5/GC IV. As a result, the limitation of sabotage is broad for civilians, but is deemed to be relative as with concerns for military personnel engaging in it.

(478) Since sabotage is not defined in the GC 1949, it is often misconstrued as espionage. In truth, the legal effects of being caught sabotaging is more likely than not to be of the same outcome as would espionage: death.



**c. Espionage**

(479) Finally, the last mean of warfare restricted under the LOAC is **espionage**. Espionage is prohibited under art. 46/AP 1. However, one must distinguish between the types of espionage that is prohibited in art. 46(1)/AP 1 and those of arts. 46(2), (3) and (4)/AP 1. In the former case, spies who are not in uniform automatically lose the right to the status of prisoner of war and therefore become subject to the national legislation of the country in which they operated; that is, unless they have succeeded in rejoining their own lines after their activities (art. 46(4)/AP 1). In the cases of art. 46(2) and (3)/AP 1, a member in uniform operating in a mission of reconnaissance to collate captured information has a right to the status of prisoner of war. This is not the case if they operate under false pretences or in a clandestine manner.

**B. THE PROHIBITED MEANS OF WARFARE**

(480) In addition to restricted means of warfare, there are prohibited means. They are:

- a. perfidy;
- b. refusal/denial of quarter (i.e., ordering “No prisoners!”);
- c. assassination;
- d. terrorizing the civilian population;
- e. forced enrolment in the army of an enemy;
- f. indiscriminate attacks that cannot distinguish between combatants and civilians;
- g. destruction without military necessity; and
- h. armed reprisals against the civilian population.

**a. Perfidy**

(481) **Perfidy** dates back, in modern LOAC, to the *Hague Rules of 1899* in its art. 23(b) and (f). However, the existence of a code of honour interdicting the use of such means of warfare has been known at least since the Middle Ages. Perfidy is defined as “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with the intend to betray that confidence....” The false use of emblems such as the white flag, the shield of the 1954 Hague Convention, or worse, the use of the Red Cross or Red Crescent, are all acts of perfidy. It is in good faith that the enemy abstains to fire at your ambulances. If these are used to transport ammunitions, it is to use falsely the Red Cross emblem and to betray this good faith. This is perfidy.

(482) In 1899, art. 23(f), spoke of wrongful use of the enemy’s good faith. This resulted in a restrictive interpretation of these means of warfare. This interpretation was used in a very famous trial, that of Otto Skorzeny, in relation to the use of American uniforms by a whole battalion of German soldiers during the Battle of the Bulge in 1944. The German High Command of Armies attempted to break through the American forces in an attempt to divide them. Part of this plan included the use of uniforms, pay books,

and identity disks taken from American prisoners of war, and the use of German volunteers to confuse the Americans and use this advantage to create confusion. And confuse them it did. For days, the Americans were unsure of who was the enemy. Scenes of fratricide firefights, misdirected circulation, and even a (denied) assassination attempt on General Dwight D. Eisenhower were reported. When Skorzeny was brought to court under a military tribunal for the war crime of perfidy, it was decided that he had not committed an act contrary to the international laws applicable at the time since he had fought in his national uniform, taking off the American uniform before engaging in combat (which appears to have been the case of most of the German soldiers who fought during this operation). The bibliography of Col. Skorzeny is highly recommended as the case of a hardcore professional that managed to always carry his controversial missions within the parameters of the LOAC.

(483) This rule was therefore kept as is since this case proved the law valid. GC 1949 did not amend it. In fact, art. 53/GC I only confirmed the rule against wrongful use of the Red Cross and Red Crescent emblems of art. 38/GC I. As for art. 45/GC II, it imposed upon states the duty to bring to trial any individual who wrongfully used the protective emblem on the seas (art. 43/GC II).

(484) It is only with AP I 1977 that the situation was clearly redefined. art. 39(2)/AP 1 expressly prohibits the use of enemy uniforms or emblems to attack or to “shield, favour, protect or impede military operations.” However, to contravene to art. 39(2)/AP 1 is not a war crime, since no rules of international law qualify this act as a grave breach of the LOAC. Nonetheless, it remains treacherous. The participants in such an attack made on a legitimate military objective using this means of warfare are then submitted to the national legislation of the power that captures them. – it is important to specify that Canada has made an interpretative statement to this article according to which it reserves the right for its Forces to use the enemy’s uniform. However, only national authority (the Chief of Defence Staff, the Minister of National Defence of the Prime Minister) can confer such permission to wear the enemy’s uniform.

(485) Perfidy is prohibited by art. 37(1)/AP 1. Under this text, it is prohibited to: feign in an intent to negotiate under a flag of truce, feign incapacitation by wound or sickness, feign to be a civilian or a non-combatant as defined by art. 41/AP 1 and feign to be protected by the signs, uniforms, or emblems of the United Nations or of neutral states not party to the conflict. The emblems recognized in art. 37(1)/AP 1 can be found at art. 38/AP 1.

(486) The use of these means of warfare are grave breaches of the LOAC, and as such are war crimes in accordance with art. 85(3)(f)/AP 1. The individual who commits such an act is guilty of a war crime.

**b. Denial of quarter (No Prisoners!)**

(487) To refuse (deny) quarter is the second means of warfare prohibited. Since the *Hague Rules of 1899* (art. 23(d)), it is prohibited to order that no prisoners be taken. This rule was further widened under the AP 1977 by the inclusion in art. 40/AP 1 of the prohibition not only of ordering such a denial of quarter, but also of alluding to it indirectly, encouraging it, or making threats to an adversary that such an order will be given.

**c. Assassination**

(488) **Assassination**, the third means, is defined as **murder, an intentional homicide against a non-combatant or a civilian chosen on the basis of political or religious opinions**. In the same manner, it is prohibited to put a price on a head, dead or alive. Assassination is expressly mentioned in arts. 50/GC I, 51/GC II, 130/GC III and 147/GC IV of GC 1949. It is a grave breach of the LOAC. This was further restated in art. 85(2)/AP 1 that confirms this type of violation as a war crime.

**d. Terrorizing the civilian population**

(489) **Terrorizing the civilian population is also strictly prohibited.** Acts or threats of violence with the intent of spreading terror among the civilian population are unacceptable under any circumstances. Art. 51(2)/AP 1 clearly prohibits such use of weapons and violence. The problem that arises in qualifying such actions is the degree necessary to fall under its definition. It is accepted by jurists that it is not the *result* of the action that matters, but the *intent*. Even if the action or threat does not instil terror, the fact of doing it with this intention is an infraction.

(490) That being said, it is hard to even conceive why a belligerent would want to use this prohibited means of warfare since, in all the conflicts of this century, those that have resorted to terrorizing the population have all seen the population rise against them, stiffen their resistance, and fight to the death. Whether Russia between 1942 and 1944, France in 1943-44, Indochina between 1947 and 1954, Algeria between 1954-1962, Vietnam between 1962 and 1972, Afghanistan between 1980 and 1989 or Kuwait in 1991, all users of terror have met their match, preventing themselves from acquiring support within the target population and finally losing their war (even when it took decades). No armed forces benefit from this mean of combat. Its prohibition is not only humanitarian: it obeys the principle of economy of forces. When the population is alienated, more young people join the ranks of the rebels and tie up more troops. Winning the population's heart, even a small part of it, liberates resources that can be used elsewhere.

**e. Forced enrolment in enemy forces**

(491) **Forced enrolment in the armed forces of the enemy** is also prohibited. Again, this dates back to the *Hague Rules of 1899*, at art. 23(h). However, this rule does not concern in any way the right of a state to declare conscription within its own population. This population must be understood as the population *ante bellum* (before war). The rule is confirmed by arts. 130/GC III and 147/GC IV.

**f. Indiscriminate attacks**

(492) **Indiscriminate attacks that cannot distinguish between civilian and combatants** are also prohibited. This point has already been discussed in many ways in the course, but it is still useful to emphasize that this means of warfare is prohibited under arts. 51(4), (5) and (8)/AP 1 as well as art. 57/AP 1. Read and reread these sections, because they are the key to the whole philosophy of the LOAC.

**g. Unwarranted (or wanton) destruction**

(493) **Destruction without military necessity, including pillaging**, is also prohibited. As we have again seen repeatedly, this is a cardinal rule that flows first from art. 23(g) of the *Hague Rule*, confirmed and widened by art. 52(2)/AP 1, specifying that only a legitimate military objective that can be attacked. Furthermore, one must not forget the presumption of civilian character attributed to civilian objects in case of doubt (art. 52(3)/AP 1).

**h. Reprisals**

(494) Finally, **armed reprisal against civilians** is prohibited. The prohibition is specifically "against civilians," as reprisals in general are not in themselves prohibited when understood under the term "**counter-measures**". Counter-measures are military actions against legitimate military objectives which respect the principle of proportionality and that can be enacted "in reprisals to" a previous warlike act. To differentiate between the two and avoid confusion, we will always refer to **reprisals** as those acts against the civilian population, which are war crimes, and **counter-measures**, which may be lawful acts under the conditions set above.

(495) A general interdiction against armed reprisals is still a hotly debated point of the LOAC. For the moment, the prohibition concerns only specific situations. These include the prohibition of using force against civilians or their properties under:

- a. UN General Assembly's Resolution 2675 (XXV) of 9 December 1970, at art. 7;
- b. art. 3(2) of Protocol II of the Convention of the United Nations of April 10, 1981;
- c. art. 56(2)/AP 1;
- d. art. 52(1)/AP 1;
- e. art. 55(2)/AP 1; and
- f. art. 54(4)/AP 1.

(496) As for acts and threats of violence against the civilian population, reprisals are an instrument that results in the "boomerang effect": such acts come back to haunt your own forces. Examples are too numerous to be mention, but let us simply say that the *lex talionis* of "An eye for an eye, a tooth for a tooth" has produced only orphans and widows, increasing the level of barbarity of conflicts while resolving nothing.

### C. THE WEAPONS WHICH USES ARE LIMITED OF USE

(497) There exist four (4) categories of weapons whose use is restricted (limited) by treaties and conventions. They are:

- a(1). incendiary weapons (including flame-throwers);
- a(2). booby-traps and other devices;
- a(3). antipersonnel and remotely delivered mines; and
- a(4). nuclear weapons.

#### a(1). Incendiary weapons

(498) **Incendiary weapons** are regulated by the *United Nations Convention of April 10, 1981* through its *Protocol III*<sup>145</sup>. Their use is not prohibited but restricted. These restrictions are separated in four categories:

- a. ***The prohibition against attacking civilians and their property.*** Allied attacks on Hamburg and Cologne in 1944 would have illegal if this convention had been in place, since the civilian population was intentionally submitted to intense incendiary bombardment;

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<sup>145</sup> *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)*, Geneva, 10 October 1980 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

- b. *The prohibition against bombarding by aircraft an objective situated close to a civilian concentration* (i.e., a military headquarters located in the center of a city). If incendiary weapons had been used against Hanoi during the American actions in Vietnam, for example, in an air attack of the type of *Linebacker II* in 1972, this would have been illegal if the 1981 convention had been in place. It is important to define the word “concentration” not only as a city, but also as a part of a city or a village. Therefore, the National Defence Headquarters, located in downtown Ottawa, close to the University of Ottawa and right beside a shopping center and some office buildings, could not be attacked by incendiary weapons by an aircraft (unless, of course, the attack was so precise as to guarantee that damages would be restricted only to the target and that all precautions of art. 57/AP 1 had been respected). Such protection would not cover a military research center located in a separate part of town, at the city’s edge for example;
- c. *The prohibition against bombarding with incendiary weapons from land or sea a military objective situated near a civilian concentration* (i.e., bombarding Halifax’s harbour with incendiary weapons from a warship). However, this prohibition does not apply if: 1) the objective is sufficiently far enough away from the concentration to permit precise bombing, and 2) if all the precautions of art. 57/AP 1 have been taken to limit or prevent collateral damages;
- d. *The prohibition against using incendiary weapons against forest or other type of vegetative cover*. This interdiction does not apply if at the time of the attack the cover actually serves to protect a legitimate target and/or combatants from view. Incendiary weapons can therefore be used to clear a sector in order to deprive these combatants of their cover if their movement is anticipated there. Nonetheless, this use can only be made if factual knowledge confirms their presence in that sector. The rules of art. 35/AP 1 apply as to the extent of damages permitted in such use.

**a(2). Incendiary weapons – the case of flame-throwers**

(499) As we can see, the four prohibitions actually effect a restriction of the use of incendiary weapons, not a general prohibition. The question is now to know if this concerns the **flame-thrower**. This weapon, particularly effective for FIBUA (*Fighting In Built-Up Areas*) and the mop-up of bunkers, was prohibited by bilateral peace treaties following the Great War in 1919 and 1920 between the Allies and members of the Central Powers such as Hungary, Bulgaria, and Austria. For signatories of these treaties, it appears that the use of flame-throwers is clearly prohibited. But this also appears not to be the case of those signatories who afterward adhered to the *United Nations Convention of April 10, 1980* through its *Protocol III*.

(500) Indeed, the legal question is to know whether the terms of this convention overwrite the ones of the bilateral treaties, thereby creating a new legal regime (in fact, going back to the pre-World War I regime). This has to be weighted by differentiating the aim of the LOAC with the terms of the wishes of states. It would appear illogical that states would want to revert to a less stringent legal regime; it could even be considered a very dangerous alternative. Even though flame-throwers were used in the interwar period and during the Second World War, this use does not make them legal, since they were used in contravention of the bilateral treaties of 1919 and 1920. The obligations of their signatories have not ceased to exist because of illegal use. When ambiguity seems to be interfering with good interpretation of the LOAC, the logical pattern of evolution should be adopted in favour of the victims.

(501) Regardless of these noble thoughts, doubt still remains as to the applicability of the bilateral treaties of 1919 and 1920. Since their outright prohibition of use is not certain, **the Canadian position is to apply the terms of the *United Nations Convention of April 10, 1980* through its *Protocol III*.**

**b. Booby-traps and other devices**

(502) The second category of weapons that is restricted in terms of use includes **booby-traps and other devices**. These weapons are primarily discussed in the *United Nations Convention of April 10, 1980* through its *Protocol II*<sup>146</sup>. Two principles are stated there with regards to their use and the use of mines. As we will look at mines in Chapter 11, we concentrate here on booby-traps and other devices. These can not be used:

- a. against civilians or any military objective that would have a disproportionately negative effect on civilians; and
- b. by perfidious means, i.e., by betraying the good faith of the enemy.

(503) The prohibition against use of these devices against civilians is clear. One cannot lay booby-traps and other devices to cut lines of evacuation of civilians in order to instil terror. A booby-trap is defined as any mechanism conceived in the aim of killing or wounding and that functions in an unpredictable manner upon approaching it.

(504) The second principle prohibits the use of objects that resemble inoffensive objects and that are either attached to or associated with protective emblems and symbols, the dead or wounded, toys, food, drinks, religious objects, medical objects, or beasts. The reason for this prohibition can be traced directly to the American intervention in Vietnam (1962-72). The use of booby-traps and other devices was certainly widespread during this conflict. The resulting danger for the troops forced them to consider as hostile any suspicious person or object. As a result, this climate of fear made them respect civilians and their property less and less. These rules attempt to create a feeling of trust between military occupiers and civilians, increasing the chances of survival of both groups.

(505) The *United Nations Convention of April 10, 1980 Protocol II* was amended in 1996 by the *Protocol II Amendments of May 3, 1996*<sup>147</sup>. Its art.7(2) prohibits the use of objects of inoffensive appearance made to contain explosive devices (such as the Afghan dolls that maimed thousands of children during the 1979-89 conflict). It also states that all booby-traps, other devices, and mines must be cleared and destroyed upon cessation of hostilities. So, remember this: you put them down, you pick them up! Make sure that if you use such devices, you really need them.

(506) Art. 12(2) of the *Amendments* also includes references to the powers given to peacekeeping missions under the command of the UN. The commanders of such missions have a right to demand:

- a. that all necessary measures are taken to protect their personnel from mines, booby-traps, and other devices in the zone under their control;
- b. that all mines, booby-traps and other devices in the zone under their control are de-activated to ensure the safety of their personnel; and (even more importantly)
- c. that the location of all mines, booby-traps and other devices are communicated to them (the commanders) as much as is possible.

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<sup>146</sup> *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II)*, Geneva, 10 October 1980.

<sup>147</sup> *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996)* at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

(507) Of course, the reality on the ground will rarely reflect this spirit of good faith demanded from the warring parties. Most are not willing to disclose so easily their protection systems. However, to know these obligations and the legal reference to which they must comply is an advantage that can permit you to apply even more pressure on these parties to comply.

**c. Mines (remotely delivered)**

(508) The third category is composed of **remotely delivered mines**. These are weapon systems that remotely scatter mines over large areas. For example, aircraft-delivered grape antipersonnel mines that, upon explosion of a delivery vector scatter mines over a square kilometre, fall under this category. They can also be delivered by artillery, missiles, rockets, mortars, etc. This category is expressly discussed in the *Protocol II Amendments of May 3, 1996*. Note that only systems of a capacity limited to a coverage of 500 meters from the point of delivery are not covered by this category.

(509) The reason behind this restriction is again because these weapons cannot discriminate between civilians and combatants in their effects. Their collateral damages are too high and disproportionate in relation with the direct and concrete military advantage sought. Nonetheless, their use is permitted (art. 5(6) of the *Technical Annex - Protocol II Amendments of May 3, 1996*):

- a. if they respect the terms of the *Technical Annex* of the *Protocol II Amendments of May 3, 1996* (henceforth *Technical Annex*);
- b. if they self-destruct and auto-deactivate in respect of the *Technical Annex*;
- c. if the use of mines is other than antipersonnel mines, unless they possess some means of self-destruction and self-neutralization preventing their use once their military purpose is accomplished; and
- d. if a forewarning was given to the civilian population of the use of such a system, or if circumstances prevented such a forewarning (i.e., extremely short timing due to a surprise advance of the enemy).

(510) To this point, we have talked of mines and remotely delivered mines. As previously mentioned, the Ottawa Treaty change radically this situation, and many changes have been effected. However, the notions here still apply since not all states have signed the Ottawa Treaty. Also, they apply to all mines other than antipersonnel mines.

(511) We will discuss this in depth in Chapter 11. For the moment, let's continue with a real headache for many military and jurists: the nuclear option.

**d. Nuclear weapons**

(512) The use of the **nuclear weapon** is a legal headache in the sense that its legal use or illegal use cannot to this day be demonstrated by any proponent of one or the other thesis. However, this is not so much because of lack of legal thought on the subject: it is more because of the total lack of desire of states to recognize their use as illegal, since a great deal of their national defence rests on this single-weapons system.

(513) From a purely legal standpoint, the evidence can only lead to one conclusion: the illegality of

nuclear weapons. The *St. Petersburg Declaration* is too clear in its principles for us to be able to argue otherwise. Nonetheless, nuclear weapons use is only restricted, not prohibited. The banning of this weapon has not yet occurred.

**D. THE CASE OF NUCLEAR WEAPONS**

(514) Anyone can observe that nuclear weapons (including the atomic bomb, the hydrogen bomb, and the neutron bomb) are contrary to the *St. Petersburg Declaration* since they:

- a. render death inevitable inside a certain radius;
- b. cause unnecessary sufferings, creating delays from 0 seconds to decades in their effects and even genetic changes; and
- c. have indiscriminate effects since, apart the case of very isolated legitimate military target in the desert or on the ocean, they affect both combatants and civilians.

(515) Also, not only do they contravene all precepts of the LOAC since the *St. Petersburg Declaration* but they create major changes in the environment, contravening both art. 35/AP 1 and the *1976 Stockholm Convention*.<sup>148</sup>

(516) One can certainly make a plea for the military justification of these weapons, since their impact is undeniable, but no one should be hypocritical about their flagrant illegality. In truth, it is the doctrine of first use by NATO in order to protect its advantage in Europe during the Cold War, that has forced western states to favour ambiguity with regards to their legality.

(517) Indeed, on eight of the UN General Assembly resolutions passed since 1961, all socialist states and Third World countries have voted in favour of the illegality of nuclear weapons. But they have been opposed by western countries, led in large part by the United States and France, since both countries rely heavily on their strategic nuclear weapons for their national strategy of first use. For example, upon the ratification of the *First Additional Protocol of 1977*, the Canadian plenipotentiary declared the following **statement of understanding** – that is a definition of terms according to the government’s interpretation: “It is the understanding of the Government of Canada that the rules introduced by Protocol 1 were intended to apply exclusively to conventional weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.”<sup>149</sup> Of course, the socialist vote was not altruistic by any means: these states knew their weakness in technological advances and were trying to slow the pace of the arms race in order to catch up with their opponents. As for Third World countries, their vote was also not disinterested: they knew that as long as only a few states had these weapons due to their economic strength, Third World countries would not be able to oppose a serious challenge at the strategic level. Nonetheless, legally, if not morally, their position was more justified than the western position. The reconsideration of the first use nuclear weapons’ policy debate of 1998 within NATO was rapidly quashed by the United States.

(518) To justify their position, states argue:

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<sup>148</sup> *Convention on the prohibition of military or any hostile use of environmental modification techniques*, *supra*, note 84.

<sup>149</sup> *Declaration made upon signature by Canada*, 1125 UNTS 1979, 429, <http://www.icrc.org/ihl.nsf/0/172ffec04adc80f2c1256402003fb314?OpenDocument>.



- a. **the absence of any specific rules prohibiting the use of nuclear weapons**, despite all the UN General Assembly's resolutions that have been voted and passed on the subject, but that are not enforceable;
- b. **state practice**, as that of France, whose whole national strategy rests on the use of nuclear weapons to defend French territory; and more importantly
- c. **the right to self-defence, reprisals and the state of necessity**.

(519) On this last point, the argument cannot be sustained as far as **self-defence** goes. Indeed, certain states argue that it is the right of a state to use all available means to defend the nation-state. In their view art. 51 of the *United Nations Organisation's Charter* allows this. Most jurists disagree with this interpretation.

(520) As for **reprisals**, some states base their argument on the fact that reprisals allow a state to reply in kind to a first attack. The American second strike theory was based on this thesis, even if wrapped under the guise of **counter-measures**.

(521) On both accounts, it is most improbable that a jurist could honestly agree with this line of reasoning. Indeed, self-defence to defend a common interest of the population of a state is strictly interpreted as to the capacity of pushing the enemy back and then advising the UN's Security Council to intervene. Nuclear weaponry is not a defensive. It is a strategic weapon used in the aim of reducing the enemy's capacity to pursue operations or to actually destroy this capacity. Further, to justify oneself with the *UN's Charter* is to ridicule the intentions of this document which was crafted to preserve international peace. First and second use cannot be justified under art. 51 of the *Charter*.

(522) **Reprisals against the civilian population** are absolutely prohibited. While a certain reciprocity is permitted under art. 6 of the *Vienna Convention on the Laws of Treaties* whereby sanctions are authorized to respond to an offence, and that customs allows for counter-measures, it clearly stated that such a response has to be **proportional**. Even in the case of a city being attacked, a response in kind could only be considered a counter-measure if it is in the aim of putting an end to the attack, obtaining reparation and guaranteeing no further offenses of the kind. As such: 1) a full-blown second strike would hardly put an end the the attack since a general nuclear strike is a one-time event; 2) reparation to thousands or millions of deaths are impossible by any account; and 3) destruction of the ennemy at the present time does not guarantee lack of retaliation by surviving members or allies. In any case, GC 1949 I and II as well as art. 20/AP 1 prohibit any attacks against the wounded, sick, sanitary personnel, and sanitary units. Also, the UN General Assembly's Resolution 2675 (XXV) of December 9 1970 at its art. 7 prohibits attacks against civilians. This is reiterated in both art. 52(6)/AP 1 and in *Protocol II* of the *United Nations' Convention of April 10, 1980* at art. 3(2).

(523) Many other treaties also apply, as do the *1954 Hague Convention* and the *1976 Stockholm Convention*. All these instruments reach only one conclusion: that nuclear weapons as a means of reprisal are prohibited as reprisals against civilian populations. Indeed, how is it possible to differentiate between combatants and civilians when one uses the equivalent of two megatons of TNT against a base situated close to a city of 500,000 people? The reasoning defies logic, but this does not stop states alleging the non-applicability of these instruments in the case of nuclear weapons.

(524) This is because states link this reasoning with a much stronger argument: the **state of necessity**. States affirm that when all other means have been exhausted and that the very survival of the state is in jeopardy, it is justifiable to go to the extreme and employ nuclear weapons. Israel is probably the best example of such a state. Surrounded by an unfriendly population, the Israelis cannot afford to lose a conflict. The Judaic nation-state (read the entire Hebraic nation) would certainly become a footnote in history books. It then becomes very hard to reconcile necessity with the LOAC. If the principles of the *St. Petersburg Declaration* remain valid, do they overwrite the inherent right of a nation to survive? Or is it the other way around? This question is more a moral than a legal one and is mostly decided by analysts' personal opinions. Whether a person chooses one thesis or the other, both sides are and can be defended until states decide to ban these weapons.

(525) The International Court of Justice, in its decision of July 8, 1996, has recognized that this last position **could** (but this is not definitive) justify the use of nuclear weapons. Their use could therefore be legal in the very specific case where the survival of a state is at stake. But as this is an after-the-fact assessment of legality, let us hope that this consideration will not come to the attention of the Court.

#### E. THE JURIDICAL IMPLICATIONS OF THE INVENTION OF NEW WEAPONS

(526) The legality of creating new weapons is not in doubt, except in the case of a very few jurists. The great majority admit that nothing in international law prevents a state from developing new weapons. But there are some restrictions.

(527) One of the most debated weapons of the recent years are non-lethal ones. Indeed, some argue that if they abide by the spirit of reducing the number of victims of armed conflicts, they might be within the aim of reducing suffering. Glue weapons and electric shock weapons are especially debated.

(528) Whether or not these weapons are legal under the LOAC, the source of the restrictions imposed on the creation of new weapons can again be found in the *St. Petersburg Declaration*; its last paragraph edicts that signatory states reserve for themselves the right to meet again to determine if future scientific development of new weapons respects the principles of the declaration and are in accordance with both the necessity of war and the laws of humankind.

(529) This principle was expressed in art. 36/AP 1. In this section, the study, development, acquisition, or adoption of new weapons or new means of combat must be submitted by the developing party to determine if it is in accordance with AP 1 or any other rule of international law. For example, the new glue gun could be banned if it was found that it did not meet the obligation to reduce suffering due to its high risk of asphyxia.

#### F. THE MARTENS' CLAUSE

(530) Even without the consideration of arts. 35 and 36/AP 1, the creation of new weapons was already deemed an important subject for future conferences. For this reason, one of the jurists present at the drafting of the *1899 Hague Conventions* had the idea of including a catch-all phrase that would permit to limit the infliction of unnecessary suffering due to new weapons. This sentence is now called after its author and is named the **Martens' Clause** and can be found in the preamble of the *Hague Convention II of 1899*, the preamble of the *Hague Convention IV of 1907*, the preamble of the *1980 UN Weapons*

*Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, as well as in arts. 63/GC I, 62/GC II, 142/GC III and 158/GC IV. It is supplemented by arts.1(2)/AP 1 and paragraph (4) of the Preamble of AP 2. It edicts that in cases not covered by either treaties or customs:

“...**civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience...**”

(531) This very clause itself is now part of *jus cogens*<sup>150</sup> and must be applied at all times. Therefore, if a treaty does not cover the use of a new weapon, its legality must be understood in the light of past and current obligations under the eye of humane conscience. Any weapons going against the principles contained in the *St. Petersburg Declaration* or any other text since would without a doubt be illegal<sup>151</sup>.

## CONCLUSION

(532) This Chapter has discussed the remaining *rationae conditionis* obligations relative to the means of warfare. These obligations are vitally important. If war is the liberation of violence in the aim of imposing one's will on another, the means to do so are limited. Whether means or weapons of warfare are prohibited or restricted, nuclear weapons, or new weapons, you must be able to determine whether or not they are legal. This is both your responsibility and your obligation.

(533) Do not forget that the aim of the LOAC is to reduce the suffering of victims of armed conflicts and to establish conditions favourable to a lasting viable peace. If you follow your conscience and these concepts, you cannot fail to make the right decision.

## SUMMARY OF TERMS

**Assassination:** Intentional homicide against a non-combatant chosen for his political or religious opinions.

**Booby-traps or other devices:** any device conceived in the aim of killing or wounding and which functions upon approaching the object or on contact.

<sup>150</sup> *Legality of the Threat or Use of Nuclear Weapons*, p. 257, para. 78: “[T]he Martens Clause (...) was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows: In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’.”

<sup>151</sup> Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law”, *International Review of the Red Cross* (2003) 850, 235 available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PXLK8/\\$File/irrc\\_850\\_Chetail.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PXLK8/$File/irrc_850_Chetail.pdf): “The Clause may indeed be understood in two different ways. First, it may merely be intended to recall the continued relevance of customary law when treaty law is not applicable, in which case the “principles of humanity” and the “dictates of public conscience” referred to in the Clause would be redundant and would only provide the ethical foundations of the customary laws of war. Secondly, it may however be argued that the “principles of international law” referred to in the Clause are derived from three different and autonomous sources, namely “established custom”, the “principles of humanity” and the “dictates of public conscience”. Arguably, the Martens Clause enables one to look beyond treaty law and customary law, and to consider principles of humanity and the dictates of the public conscience as separate and legally binding yardsticks.

**Martens' Clause** : clause that edicts that in cases not covered by either treaties nor customs civilians and combatants remain under the protection and authority of the principles of international law derived from established customs, from the principles of humanity and from the dictates of public conscience.

**Perfidy**: betrayal of the adversary's good faith.

**Ruses of war**: acts that mislead the enemy into making mistakes.

**Sabotage**: the act of destroying, harming, or diverting documents, materiel, constructions, installations, technical devices, or automatic data treating systems that cause prejudice to the fundamental interests of a nation.

**State of necessity**: situation justifying the use of nuclear weapons when all other means of combat have been exhausted and the very survival of a nation is in jeopardy.

## CHAPTER 8

### RULES APPLICABLE TO AIR AND SEA OPERATIONS

#### INTRODUCTION

So far, we have looked at general laws related to armed conflicts. In this Chapter we will examine particular laws that apply to two special theatre of operation: combat on the seas and in the air. The concepts we have discussed up to this point remain applicable to these theatres. What we will study here is specific to the special battlefields that are the maritime environment and the third dimension that air warfare presents. Remember that although air and sea warfare do have specific rules, the notions studied so far are applicable in whole or in parts to them. As such, GC II 1949 is entirely applicable, and the rules of AP 1 and AP 2 are also applicable when warranted (protection of civilians, etc.), as are the other GC 1949.

#### CONTENT:

- a. the historical evolution of naval warfare;
- b. the rules of the laws of armed conflicts relative to naval warfare;
- c. the evolution of air warfare;
- d. the rules of the laws of armed conflicts relative to air warfare.

#### OPTIONAL READING

- Distein, Y., “The Laws of War at Sea”, (1980) 10 *Israel Yearbook of Human Rights*, pp. 38-69.

#### A. THE HISTORICAL EVOLUTION OF NAVAL WARFARE

(534) Of course, the aim is not to study the development of naval warfare *ad nauseam* (to the point of making oneself sick). However, it is important to understand the development of naval warfare and its major phases to be able to comprehend why the LOAC has developed special rules for sea operations. It is simply an objective set to give you the basic understanding of the development of the conduct of hostilities at sea.

(535) The origins of conflicts at sea can be traced back at least to the Micean civilization of Ancient Greece (1400 BC), as related in the writings of Homer (*The Odissey*, *The Illiad*, etc.). Nonetheless, the use of ships to raid other human settlements can be traced back to at least the fourth millennium B.C. in Ancient Egypt; this was how the islands of the Mediterranean were conquered. During the period of the Hellenic (Ancient Greek) dominance on the Mediterranean and its conflicts with Persia (now modern Turkey and Iran), most naval engagements were conducted in the same manner as land operations. Ships rammed each other, used fire weapons (the famous Greek fire) and then boarded each other. During this last phase it was mainly on-board infantry and the crew that engaged the enemy until either the capture of the ship, the scuttling of the ship or their defeat and retreat. In short, naval combat was a close copy of the land engagements, but on an unstable platform.

(536) Whether it was during the Peloponnesian War<sup>152</sup> (431-404 BC) between Sparta and the Delian League (Athens/Thebes), during the Persian Wars, or during the numerous brush wars with rising Rome, naval tactics did not really change, at least in regard to boarding techniques.

(537) This began to evolve as Rome succeeded in subjugating its neighbours. By 400 BC it had already developed professional forces of citizens-soldiers, paid by the state. In less than 200 years, Rome had acquired relatively solid control of what is now modern Italy, including Sicily, during the first Punic War (265-241 BC) against Carthage on the coast of what is now modern Tunisia and Libya.

(538) While a fleet was already in existence for Rome's control of the sea, the widening of its sphere forced it to adopt a more proactive strategy in order to effectively control the sea lanes and to prevent future incursions, as well as to threaten Carthage directly. To do so, Rome decided to build and maintain a fleet similar to that of Carthage. This achievement in turn forced them to adopt a strategic doctrine that led to their victory of the Second Punic War (218-202 BC)<sup>153</sup>: *Mare Nostrum* (***Our Sea***).

(539) This doctrine laid the foundation of a very precise legal regime. The logic went thus: if the seas are Rome's, then Rome becomes the only recognized authority to grant freedom of passage in its territorial waters. If this was so, then Rome had sole authority for the payment of taxes and duties, fishing rights, etc. Therefore, even though dozens of countries might have access to the sea, only one - Rome - had the power to regulate it.

(540) It was at first by necessity that Rome developed its naval power: to protect itself defensively, then to protect itself offensively, and finally to retain control of the sea lanes to protect its commercial sea lanes. This power was as much responsible for Rome's greatness as for its downfall in 476 and its separation into two empires. On the whole, however, naval tactics did not progress much. The rules of combat at sea were about the same as on land: win, die, or flee.

(541) Between the period following the fall of Rome, the Middle Ages up to the Renaissance, the use of naval forces was transformed. The Crusades, the Viking raids, the French ambitions in England of William the Conqueror in 1066, and similarly the English ambitions on French Britain, etc., all contributed to the continued use of ships as means of transportation to go to the enemy and defeat him on land. Although some marginal sea battles did take place, they did not result in the hegemony of control of the seas that the Romans were able to create.

(542) The era of the great explorers that followed Columbus's discovery of the Americas, from the 13<sup>th</sup> to the 16<sup>th</sup> century, continued this use of transports. France, Holland, England, Portugal and Spain all established colonies that were relatively poorly defended against the indigenous populations, many being wiped out before finally establishing a solid foothold by conquest.

(543) Whether it was the Spanish *conquistadors* in Mexico or in Florida, the French in the Caribbean and in New France, the English in Virginia and the Carolinas, ships were now being used to bring in reinforcements and re-supply the colonies to enable their survival. For all these powers, the first objectives were the conquest of new lands for their respective Crowns and the protection of these territories for the control of their resources. Since firepower was lacking for the effective control of the seas and

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<sup>152</sup> Thucydides, transl. by Richard Crawley, *The History of the Peloponnesian War* available at <http://www.gutenberg.org/etext/7142>.

<sup>153</sup> There have been three Punic Wars opposing Rome to Carthage: the First Punic War (264 BC - 241 BC) was fought on land in Sicily and Africa, and at sea; the Second Punic War (218 BC - 202 BC) saw Hannibal's crossing of the Alps; and finally, the Third Punic (149 BC - 146 BC) resulted in the siege of Carthage and its destruction.

interception of rivals, a certain spirit of the **liberty of the seas** dominated: only the coastal approaches were really guarded<sup>154</sup>.

(544) The development of gunpowder and its arrival in Europe in 1320 was now starting to influence the conduct of sea warfare. The impact of gunpowder had made its mark in the Turkish attack of 1453 on Constantinople (modern Istanbul). In the interval between its arrival and its first truly successful use in offence, the use of bombards and harquebus was mainly limited to terrestrial use since a moving platform did not provide a good base from which to attack. Canons were carried by ship, but mostly for their transportation, unloading and use on land.

(545) But the increasing application of powder weapons to naval operations soon became a major factor in naval architecture. From 1513, ships of great displacement equipped with up to 20 canons started to be built in England in order to use naval firepower as a really effective tool of warfare and diplomacy.

(546) A great example of this is the naval battle of 1571 that took place at Lepanto. The Christian forces won a decisive victory over the Turkish fleet, even though the latter outnumbered those 260 to 212<sup>155</sup>. The difference was in the type of armament used. The Christian forces had ships of 15 canons on special elevated platforms while the ships of the Turkish forces mainly carried three guns and some harquebus. The success of this battle brought a definitive halt to the Turkish advance in Europe.

(547) With this battle, it became evident that effective control of the seas could henceforth be acquired through firepower. Once coastal control was assured, small squadrons could begin to patrol further out at sea to intercept potential threats.

(548) This led to states reverting to the concept of “territorial waters” that by then was acquiring *de facto* force of law. The interception of the Spanish Great Armada in the English Channel in 1588, successful in large part because of the fast manoeuvrability of the English ships and their superior firepower (on top of the great storm that tremendously damaged the Spanish fleet, demonstrated the authority that a maritime victory could bring.

(549) Despite these developments, the attitudes of military strategists did not change rapidly. The rules applicable to sea operations were largely modeled on those of land warfare. Again, a spirit of a “*noblesse oblige*” (the Nobles’ code of honour) determined the applicable rights.

(550) Nations started organizing their navies according to national needs, some more successfully than others. For example, in 1628 England created a special committee to supervise the fleet’s activity: the

<sup>154</sup> Wendy Lim, “Toward developing a natural law jurisprudence in the U.S. Patent System”, *Santa Clara Computer and High Technology Law Journal* (2003) 19, 559 at 585 citing Hugo Grotius, *Mare Liberum*, *Grotius on the Freedom of the Seas* 53 (R.V.D. Magoffin, trans., New York: Oxford University Press, 1916) (1609) and noting that “*Mare Liberum* was published in 1609 but the discovery of the unpublished treatise *De Jure Praedae Commentarius* in 1864 showed the former work to be essentially Chapter 12 of the latter. See Stephen Buckle, *Natural Law and the Theory of Property* Clarendon Press, Oxford 1991 at 6, footnote 12: “The principal aim of *Mare Liberum* to criticize the Portuguese who opposed the principle of freedom of the seas.”

<sup>155</sup> Wikipedia, *Battle of Lepanto*, available at [http://en.wikipedia.org/wiki/Battle\\_of\\_Lepanto\\_%281571%29](http://en.wikipedia.org/wiki/Battle_of_Lepanto_%281571%29): “The Holy League’s fleet consisted of 206 galleys and 6 galleasses, (...) contributed by the various Christian factions who were supporting the Habsburgs: 105 galleys and 6 galleasses from Venice, 80 galleys from Spain, 12 from the Papal States, which were hired Tuscan vessels, 3 from Genoa, 3 from Malta, 3 from Savoy and several privately-owned galleys, most or all of whom viewed the Turkish navy as their maritime naval trade rival for the profitable Mediterranean Sea trade routes (...) [while] Ali Pasha (Ali Paşa), supported by the buccaneers Chulouk Bey of Alexandria and Uluj Ali (Uluch Ali) was at the head of approximately 220-230 galleys, 50-60 galliots, and some smaller vessels belonging to the Ottomans and their vassals.”

Admiralty. This structure permitted the implementation of a system that ensured England's dominance for the following 250 years<sup>156</sup>.

(551) By establishing this supremacy, England which had previously claimed freedom of the seas<sup>157</sup>, was clearly rejecting the legal doctrine of the liberty of the seas, especially through the writings of the Scot William Welwood<sup>158</sup> and John Selden<sup>159</sup>. It needed security for both its commerce and its empire, and sea power was the instrument to provide it.

(552) Opposed to this was Hugo Grotius who refuted such a doctrine comparable to that of the Roman *mare nostrum*: the *mare clausum* (closed seas) by that of the *mare liberum* (freedom of the seas). Grotius opposed both imperium (governance) and dominium (ownership) of the seas and his theory was progressively accepted in words and actions<sup>160</sup>.

(553) France and Spain attempted to contest this English supremacy during the Seven Years War (1754-1763) and by the use of corsairs, but the English power was there to stay. While England was able to control oceans, smaller countries had to limit themselves to the protection of their coastal zones and some colonies. The French theory of "*guerre de course*" – or *commerce raiding* - by which small fleets between them could check the English might by using a tactic of repetitive small raids upon commercial or isolated ships, did not create the challenge necessary to defeat England's naval power. The British Empire took form and at its greatest height, during the rule of Queen Victoria, three-quarters of the globe was under British dominance, mainly due to its naval power.

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<sup>156</sup> Wikipedia, Admiralty, available at <http://en.wikipedia.org/wiki/Admiralty>. While the Office of Admiral of England was created around 1400, the board of the Admiralty was only created in 1628 by Charles I.

<sup>157</sup> Kari Hakapää, "Foreign Ships in Vulnerable Waters: Coastal Jurisdiction over Vessels Source Pollution with Special Reference to the Baltic Sea", *International Journal of Legal Information*, (2005) 33, 256 at 257 stating: "This may, first, take us some centuries back in the history of the Law of the Sea. In 1609, the Dutch scholar Hugo Grotius published his classic work, *Mare Liberum*, in which he propounded the freedom of the seas: oceans were not to be claimed by anyone but should be open to all nations. At the time, however, such a principle was far from well-adopted. It was challenged by the school of "closed seas" arguing that, like land territory, sea areas should be open to occupation. In fact, at the end of the 15th century the Pope issued a Papal bulletin awarding control of the oceans, then discovered by the Great Expeditions, to two states, Spain and Portugal. Such claims, however, raised protests by other sea-going states, especially the Dutch and the British. For them, the principle of the freedom of the seas was the one to rule. As time passed, it also became the prevailing principle as applied to the "high seas," where claims were not to be submitted to the jurisdiction of coastal states. For quite some time, sea areas were divided into two jurisdictional zones. There was the narrow belt of territorial waters subject to coastal sovereignty, and, beyond territorial waters, there opened the high seas, which belonged to nobody. In the mid-twentieth century, new developments took place. First, the United States claimed rights over the natural resources of the continental shelf off its coast. Soon after, several Latin American states issued zonal claims over their coastal waters. Soon, such claims became typical of newly independent coastal states relieved from colonial rule and determined to secure their rights over natural resources (fish, oil, and gas) off \*258 their coasts. Some other states (like Iceland) that were heavily dependent on their fisheries, also followed suit. The new developments were subject to discussion in the Law of the Sea Conferences convened by the United Nations in 1958 and 1960. In terms of zonal expansion, however, the results remained modest. The Conventions adopted in 1958 confirmed the continental shelf regime but otherwise refrained from extensive reform. The 1960 Conference failed to produce concrete results. In no time, however, pressures for a more drastic change grew, and a "new deal" of oceans was effected by the third UN Conference on the Law of the Sea when, in 1982, it adopted the presently prevailing UN Convention on the Law of the Sea. [FN3] The new Convention entered into force in 1994 and today has 148 Parties."

<sup>158</sup> William Welwood, *An Abridgement of All Sea-Lawes* 1613, where he vehemently opposed the position chosen by Grotius, for, interestingly enough, theological reasons.

<sup>159</sup> John Selden, *Mare Clausum*, 1635, also for divine reasons.

<sup>160</sup> Hugo Grotius, *Mare Liberum*, 1609. While Grotius' theory may be the one accepted and, also the most logical, it remains that his stipulations were not disinterested: this debate of the liberty of the sea took place at the height of the Herring War when England and Holland were fighting over fishing rights in the North Sea.



(554) Some basic rules regulating the conduct of hostilities at sea were set during the nineteenth century, particularly during the *1856 Declaration of Paris* and in the *1864 Geneva Convention*, but these were of a very restricted nature.

(555) With the growth of the British Empire, rivals also grew and attempted to threaten the control of the seas. To counter this, the Admiral Mahan<sup>161</sup> in 1890 published a book that was to influence the doctrine of the control of the sea: this was to be based on overwhelming numbers of ships that would acquire decisive victory through engagement and destruction of the enemy. Nowhere was this doctrine more espoused than in Germany and the United States.

(556) The isolationist United States of the nineteenth century was suggesting an international legal regime that would recognize freedom of the seas. But as we have seen, this ran counter to British as well to German interests, which required control of “territorial waters” in case of war. The 1899 Hague Conference and that of 1907<sup>162</sup> did not settle that doctrinal problem, nor the question of the size of fleets. That failure was in part responsible for the diplomatic catastrophe of the Great War and the resulting sinking at will of merchant vessels by German submarines.

(557) Since the legal regime was uncertain, many acts of the Great War were committed without punishment, such as the torpedo sinking of the passenger ship *Lusitania* that was killed, among others, 128 Americans, and prompted the U.S. entry in the war (with the affair of the *Zimmermann Telegram*)<sup>163</sup>.

(558) At the end of the conflict, it became evident that freedom of the seas was impractical and that the LOAC were not prepared for the new conditions of the conduct of hostilities at seas. This is why the 1929 Geneva Convention attempted to address the problems encountered. However, the Second World War (1939-1945), due to its spirit of total war, once more rendered the laws on maritime conflict obsolete. The 1949 Geneva Conventions were therefore established and in its Second Convention specifically treated the laws applicable at sea. This is what we will now examine.

## **B. THE RULES OF THE LAWS OF ARMED CONFLICTS RELATIVE TO NAVAL WARFARE**

(559) Before studying the modern rules applicable to the conduct of hostilities at sea, we must first understand certain notions of maritime international law. Since 1945, many changes have adapted the laws to the modern era. Indeed, since the 1982 Montenegro Bay Conference, a solution to the conflict between the doctrines of *mare clausum* and *mare liberum* was adopted and clarified. Today there exists a clearly recognized distance up to which a state can claim effective control and juridical authority, where freedom of passage is recognized but can be limited, and an international space where pure freedom of the seas is

<sup>161</sup> Alfred Thayer Mahan, *Naval Administration and Warfare: Some General Principles, with Other Essays* (1908)

<sup>162</sup> In both instances, the retaining of ‘*si omnes*’ clauses and the failure to adopt some of the most controversial conventions proved an incomplete codification of the customary law and inapplicable in many cases. See Patrick Dallier et Alain Pellet, *Droit international public*, 7th ed., L.G.D.J., Paris, 2002 at 969.

<sup>163</sup> A coded telegram from the Foreign Secretary of the German Empire sent to the German ambassador in Mexico instructing him to propose a military alliance with Mexico in order to tie it down and prevent its entry into the war. Intercepted and decoded by British forces, it was transmitted to the United States where it galvanised the public opinion against Germany, which was already very shaken by the sinking of the liner RMS *Lusitania* with heavy civilian losses (1198 lost their lives out of 1257 passenger and 128 American out of 198). Although this was an act of unrestricted warfare that had been declared and advertised in the US, the captain of the U-boat was deemed a ‘war criminal’ and condemnation flowed from everywhere. But it is only after the Zimmerman affair that finally did the United States entered the war.

now sacred. To understand this, we must examine the differences between territorial waters and international waters.

(561) Territorial waters are divided into three categories:

- a. territorial seas;
- b. interior waters; and
- c. archipelagic waters.

(562) **Territorial seas** are composed of the maritime space contained between the coastlines of a state up to a limit of 12 miles. This distance is measured from the territorial baseline of a state, meaning where the waterline at low tide. The state then exercises all the privileges of its sovereignty over the territorial sea but has an obligation to grant freedom of passage to ships that pass in a peaceful manner. This is called **innocent passage**. As for the sea bottoms under these waters, they are called the **continental shelf** and are the property of a state up to 200 meters of depth. The continental shelf can go beyond the limit of the territorial sea, but once past the limit of the territorial seas, the state only exercise functional authority over the economic interests that might be on the sea bottom and can limit totally or in part other states' right to exploit them.

(563) However, in some parts of the world the sea bed does not attain the depth of 200 meters for many miles. Technically, this would allow a country to claim another's continental shelf if they were close enough. For this reason, the continental shelf is either ending at the depth of 200 meters **or** is ending at a distance of 200 miles from the water base line, whichever comes first.

(564) Past the depth of 200 meters, the continental shelf becomes the **sea bed**. Over this, no states have jurisdiction. Therefore any state can exploit sea bed or lay any cable or pipeline that does not threaten the environment or is not of an aggressive nature.

(565) **Innocent passage** is defined at art. 14(1) of the *1958 Geneva Convention on International Maritime Law*. Under this section, no state can refuse access to its seas to a foreign ship that does not threaten its security, public order, or fiscal interests. One can therefore see that the spirit of the *mare liberum* doctrine ultimately won over the *mare clausum*, but with some concessions. The right to innocent passage does not grant the right of aerial passage.

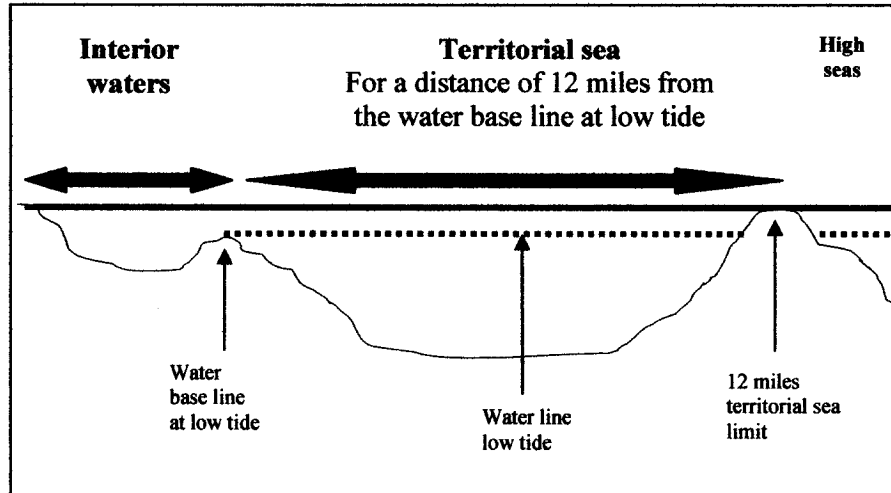
(566) **Interior waters** are those waters situated within the territorial baseline and where a state exercises all its sovereign power. For example, ports, harbours, and bays with some access to the sea are considered as part of interior waters (including rivers and interior "closed" seas such as the Caspian Sea).

(567) **Archipelagic waters** are the waters surrounding a group of islands that constitute an archipelago. In these as in straits, the distance between the islands (or even countries) is so small that it is impossible to measure up to 12 miles from one's territorial baseline without encroaching on the other's territory and being able to permit innocent passage in between. For such a case the right of transit passage was created.

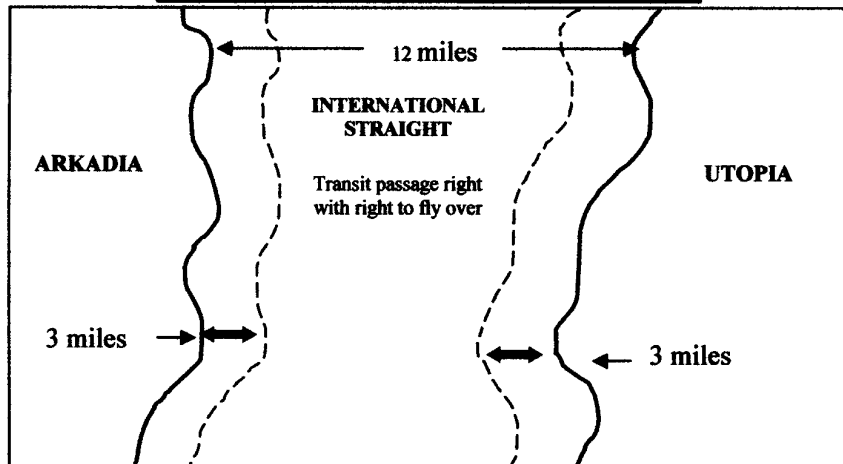
(568) In the case of an archipelago, since neither state can claim a sovereignty of 12 miles, this is downscaled to 3 miles in order to permit passage in the zone between those two territorial seas. Contrary to the right of innocent passage, the right of transit passage does grant the right to fly over this aerial

corridor. Study attentively the Figures below to clarify these concepts:

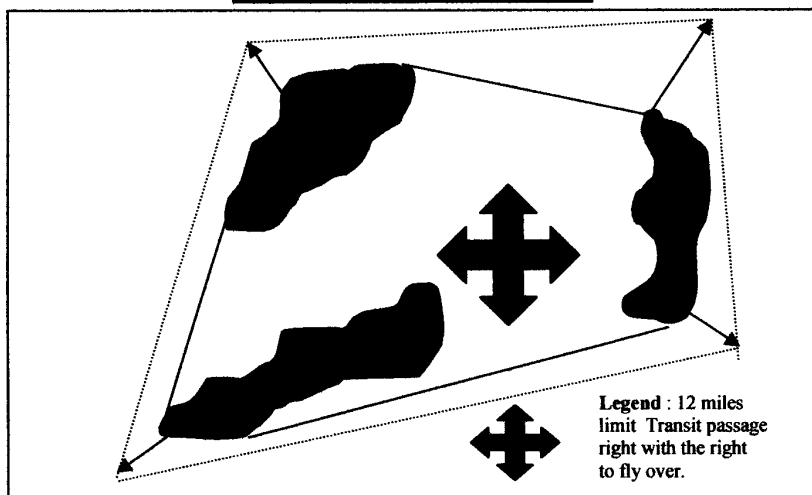
**FIGURE 1 : INTERIOR WATERS AND TERRITORIAL SEAS**



**FIGURE 2 : INTERNATIONAL STRAIGHT**



**FIGURE 3 : ARCHIPELAGIC**



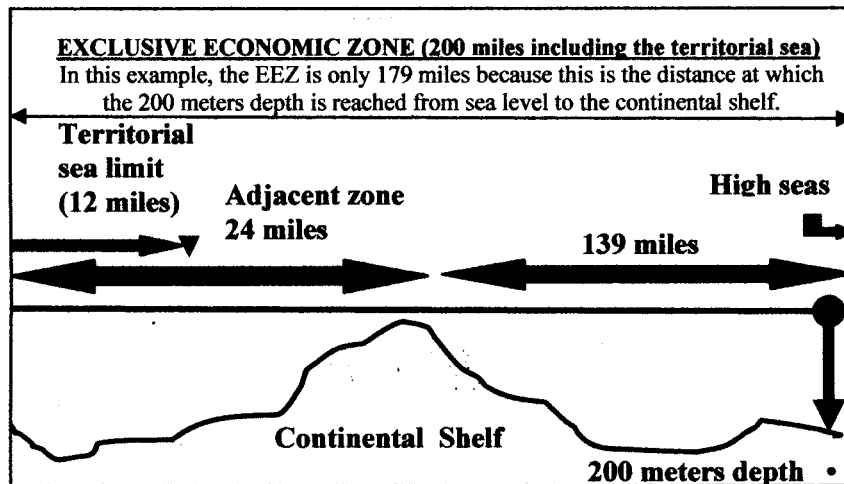
(569) The other types of waters fall under the international category:

- a. adjacent zones;
- b. exclusive economic zones; and
- c. high seas.

(570) **Adjacent zones** can extend up to 24 miles from the water base line. The state that claims such a zone can exercise “functional” authority over it. The state can therefore demand that ships entering it must have special security features, or it can carry out search and rescue operations in the zone (it could also demand that ships submit to its right to verify that fishing quotas are respected).

(571) This zone can be partly or **exclusively economic zones** that guarantee the state sole fishing or exploitation rights over it. This type of zone can extend up to 200 miles from the water baseline at low tide. In this zone the state can claim only very restricted authority, but this is nonetheless very important. Indeed, the state that has control of such a zone can exploit its natural resources such as marine (fishing) or under sea-bed (petroleum) resources. This is the case of Canada on the Grand Banks where cod is a great resource and with the Hibernia drilling platform off Newfoundland that exploits petroleum pockets. The state that possesses such a zone can claim all the economic interests and restrict other states’ rights to exploit them if this runs counter to its interests. All other waters that do not fall under the categories seen above fall under that called **high seas**. As mentioned, freedom of navigating and flying over is absolute.

**FIGURE 4 : INTERNATIONAL WATERS**



(572) Now that we have assimilated these fundamental concepts of maritime international law, we can focus on the LOAC regulating the conduct of hostilities at sea. Keep the notions we have just discussed in mind: they will serve to explain the existence of some rules of the LOAC.

(573) It is essential to understand in what type of water a ship might be, because this can prevent you from taking measures against a belligerent craft. Indeed, waters can be “neutral” by their nature. **Neutral waters** are those that can be found in international straits and in archipelagic waters. Actions prohibited in these waters are, in particular:

- a. the attack of persons or objects in neutral waters or territories;
- b. the use of the waters' neutral status as a protection for a base of operation;
- c. mining; or
- d. visitation, search, diversion, or capture.

(574) All these actions are prohibited by art. 30 of the *San Remo Manual on the Rights Applicable to the Conduct of Hostilities at Sea*<sup>164</sup>, which is abbreviated here to '**SRM**', adopted in June 1994. Although the manual is not a treaty, it is a very important document that sums up those laws applicable at sea during hostilities. It is the published result of a conference of many renowned maritime international law and LOAC jurists who attempted to collate and clarify the rights applicable. Despite its doctrine status, the San Remo Manual has a very high moral authority and Canada accepts the vast majority of its conclusions. The manual is in fact a compilation of all the customary and conventional (i.e., GC II) rules relevant to the conduct of hostilities at sea.

(575) When a ship passes through neutral waters, it must do so without delays, and without use or threats of use of force against the territorial integrity or political independence of a state (art. 30/SRM). It must be noted that this obligation applies only to offensive gestures, not to defensive ones (art. 30/SRM). According to this, the launching of aircraft, the forming of a screen, and the deployment of acoustic or electronic surveillance measures are permitted.

(576) Another obligation of the conduct of hostilities at sea is that all operations done in an exclusive economic zone or over the continental shelf must be done with respect of maritime resources and other exploitable resources that are present (art. 34/SRM).

(577) During operations at sea, belligerents are restricted by the rules of targeting that we have discussed and that apply on land. The notions of **military necessity** and of **proportionality** continue to apply. However, in order to adapt these rules to the particular condition of a sea battlefield, many treaties clarify those notions. The 1936 *London Protocol*, dealing in general with hostilities at sea, also deals specifically with submarines. This is because after the German campaign of torpedoing on sight all merchant ships bound for England, up until 1915 and recommencing again in 1917, nations felt that rules had to be established for this new weapon system.

(578) The first conclusion on which signatories decided in the *1936 London Protocol* at art. 1 was that submarines were subject to the same rules as surface ships. Following this conclusion, signatories decided that, as for surface ships, submerged ships could not sink or render incapable of navigation a merchant ship without having first placed in security (art. 2 *1936 London Protocol*):

- a. the ship's passengers;
- b. the ship's crew; and
- c. the ship's papers (especially the cargo registers and the ship's log).

<sup>164</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994 at <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce?OpenDocument>.

(579) It must be specified that the notion of security described at art. 2 is very strict in its interpretation. Under this interpretation, life rafts are not a secure place, unless a ship is close enough to rescue them or land is nearby. Also, the security of the persons and papers must be interpreted with regards to climatic conditions and temperature. Therefore, a submarine could not sink a merchant ship in the Arctic sea in the middle of a storm if the closest rescue ship were three hours away, unless it was itself prepared to rescue the passengers and crew. Otherwise, this action would condemn these people to certain death.

(580) That being said, one must first of all understand what is a merchant ship. The general interpretation of art. 1/1936 *London Protocol* is that merchant ships are all crafts or ships that:

- a. are not warships;
- b. have not been incorporated in the state's war effort (by arming them for operations or by official requisition); or
- c. do not travel under military escort in convoy (a merchant ship accompanied by one warship is a convoy).

(581) This does not mean that merchant ships are exempt from any form of attacks. In fact, there are four situations when it can become imperative for a surface or submerged ship to attack. It is permissible to attack **enemy merchant ships** (art. 60/SRM):

- a. when they engage in hostile activities (mine laying, submerged cable cutting, pipeline cutting, visits or searches of neutral ships, or attacks of other merchant ships);
- b. when they act as auxiliaries of the enemy's armed forces (i.e., by transporting troops or supplies for these forces);
- c. when they are incorporated in the intelligence system;
- d. when they are navigating under military escort (whether it be air or sea escort) in convoy;
- e. when they are armed in such a manner that they can inflict damages to a warship (the bow for ramming purpose, individual weapons, or counter-measures systems are not such offensive weapons; a sea-sea anti-ship missile system or 40mm Bofor canons would be considered offensive weapons systems.);
- f. when they refuse to obey to an order to stop and to submit to a visit, a search or their capture; and
- g. when they **effectively contribute to the enemy's war effort**.

(582) This last point is extremely important and subject to a wide range of interpretations. Is a tanker bound for a country that makes extensive use of armoured forces effectively contributing to the enemy's war efforts if it brings the equivalent of a week's supply of petrol for these forces?

(583) This question did arise during the first Persian Gulf War (1980-1988), also called Iran-Iraq War. The San Remo conference has offered the opinion that a neutral tanker doing the shuttle for Iran effectively contributed to the war effort. In this particular case, a reasonable person could have presumed

that the profits made from the petrol would have served in large part to the funding of the war effort, petrol being its first export and best source of profits.

(584) In its comments the San Remo conference advised that this was a particular case and that a generalization should not be made. The decision of an effective contribution to the war effort must be made on a case-by-case basis.

### NEUTRAL MERCHANT SHIPS

(585) **Neutral merchant ships** can only be attacked (art. 67/SRM):

- a. if there are reasons to believe that it is transporting **contraband** (meaning **goods destined to territory under the control of the enemy and subject to its use in an armed conflict** (art. 148/SRM)) or if it attempts to pierce through a blockade, clearly refusing to stop and be subjected to either visit, search or capture, after having being duly warned to stop;
- b. if it engages in hostile acts;
- c. if it acts as an auxiliary of the enemy's armed forces;
- d. if it is incorporated in the enemy's intelligence system;
- e. if it is navigating under military escort (whether it be air or sea escort) in convoy;
- f. if it is **effectively contributing to the enemy's war effort**. Furthermore, if circumstances warrant, the ship must be warned and given an alternative route to unload its cargo; and all other necessary precautions must be taken before firing.

(586) A special rule is applicable to neutral merchant ships: contrary to enemy merchant ships, the **simple fact that a neutral merchant ship is armed, even offensively, does not automatically give the right to attack it** (art. 69/SRM).

### ENEMY MERCHANT SHIPS

(587) There are also categories of enemy vessels that are exempt from any type or forms of attacks or capture. These are (exemption from attack: art. 47/SRM; exemption from capture: art. 136/SRM);

- a. hospital ships;
- b. small craft used for coastal search and rescue operations and medical transport;
- c. ships that have been granted safe conduct by agreement between belligerents, including:
  - (i) vessels carrying prisoners of war;
  - (ii) vessels engaged in humanitarian missions, including transporting goods essential for the survival of the civilian population, or those engaged in rescue operations and humanitarian aid.

- d. ships carrying cultural property of a state under the special protection;
- e. ships carrying only passengers;
- f. ships carrying religious, non-military, scientific or philanthropic (clothing, toys, food for refugees) objects. This excludes ships gathering scientific data for military use (meteorological ships, etc.);
- g. coastal fishing vessels engaged in local trade. However, these are subject to the rules declared by the local military commander in the sector and must subject themselves to inspection when asked;
- h. ships specifically designed to respond to pollution emergencies in the marine environment;
- i. ships that have surrendered;
- j. life rafts and lifeboats.

(588) These protections are only applicable **if** (arts. 48 and 137/SRM):

- a. they are employed in their normal roles;
- b. they submit to identification and inspection when required; and
- c. they obey orders to stop or move out of the way when required and do not intentionally hamper the movements of combatants.

(589) All these must be obeyed **concurrently**. Not obeying one of them is enough to warrant the sinking of the ship.

(590) Even a hospital ship can lose its protection and be attacked (**in last resort**), **if** (art. 51/SRM):

- a. its diversion or capture is impossible;
- b. no other method of controlling is available;
- c. the circumstances of the breaches are so grave and serious that the ship has become a legitimate military target; and
- d. if the damages and the human losses are not disproportionate with the direct and concrete military advantage sought.

(591) For all vessels exempt from attack other than hospital ships, they can only be attacked under the conditions of art. 52/San Remo (art. 47/SRM).

(592) In maritime operational terms, we can see that the type of ship, the circumstances of the action, and the type of weapons used are subject to numerous and different rules. Nonetheless, only exhaustive comprehension of these rules and their full application by competent naval commanders can reduce the sufferings of victims of armed conflict at sea. This is why you must fully understand these concepts and be able to interpret them under the circumstances. Once in operation, it will be too late to change one's



actions and a mistake can be costly in terms of material losses, human lives, and the political capital of a state that renders itself guilty of an infraction because of a commander who did not know how to interpret the rules.

(593) Naval commanders are some of the very few people on Earth who can kill hundreds of persons with an order. It is too late, once the missiles have left the ship, to ponder the legality of the order under the LOAC. Doubts in operation can make the difference between the success of your mission and a humanitarian, military and diplomatic failure.

### **BLOCKADE**

(594) And since we are addressing the question of missions, one of the more complex naval operation to execute is the **blockade**. But first, what is a blockade? The San Remo Conference defines it in its preliminary notes of Section II of Part IV/San Remo Manual as: **the blocking of all approaches to the enemy coast, or part of it, for the purpose of preventing ingress and egress of vessels or aircrafts**. The blockade must be applied in an impartial manner (art. 100/SRM) and must not prevent access to the ports of neutral states or to their shorelines (art. 99/SRM).

(595) A blockade must be declared. All belligerents and neutral states must be notified officially through the “Notes to Mariners” of the *International Maritime Organization*, in accordance with art. 93/SRM and in the same manner as mines would be signified to other parties (as per art. 83/SRM’s commentary which specifies an obligation to notify all States which can be affected through diplomatic channels and by communication through the International maritime Organisation). The declaration must specify the commencement, duration, location, and extent of the blockade as well as the delays during which neutral states’ ships are able to leave the blockade’s zone (art. 94/SRM).

(596) However, in order for a blockade to exist, its declaration must not only be declared: it must be effective *de facto* (art. 95/SRM). It follows that to sink a ship that does not respect a partial and/or ineffective blockade would be contrary to the LOAC. Effectiveness is judged by success in rendering it dangerous for air, surface and submarine craft to enter or exit the blockaded zone.

(597) For a blockade to exist, no distances are pre-set. Ships can be miles away from the coastlines of a state and still maintain an effective barrier to the covered zone (art. 96/SRM). To be legal, a blockade must not be established (art. 102/SRM):

- a. in the sole aim of creating famine for a civilian population or resulting in the denying of goods essential for its survival; or
- b. in such a manner that damages to the civilian population are disproportionate with the direct and concrete military advantage sought.

(598) If the civilian population suffers in a disproportionate manner from the effects of a blockade, the blockading power **must** permit passage of the food and essential goods necessary for survival. The blockading power still retains the right to prescribe the technical conditions of the distribution of these goods, such as their distribution through the local supervision of a **Protecting Power** in the sense of art. 8/GG I or an impartial humanitarian organization such as the Red Cross and Red Crescent Movement (art. 103/SRM). Permitting passage of medical re-supply and the sick and wounded is also a duty of the blockading state, again subject to the technical conditions of art. 103/SRM (art. 104/SRM).

(599) This last rule is distinctive because it underlines the fact that while a blockade must be effective to be recognized as such, it must not be carried out to the point of denying absolutely entry or exit. A blockade can be legal, even when using naval mines and air patrols, but it must permit the respect of humanitarian law, and therefore of the LOAC. If a naval minefield is legal in itself, it can only be so if it has a breach through which ships can enter and exit under the control of the blockading power (art. 97/SRM).

(600) To respect these obligations, the blockading state can decide either to cease the blockade, lift it temporarily, re-establish it, widen its extent, or create any other alterations it finds suitable (art. 101/SRM). If this is the case, these changes must be communicated in accordance with art. 83/SRM's commentary.

(601) As for the use of naval **mines**, the question is addressed by art. 80 to 92/SRM. As art. 80/SRM states, the use of such mines can only be done for legitimate military purposes in the aim of denying the enemy access to an area. Any other use would be contrary to this rule (e.g., to prevent the passage of humanitarian aid).

(602) Naval mines can be used only under one condition (art. 82/SRM): if effective neutralization takes place after they are detached from their anchor or when control over them is lost. Further, the use of floating mines (mines laid without anchors) is prohibited if (art. 82/SRM):

- a. they are not directed against a legitimate military objective; **and**
- b. they do not automatically neutralize one hour after loss of control over them.

(603) If naval mines are deployed, the area of deployment must be signified unless they can only explode against military objectives (art. 83/SRM). As is the case with land mines, the exact location and spread of a mine field must be registered at the end of hostilities with the belligerent to allow for the demining operations that will take place after cessation of hostilities (art. 84/SRM). Also like land mines, the obligation to remove or neutralize them is very clearly specified at arts. 90 and 91/SRM.

(604) Further, mine laying can only be done within certain areas. Arts. 85 to 89/SRM specify that limitations exist to mine laying within territorial waters (interior waters, territorial seas, archipelagic waters) with respect to neutral ships. Mine laying in neutral waters to prohibit access to neutral or international waters without offering alternative routes for neutral shipping is prohibited.

(605) As we have seen before, neutral or enemy merchant ships that run a blockade can, after a warning, be attacked or captured (art. 98/SRM). Would that be the case in a Maritime Exclusion Zone?

(606) **Maritime Exclusion Zones (MEZ)** are areas within, on and under which a state can prohibit or restrict maritime and aerial access. Also called "zones," "military areas," "prohibited" areas, "war zones" and "operational zones," these are places where maritime and aerial traffic enters at its own risk. However, they **are not** free-fire zones. Because a ship or an aircraft is within one does not mean that it must be sunk or shot down (Preliminary notes on the zones preceding art. 105/SRM).

(607) The LOAC continue to apply in the same manner outside and within the MEZ (art. 106/SRM). The aim of such a zone is simply to warn all ships and aircraft that the area is a combat zone or is susceptible to becoming one. A ship could therefore find itself in the middle of a 60-square-mile

engagement and be caught in the crossfire of missiles, bullets, canons and torpedoes. Nevertheless, a belligerent can never justify its actions in attacking a neutral merchant ship that conforms to its obligations on the basis of the simple fact that it is within a MEZ (art. 105/SRM).

(608) If a belligerent establishes a MEZ (art. 106/SRM),

- a. the rules of the LOAC continue to apply as well as international law;
- b. the extent, location, duration, and imposed measures of the MEZ cannot exceed the operational need of military necessity and cannot exceed proportionality;
- c. respect of neutral states' interests will be preserved;
- d. alternative shipping routes for transit passage will be offered to neutral ships and aircraft:
  - (i). where the geographic extent of the zone hampers the access of these ships and aircraft to ports and shores of neutral countries; and
  - (ii). where normal navigation routes are affected, except if military necessity does not allow it.
- e. the commencement, duration, and extent of imposed measures will be declared and signified in accordance with art. 93/SRM.

(609) The effect of transit passage zones is to create a funnel. Ships entering them can become trapped and required to submit to visit and search and sometimes to capture. Must one therefore presume that a neutral ship entering such a zone which comes back out, refusing to engage any further, is committing hostile acts? The answer is NO. The enemy character of a ship cannot be presumed on the basis of the measures it takes. Art. 107/SRM clearly states that in such a case, no such assumption can be made.

(610) This does not prevent a belligerent from taking measures in the proximity of the MEZ, or within it, to stop suspect ships or aircraft, particularly with regards to communications. Art. 108/SRM is explicit on the subject. A ship or an aircraft that refuses to subject itself to the directions of the MEZ controlling power does so at its own risk and peril. If the integrity of the operation is put in jeopardy, the ship or aircraft can be attacked or captured.

(611) This rule is quite important when one considers the vital aspect of security with regards to naval warfare. Ships are of extreme importance in terms of costs, personnel, and operational efficiency. The security of their location must be maintained.

(612) The integrity of such ships cannot be jeopardized. This is even more applicable since the ruses of war referred to in art. 37(2)/AP 1 are also permitted at sea (art. 110/SRM), rendering ships even more of a target. For example, the right to carry false colors (i.e., the flag of a neutral state) remains. However, military ships and their auxiliaries cannot attack under such a flag and cannot pretend to be (art. 100/SRM):

- a. a hospital ship, a rescue craft, or medical transport;
- b. a vessel engaged in a humanitarian mission;

- c. a liner (passenger-carrying ship);
- d. a vessel carrying the flag of the United Nations;
- e. a vessel guaranteed safe passage under a safe conduct, especially for vessels carrying prisoners of war;
- f. a vessel entitled to use the emblem of the Red Cross or the Red Crescent; or
- g. a vessel engaged in the transport of cultural objects under special protection.

(613) Nevertheless, while ruses of war are permitted, perfidy is prohibited in accordance with art. 37(1)/AP 1 (art. 111/SRM). Perfidy is the act of betraying the adversary's good faith by leading him to believe that the vessel is protected under the LOAC in order to launch an attack (i.e., to attack under the UN's flag). The ruses of war permitted are:

- a. surprise;
- b. feigning attacks, retreat or flight;
- c. simulating silence of inactivity;
- d. transmitting false communications, or false news in order to be the target of a capture attempt;
- e. using signals, pass words, codes and orders of the enemy;
- f. conducting a false military exercise on radio waves while a real operation is taking place elsewhere
- g. pretending to communicate with forces that do not exist.

(614) It is clear that in the above cases the use of these ruses does subject those who using them to the risk of an attack, since they are engaging in hostile activities and incorporating the intelligence system of the enemy.

(615) But if a ship does not commit such actions and acts within its normal role, is the carrying of the enemy's flag sufficient proof of its enemy nature? The answer is yes. A ship or aircraft carrying the emblems, colours, or flags of the enemy gives proof *prima facie* (at first glance) of its enemy character. It can therefore be submitted to visit, search, capture, or attacks (art. 112/SRM).

(616) The same applies to the neutrality of ships and aircraft. If they carry the emblems of a neutral power, they must be considered as neutral unless they commit hostile acts or unless serious doubts about their neutral character warrant intervention (art. 113/SRM). In both of these cases, the enemy character of a ship can be determined by its registration, property, charts, or any other pertinent indication of enemy collaboration (art. 117/SRM).

(617) In the case where a ship's commander suspects a neutral ship to be acting for the enemy, he can decide to visit and search the ship (art. 114/SRM). This right includes the right to divert the suspected ship

towards an appropriate port or area if the search at sea is too dangerous or impossible (arts. 119 and 121/SRM). The same rule applies to aircraft (art. 115/SRM). Rights for their search are explained at art. 118/SRM.

(618) If, after a search, there remain sufficient doubts as to its neutral character, the ship can be captured and adjudged as a war prize (art. 116/SRM).

(619) A particular case is that of merchant ships under the military escort of **neutral** ships or aircraft. Are they to be considered as subject to visits or searches? The answer is NO as long as (art. 120/SRM):

- a. they are bound for a neutral port;
- b. the escort is of the same nationality as the merchant ship or if a formal agreement exists between the two different nationalities;
- c. if the state of the merchant ship guarantees that it does not carry contraband or is not engaged in activities inconsistent with its neutral status; **and**
- d. if the neutral ship's commander transmits all pertinent information with regards to the ship's character and its cargo to the intercepting warship's commander

(620) If an interception of merchant ships is made with the intention of proceeding to a visit, search or capture, it must be in conformity with arts. 118 to 124/SRM as well as arts. 146 to 152/SRM for neutral shipping. As for enemy shipping, it must respect arts. 135 to 140/SRM for enemy shipping.

(621) Enemy aircraft interceptions must conform to arts. 141 to 145/SRM, while neutral aircraft fall under arts. 153 to 158/SRM. In all cases, whether neutral or friendly, civilian aircrafts fall under the protections of arts. 125 to 134/SRM. These rules applicable to aircraft are examined in the following teaching point.

(622) The San Remo manual encourages states to establish flight plans and communicate them to all belligerents (art. 129/SRM), to establish procedures for the dissemination of information for alternate routes (art. 130/SRM), to establish in advance conditions of inspection that would avoid searches on high seas (art. 132/SRM), and to communicate all pertinent documents concerning the cargo of their ship to all belligerents before taking to sea, in order to avoid searches (art. 134/SRM).

(623) These measures have the double advantage of ensuring that neutral states do conform to the necessary requirements while avoiding the loss of time at sea of the belligerent's patrolling ships. Of course, it is impossible to discard the possibility of renegade ships acting for the enemy transboarding cargo at sea. If a ship is suspected of such activities, then the right of visit and search can be applied.

(624) Regardless, in a vast majority of cases we can expect compliance with these rules, permitting the reduction of loss of time for international trade and minimizing interceptions by patrolling ships (long and arduous work that diminishes crew efficiency, while the list of suspected ships increases). It is therefore everybody's advantage to follow these rules.

(625) If a ship is subjected to capture or if an interception results in a search and the belligerent

concludes that the ship is of an enemy character, the rules applicable to capture then are enacted. First, a capture cannot take place in neutral waters. Further, every effort must be made not to capture the personal property of enemy civilians. As we have seen before in Chapter 1, this property is protected. The same does not apply to the cargo of the ship.

(626) The cargo of an enemy ship can always be captured as a war prize. The cargo of a neutral merchant ship can only be captured when it is contraband (i.e., undeclared war material destined for the enemy, such as ammunition, petrol, combat rations, etc.), if it attempts to penetrate a blockade, if it resists visit or search, or if it navigates under enemy military escort (art. 135/SRM).

(627) Once captured, the cargo is judged to be war prize. However, if the capture cannot be made at sea, there are two alternatives (art. 138/SRM):

- a. its diversion to an appropriate area or to a port to complete its capture; or
- b. its diversion to another port without its capture.

(628) In the case where capture is impossible, an enemy merchant ship can be sunk, but only after meeting all of these three conditions (art. 139/SRM):

- a. the security of the passengers and the crew have been ensured;
- b. all documents and ship's papers have been put in a safe place; **and**
- c. when possible, the personal property of the passengers and the crew have been saved.

(629) Regardless of all this, keep in mind that in **absolutely no case whatsoever** is it legitimate to sink a liner at sea (art. 140/SRM). The ship must be directed to an appropriate area or port in order to complete its capture. To sink a liner may result in prompting new belligerents in the war on the other side and thereby increases your chances of losing the conflict. Germany twice lost control of the seas, and many will argue the wars, because of this fatal mistake.

(630) As for neutral merchant ships, they are subject to capture outside neutral waters if they commit acts mentioned at art. 67/SRM or if it is determined following a visit or a search (art. 146/SRM) that they:

- a. are transporting contraband; - contraband is defined in art. 148/SRM as "goods which are ultimately destined for territory under the control of the enemy which may be susceptible for use in armed conflict". This may be either directly or indirectly directed as such. However, while it does concern ingress, it does not include egress from a country. For example, a neutral ship bound for the coastal port of one belligerent with a cargo of 7.62mm short ammunition will be considered as carrying contraband. The same ship leaving a belligerent's port with the same cargo will not be considered as carrying contraband as it obviously is not destined for use by this belligerent. However, if it was so carrying this cargo from one belligerent's port to one of its allies, then it would be considered as carrying contraband.
- b. are transporting passengers who are members of the enemy's armed forces;
- c. are operating under the control, orders, charter, or directions of the enemy;

- d. present false and/or irregular documents, do not present any documents, destroy documents, hide documents, or smear documents;
- e. violate the belligerent's rules with regards to a MEZ;
- f. attempt to run a blockade.

(631) The capture of a neutral merchant ship is made by the physical taking of control of the ship and its adjudication as war prize (art. 146 *in fine*/SRM).

(632) As for enemy merchant ships, the cargo found on board cannot be captured if it is personal property. Only contraband can be captured (art. 147/SRM). What is contraband? This is not left to the interpretation of the ship's commander who does the interception. Contraband is property that a state considers as such and that is published in a list and signified to other states. This list must be reasonably precise. It must be published before contraband is seized. However, such a list is not necessary for the seizure of obvious contraband like 7.62mm ammunition: it has only one use! (art. 149/SRM).

(633) For example, is a neutral merchant ship carrying many boxes of .22 calibre ammunition running contraband? Normally, such ammunition is used only for two purposes: small game hunting and precision rifling. Here, the decision would be a question of circumstances, since no states use .22 calibre as war ammunition.

(634) Still, this ammunition could be used for military training, for guerrilla warfare, etc. The destination of the ship and its registers would give some indication of the intended use. A state poor in resources and without an internal hunting market would indicate an intention of military use, while a country with an imposing modern army and a large internal hunting market would certainly not even think of using .22 ammunition for military purposes.

(635) As with many other things, this type of decision is in the commander's realm of decisions. It would depend on the number of boxes, the political situation of the intended country, etc.

(636) A contraband list cannot contain everything. At a minimum, it must exclude (art. 150/SRM):

- a. religious objects;
- b. articles that can only be use for the treatment of the wounded and sick or the prevention of diseases (for example the Allied decision to blockade Germany in 1918 greatly favoured the development of the Spanish Flu that killed over 20 million persons between 1918 and 1920 -- twice the number of the victims of the war itself). It is to the advantage of all to prevent the emergence of contagious diseases;
- c. clothing, blankets, essential food, means of protection against the elements for the civilian population in general and for women and children in particular. (No real advantage can be obtained from this privation, only the perpetuation of hatred that will encourage the resurgence of the conflict in the future);
- d. goods destined for prisoners of war, including individual parcels and collective gifts containing food, clothing, or educational, cultural or recreational articles;

- e. goods exempted by international treaties or by special arrangements between the belligerents;
- f. any good not susceptible to being used in an armed conflict.

(637) A neutral merchant ship can be sunk as a last resort following the same conditions as for enemy merchant ships art. 139/San Remo. All efforts must be made to avoid this last resort action (art. 151 *in fine*/San Remo).

(638) The destruction of a neutral liner is **absolutely** prohibited (art. 152/SRM). Again, it is impossible not to repeat that your knowledge of these rules must be exhaustive. If you have doubts or questions, get answers to them. You must know the LOAC regulating the conduct of hostilities at sea.

### C. THE EVOLUTION OF AIR WARFARE

(639) The history of military air power is very recent, but there are fundamental aspects to its development that need to be looked at. As we all know, the desire of humans to fly is not new. The Ancient Greeks characterized it as an unnatural act through the legend of Icarus, the boy who flew on the wax wings made by his father but went too close to the sun and plummeted to his death. Leonardo da Vinci, the famous inventor and painter, designed many sketches of flying machines that strangely resemble the functional prototypes of helicopters of the 1930s and 1940s.

(640) During the eighteenth and nineteenth centuries, a corps of aerial observers was created following the principles of the hot air balloons of the Montgolfière brothers. Napoleon Bonaparte had the corps dismissed in 1809. If he had retained it, it might have told him of the advance of Blucher at Waterloo in 1814 and history might have been quite different. Fifty years later in the American Civil War (1860-1865), the Federal troops of the North used such observers extensively to direct artillery fire against the Confederates.

(641) Although gliders have been attempted since the Middle Ages, they only appeared in a functional form in the 19th century. It was on December 7, 1903, at Kitty Hawk, North Carolina, that man first achieved powered flight with a machine built by the Wright brothers, Orville and Wilbur. The potential military use of such aircraft was not long to take shape in military minds. Six years after their first flight, the Wright brothers opened the *Wright Aeroplane Company* in 1909 with the financial support of the U.S. Army.

(642) Already two years later, in 1911, planes were used as engines of war in the Italo-Turkish war<sup>165</sup>. Five years later, aeroplanes began their journey as military instruments. Aircraft were developed with remarkable speed during the war period of 1914-1918. In four years, all of the modern roles of the aircraft used today were exploited, albeit not to their fullest. Indeed, in 1914 the aircraft of the *Royal Flying Corps (RFC)* acted much as did the observers corps in the American Civil War. But by 1915 flying machines were equipped for the control of artillery fire, and then with synchronized machine-guns that would fire between the intervals of the propellers. More importantly, tactical bombing was adopted that year by the *RFC*, while the Germans were using Zeppelins and Gothas to strategically bomb cities like London.

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<sup>165</sup> Wikipedia, *Italo-Turkish War*, available at [http://en.wikipedia.org/wiki/Italo-Turkish\\_War](http://en.wikipedia.org/wiki/Italo-Turkish_War): The Italo-Turkish war saw numerous technological advances used in warfare; notably the aeroplane. On October 23, 1911, an Italian pilot flew over Turkish lines on a reconnaissance mission, and on November 1, the first ever aerial bomb was dropped on Turkish troops in Libya.



(643) The British recognized the value of such bombing in 1918 and created a separated strategic corps called the *Independent Air Force*. The creation of this corps aimed at the realization of Plan 1919, in which in conjunction with the new tank weapon on the ground they would use giant airships capable of transporting more than 7,500 tons of bombs. Since the war ended in 1918, the plan was never enacted, but the idea of strategic bombing was kept for future use.

(644) The technical progress of the Interwar period (1918-1939), in purely scientific terms, can only be qualified as mind-blowing. From biplanes, engineers went to the monoplane with numerous machine-guns and canons in the wing and nose, while engines were rendered ever higher performing, achieving speeds never dreamed of before. Great powers did not count their air forces in terms of a few dozen aircraft, but in many thousands. What is more, strategists and military thinkers were pleading for bigger and more powerful air forces, believing this was the only way to the future. The Italian Douhet, the American Mitchell or the British Trenchard were the prophets who attempted to define war in the third dimension: its use, its aims and its probable results.

(645) But it was in the course of the Second World War that the transformation and improvements of the war aircraft were most incredible. During this conflict, technical research led to results that truly surpassed anything before accomplished by humans. During these six years, when all resources of nations were put towards the war effort, technical progress created anti-tank rocket systems, long-range bombers, 20mm and 30mm canon mounted in the wings and noses of planes, and most importantly, jet planes like the ME-262.

(646) At the end of the war, the victors captured numerous scientific personnel and the plans for the jet plane. Before long, these victors took these ideas for themselves and built on them. Whether the Soviets' Yak-19 and Mig-21, the French Mirage, the American Sabre, or the British Jaguar, all can be directly traced back to German know-how.

(647) Also, the strategic experiments of the war led the Americans to develop in 1952 a long-range bomber so efficient that it is still in service today and will be for at least another 10 years: the B-52. Following their war experience and their post-war political situation, Americans truly believed that the nuclear weapon had to be provided with a vector that could carry the bomb deep inside Russian territory. General Curtis Lemay was certainly one of the most adamant on this point.

(648) But strategic bombing was not the only sector developed. Tactical aircraft capable of achieving and maintaining tactical superiority were also developed. Since the Cold War forced powers to innovate in all domains for the arms race, many successful aircraft were created such as the F-4 Phantom, the E-7 Corsair, the E-6 Intruder for the Americans, and the Mig-23 and -25 for the Russians; these have provided the basis of technology in order to create today's planes like stealth fighters (that have a low reflection of radar waves due to its use of sharp angles and composites materials), the F-117, and high performance planes such as the Mig-31. The next generation, with the F-22, the Eurofighter, etc., promises even more firepower and more interception methods.

(649) Regardless of the advances in aviation technology, the employment of aircraft on the battlefield is very similar today to what it was in the Great War: tactical support, acquisition, and maintenance of air superiority, observation, strategic bombardments, etc. Therefore, regardless of the type of aircraft, whether a helicopter, bomber, fighter, or any other craft, what is important is its use in accordance to the LOAC. The LOAC have developed along with the aeroplanes and we will now look at its application.

**D. THE RULES OF THE LAWS OF ARMED CONFLICTS RELATIVE TO AIR WARFARE**

(650) The rules learned in Chapters 2 to 6 relative to persons, property, and means and methods of war continue to apply to air warfare. We will see here certain specific rules that apply to the particular battlefield that is created by air power. If there exist many instruments applicable to air warfare, only one document deals with it exclusively: the *1923 Hague Rules of Air Warfare*. This document is not a treaty; like the *San Remo Manual*, it is an authoritative statement of applicable law as opined by a special Commission of Jurists composed of very knowledgeable practitioners of law.

(651) This document defines its own jurisdiction by stating that it applies to **all** aircraft (art. 1/1923 *Hague*) and then presents many articles general in scope. It truly focuses on the question of air power in its Chapter IV, when it deals with the use of tracer projectiles, incendiary and explosives, permitting their use by all, including signatories of the 1868 *St. Petersburg Declaration* (art. 18/1923 *Hague*).

(652) If an aircraft is hit and its passengers and crew must exit with parachutes, they cannot be attacked during their descent (art. 20/1923 *Hague Rules*). However, this does not apply to parachutists from airborne-type units that jump out of functioning airplanes. Since they are in combat from the moment they jump, these can be shot during descent.

(653) These rules are reiterated in AP 1. A fundamental rule is that crews must respect art. 48(1)/AP 1 concerning the obligation to distinguish between a legitimate military objective and a civilian object when conducting an attack, following the interpretation of art. 52(2)/AP 1. The example of a bombardment as per art. 51(5)/AP 1 would apply in this case.

(654) These rules clearly prohibit indiscriminate attacks. This springs from art. 21/1923 *Hague* that prohibits the use of air power against objectives others than:

- a. military forces;
- b. military works;
- c. military installations and depots;
- d. Weapons industries;
- e. communication lines; and
- f. military means of transportation.

(655) A *contrario*, it means that you cannot attack:

- a. civilians;
- b. civilian property;
- c. medical establishments;
- d. medical and religious personnel;

- e. medical vehicles (including airplanes) and materials;
- f. hospital ships;
- g. the wounded, sick and shipwrecked;
- h. prisoners of war.

(656) Furthermore, because a target is of a military nature does not automatically mean that it can be attacked. Keep in mind the rules on targeting: to be a legitimate military objective, the target must be efficiently contributing to the enemy's war effort and must offer a direct and concrete military advantage at the time of the attack.

(657) Also, do not forget the three types of precautions you must take for an attack: during planning, before the attack, and during the attack (art. 57/AP 1). It is the duty of planners as much as that of pilots and crews to determine the legitimacy of a target.

(658) In the case of **enemy civil aircraft**, we have briefly addressed this subject in teaching point B of this Chapter, stating that these were subject to capture (art. 141/San Remo), following the general rules of sects. 142-145/San Remo. Indeed, outside of neutral airspace, these aircraft can be captured as well as the goods they carry (with the exception of civilian property) without need for search or visit.

(659) However, there exist two categories of aircraft exempt from all capture:

- a. medical aircraft; and
- b. aircraft that have been guaranteed safe passage by safe conduct, following an agreement between belligerents.

(660) These last rules are in accordance with the military manuals of Canada and the United States. However, such an aircraft can nonetheless be ordered to land and to submit to a visit or a search if suspicions arise. If it is determined that grave irregularities are being committed, the aircraft and its personnel can be captured. This is because such an aircraft can only retain its protected status if (art. 142/San Remo):

- a. it is employed in its normal role;
- b. the aircraft and its personnel do not commit hostile acts;
- c. aircraft personnel submit immediately to interception and identification as required;
- d. the aircraft and its personnel refrain from intentionally hampering movements of combatants and obey to orders to divert their course when necessary; **and**
- e. they do not violate a previous agreement.

(661) Capture consists of the interception, landing, physical taking of the aircraft, and its adjudication as a war prize (art. 144/San Remo). If such a capture is made, the security of the crew, passengers, and aircraft documents must be assured (art. 145/San Remo). If capture is not practical, the aircraft can be diverted to another destination.

(662) The case of **neutral civil aircraft** differs somewhat. Such aircraft can be captured if they commit hostile acts under arts. 70 and 153/San Remo:

- a. if they carry contraband;
- b. if they transport passengers who are members of the enemy's armed forces;
- c. if they operate under the control, orders, charter, or direction of the enemy;
- d. if aircraft personnel present false documents and/or irregular documents, do not present any documents, destroy documents, hide documents, or efface documents;
- e. if they violate the belligerent's rules of a MEZ;
- f. if they try to run a blockade (since it also includes air blockade).

(663) Only contraband goods can be captured (art. 154/San Remo). The rules of arts. 148-150 concerning the capture of neutral merchant ships apply to neutral civilian aircraft. The capture procedure and its obligations are identical to those of the enemy's civilian aircraft we have just seen (art. 156 and 158/San Remo).

(664) As an alternative to capture, the aircraft may be diverted to another destination (art. 157/San Remo).

## **CONCLUSION**

(665) We have seen the pertinent rules applicable to the conduct of air and sea operations. As has been repeatedly mentioned, these are numerous and complex, depending on the circumstances, the type of zones, and the national and international territories. You must comprehend them and be able to apply them. The LOAC are a whole. The rules pertaining to the treatment of civilians and PWs previously studied continue to apply, as do the rules of targeting. Once more, do not hesitate to ask for clarification if questions or doubts remain in your mind about their interpretation.

(666) The LOAC aim at reducing the suffering of the victims of armed conflicts. As managers of violence in a command role, and as individuals subject to the LOAC, you are held responsible for applying these rules with the greatest measure of humanity possible. Nobody denies that the combat environment results in wounds, loss of lives and the unleashing of bestial emotions often far beyond anything one could imagine. We are humans and it is a fact that we are social animals led in part by reason and in another part by emotion.

(667) Nonetheless, do not forget that all armed conflicts start and end one day or another: conflicts are not eternal. There is a portion of humanity that must never be lost in combat because otherwise it will

tarnish both your conscience and the reputation of your country. By remaining human, you will favour a return to a viable and lasting peace, avoiding the secular hatred that fosters conflict in the future.

(668) These rules are not only humanitarian in aim: they are also strategic weapons. The fact that the enemy knows he will be well treated if captured encourages him to surrender more easily than if he believes he will be executed as soon as captured. The 1991 Second Gulf War offered ample proof of this. Iraqis surrendered by the tens of thousands knowing they would receive decent, humane treatment.

#### SUMMARY OF TERMS

**Adjacent zones:** zones that can extend up to 24 miles from the water baseline. The state that claims such a zone has functional authority over it.

**Archipelagic waters:** waters surrounding or close by a group of islands that constitute an archipelago.

**Blockade:** the surrounding or blocking of an area such as a port to prevent entry or exit of supplies.

**Continental shelf:** sea floor up to a depth of 200 meters off the coast of a state. The state has functional authority over it and a right to exploit all natural resources contained in it.

**Contraband:** goods destined to a territory under the control of the enemy and susceptible of use in an armed conflict.

**Innocent passage:** right of freedom of navigation. No state can refuse access to its seas unless its national economic or security interests are threatened. Does not give the right of over-flight.

**Interior waters:** water located within the water baseline at low tide and on which a state exercises all its sovereignty.

**Maritime Exclusion Zone (MEZ):** area within, over and under which a state can prohibit or restrict maritime and aerial access.

**Neutral waters:** waters of international straits or archipelagic waters.

**Sea bed:** floor of the ocean starting from a depth of 200 meters.

**Territorial seas:** maritime space that borders the coast of a state, extending for a distance of 12 miles toward the high seas.

**Transit passage right:** freedom of navigation giving the right to fly over.



**CHAPTER 9**  
**SPECIAL CASES: CHILDREN SOLDIERS, MERCENARIES,**  
**SPIES, AND THE DEBATE OF THE COMBATANT STATUS**

**INTRODUCTION**

The concept of combatant is fundamental to the LOAC since it determines who can be the object of an attack and who must be protected. However, there are some types of persons who take part in hostilities without having combatant status, due to the nature of their activities. These special cases are the focus of this Chapter.

**CONTENT**

- a. differentiation of espionage and sabotage from legitimate reconnaissance operations;
- b. the application of PW status in case of treason;
- c. the mercenary and his right to the status of PW;
- d. the dispositions relative to child soldiers;
- e. the application of PW status in cases of desertion and the options of the detaining power;
- f. PW status in cases of desertion and the options the detaining power;
- g. Interpreting the combatant status in relation to cases of levée-en-masse and resistance

**A. DIFFERENTIATION OF ESPIONAGE AND SABOTAGE FROM LEGITIMATE RECONNAISSANCE OPERATIONS**

(669) As we have seen, **espionage** is allowed by the LOAC, albeit in a limited manner through art. 24 of the *1907 Hague Rules*, art. 5/GG IV, and by art. 46/AP 1. **Espionage is the clandestine search for military and political secrets or information.**

(670) Art. 5/GC IV defines *in lato sensu* the rights and obligations relative to spies and saboteurs. These revisions of the prior applicable rules is largely due to the famous order of German Chancellor Adolf Hitler of October 18, 1942, called the “*Commando Order*,” in which he ordered that quarter be denied to any combatant, regular or irregular, captured while doing sabotage operations behind the German lines. As a result, many British Commandos were deprived of their PW status and executed without trial.

(671) Art. 5/GC IV now prohibits such practices since it defines espionage as an act committed by a protected person (civilian). It now forces states to grant spies and saboteurs decent, humane treatment and a fair trial, in which the basic rules of *audi alteram partem* (the right to a full defence) and *nemo iudex in sua causa* (the right to an impartial judge) guarantee the basic judicial rights of the accused.

(672) Art. 46/AP 1 specifies the application of art. 5/GC IV, which was still relatively vague overall. For this reason, art. 46/AP 1 differentiates between four situations: spying as such in art. 46(1)/AP 1, and the special cases in arts. 46(2), (3) and (4)/AP 1.

(673) In the first case, a spy not wearing a uniform is not considered a combatant and does not acquire the status of PW upon capture. He becomes subject to national legislation -- unless he is captured after having rejoined his own forces (art. 46(4)/AP 1). In the other cases, a person wearing the uniform of his country's armed forces while gathering information, unless he does it under false pretences or in a

clandestine manner, is not considered a spy and has a right to the status of PW upon capture (arts. 46(2) and (3)/AP 1).

(674) Also, do not forget that art. 46/AP 1 has limited territorial reach. Indeed, it can only be applied in the case of personnel disguised as civilians in conquered territory *in which they reside*. For example, a Croat officer of Krajina whose residence was under Serb control in 1994 could not be accused of espionage for the sole reason that he inadvertently observed a changeover of units in Serbian positions while dressed as a civilian.

(675) To be accused of espionage, he must have acted through false pretence or deliberately in a clandestine manner, with the aim of gathering information. To successfully lay espionage charges against him, the Serbs would have had to prove a strong presumption of *mens rea*: that is, of committing the acts he is accused of *with intent*.

(676) These articles reject outright the idea that spies and saboteurs can be shot as soon as discovered. Force can only be used on spies and saboteurs if they resist capture and no other means are available to capture them, or if they attempt violence. As with any protected persons and PWs, captured spies and saboteurs are to be tried fairly. Espionage falls under the rules of treason at art. 46(2)(b) of the *Canadian Criminal Code* and is thereby punishable with life in prison during a state of war or fourteen years in prison during peace time while sabotage falls under the rules of art. 52 of the *Canadian Criminal Code*. Sabotage is punishable with a maximum sentence of ten years in prison. The Canadian understanding of sabotage is the act or omission to act in order to:

- a. diminish the efficiency or the functioning of a ship, vehicle, aircraft, machine, device or any other thing ; or
- b. lose, damage or destroy goods and property whoever may be their owner.

(677) Special rules of the LOAC apply to spies relative to the conduct of hostilities in the air. These are arts. 27 to 29 of the 1923 *Hague Rules of Air Warfare*.

(678) Under art. 27/1923 Hague Rules, a person on board an aircraft cannot be accused of espionage unless he or she acts in a clandestine manner or under false pretences with the aim of gathering information to communicate it to the enemy.

(679) Art. 28/1923 *Hague Rules* states that acts of espionage committed by crew members or passengers of an aircraft once on the ground are subject to the national legislation of a state regulating the LOAC in land operations.

(680) To harmonize these rules, we now apply the concepts of arts. 5/GC IV and 46/AP 1, not the previous ambiguous sects. 30 and 31 of the 1907 *Hague Rules*.

## **B. APPLYING THE PW STATUS IN CASE OF TREASON**

(681) The subject of spies leads to another category of persons, often widely despised: traitors. As for spies, some persons of particular ethnicity, religion, or political ideas, or through greed, will sometimes join the national ranks of the enemy's forces even though not of that nationality. This was notably the case



of many Alsatians who joined, some by choice, others by force, the ranks and files of the German Army between 1940 and 1944, as well as that of many Ukrainians who did the same to fight communism on the Russian Front.

(682) When these persons are captured, one can easily understand that the feelings of their ex-compatriots may be less than benevolent, to say the least. The temptation to execute some on the spot is certainly quite present, especially after rough battles where one might have been wounded or lost friends.

(683) What are the traitors' rights? First, it appears that the power detaining a presumed traitor must *a priori* (first) establish whether the enlistment was voluntary. Part of the doctrine seems indeed to differentiate between the two situations: granting combatant status to one who was forced to join and refusing it to the one who did so voluntarily. Some jurists, however, argue that both cases should be granted the status of combatant and, as a result, of PW.

(684) The latter argument is based on arts. 4/GC III and 43-44/AP 1 that state clearly that any member of the armed forces of a belligerent is a combatant, including militias and volunteer corps. Further, they argue that art. 45(1)/AP 1 always gives the benefit of the doubt to a person when they claim the status of combatant. Following this section, they must continue to profit from this status until a competent tribunal confirms or denies their status.

(685) The importance of this status must be reiterated. All persons granted the status of combatant are considered PWs upon capture. This in turn permits them to benefit from GC III. Since the situation can sometimes be very difficult to establish concerning traitors, it is highly advisable to treat them as combatants until the end of hostilities and then try them. The challenge in this case is that a traitor may be tried after cessation of hostility under the national legislation of his former state, which will probably not regard his choice as laudable. Most if not all states prohibit treachery and more than one carries the death penalty upon conviction.

(686) One of the most famous case of treachery is that of Marshall Henri Philippe Pétain. Marshall Pétain was a career officer of the French Infantry, commissioned in 1878. Becoming an instructor at the École de Guerre in 1906, he was promoted to Colonel in 1912 and two years later became General. Victor of the Battle of Verdun in 1917, he was named commander-in-chief of the French armies after the mutinies of the *Chemin des Dames* (1917).

(687) He crushed the mutinies by a series of executions that followed botched trials (or even without trials). The Verdun success made him a national hero and his regaining control of the *Chemin des Dames* situation (although the methods were not divulged) furthered his reputation. After the troubles and the invasion of May 1940, the French government in panic named him Prime Minister on June 16, 1940, calling him out of retirement. Six days later, June 22, 1940, Marshall Pétain signed an armistice with Germany.

(688) On July 10, 1940, he succeeded in having the Assemblée Nationale adopt a decree giving him authoritarian rule over Free France (the southern portion of France that Germany promised not to occupy). In fact, he became a puppet for the Germans in November 1942, when Germany reneged on its promise and occupied Free France. He therefore “governed” until his “invitation” to Germany in 1944.

(689) In July 1945, he was condemned by the French government as a traitor. France, not being known as a country that takes half measures, deprived him of his rank, his titles and condemned him to death.

However, due to his services rendered during the Great War and after, his sentence was commuted to prison for life. He was therefore interned on the Island Yeu where, as an old man of 95 years, he died and was buried. Since that time, all French governments have resisted efforts to grant him posthumous pardon, to clear his family's name and allow him to be put to rest in Verdun in accordance with his last wishes.

(690) If the GC 1949 and AP 1977 had been in existence at the time, none of the above actions would have changed. The Marshall would have been judged by a tribunal under French law.

(691) In the same manner for combatants today, national legislations are the ones used against traitors and are applicable to all nationals *ante bellum* (before the war), even if they change nationality during the war.

(692) In Canada, art. 46(1) of the *Criminal Code* defines treason. Under it, treason is the act of planning, encouraging to commit, or committing seditious acts against the Canadian government, such as insurrection, mutiny, etc. It is punishable by a maximum of a life in prison during a state of war and by a sentence of fourteen years during peace time. It must be noted that the alleged infractions must be tried in the three years following their being committed as past this time no charges can be brought against the perpetrator. Furthermore, complicity in treason by omitting to report a treacherous act is punishable with fourteen years in prison.

### C. THE MERCENARY AND HIS RIGHT TO THE STATUS OF PW

(693) The phenomenon of soldiers of fortune is certainly not a novelty in armed conflicts. The Roman Empire from its very beginnings made extensive use of them, recruiting local tribes to protect its borders, its colonists, and its alliances.

(694) In the Middle Ages, the use of mercenaries was so common that often in "fighting," many did not come to blows and so suffered no casualties. Machiavelli reports that in 1423 at the "Battle" of Zagonara, the only victims who lost their lives were Ludovici degli Obizi and two of his men when they fell from their horses and were trampled on!

(695) But what is a mercenary? Art. 47(2)/AP 1 defines it as an individual who:

- a. is specially recruited locally or abroad in order to fight in an armed conflict;
- b. does, in fact, take a direct part in the hostilities;
- c. is motivated by private gain;
- d. is neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflict;
- e. is not a member of the armed forces of a party to the conflict; and
- f. has not been sent by a state which is not party to the conflict on official duty as a member of its armed forces (i.e., the famous Soviet "technical advisors" in Vietnam, or the American ones in Afghanistan, etc.).

(696) The wording of this section, particularly of sub-paragraphs 2 (a), (b) and (d), was in large part influenced by the events of the 1964-65 Kinshasa (Belgian Congo) rebellion, when major troubles followed the hasty withdrawal of Belgian troops from the country. The rebels captured many French and Belgian mine workers, passed them before (very summary) tribunals under the accusation of mercenaries, and executed them.

(697) For the rebels, the simple presence of a foreigner working for his own profit was a proof *prima facie* (to its face) that an individual was a mercenary. AP 1 attempts to correct this situation by interpreting *stricto sensu* what is a mercenary in order to prevent the massacre of civilians.

(698) Mercenaries do not have the right to the status of PW (art. 47(1)/AP 1). This is because they do not have the status of combatants. When they take up arms, they are illegal combatants and can be tried under national legislation for their actions. However, mercenaries are entitled to the protection of art. 3/GC 1949 and of arts. 75(2) to (7)/AP 1 from attempts on their lives and their well-being as well as from humiliating or degrading treatment.

(699) Nonetheless, the definition given by art. 47/AP 1 with the intention of protecting civilians has a perverse effect as well. It is easy to see that it can be circumvented simply by enrolling volunteers within the structure of the belligerent's armed forces. Not only do states have to prove that an individual has been recruited in a manner inconsistent with art. 47/AP 1, but they must prove his intention to profit from the hostilities. To do such a thing, it would be necessary to show that his salary was inconsistent with that of those of the same rank in the armed forces. A mercenary, however, would be intelligent enough to ensure his undeclared salary was parallel to that being given by the army, in case of capture. By enrolling mercenaries directly within the armed forces, it is possible to actually erase most traces that would prove the case against them. Nonetheless, the dispositions of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*<sup>166</sup> and *Convention of the OAU for the Elimination of Mercenarism in Africa*<sup>167</sup> can be of use in African conflicts.

(700) But elsewhere, it remains easy to hide traces of *mercenarism*. This is the case of Bosnia-Herzegovina with its creation in 1992 of the *1st International Brigade*, of which a majority of volunteers were "liberally paid" Iranian Muslims<sup>168</sup>. To this day, none have been tried.

(701) Even the recent cases of American "vigilantes" condemned to 10-years' jail sentences does not meet this test as they were condemned not for mercenarism but for use of torture and other illegal acts under the Afghan criminal code. Two former Green Berets, Jonhathan K. "Jack" Idema and Brent Bennet received a 10-year jail sentences while Edward Carabello, a journalist accused of collaborating with them, was handed an 8-year sentence and four Afghan nationals were given lesser sentences<sup>169</sup>.

<sup>166</sup> *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>167</sup> *Convention of the OAU for the Elimination of Mercenarism in Africa*, O.A.U. Doc. CM/433/Rev.L, Annex 1(1972), Libreville, entered into force on 3 July 1977.

<sup>168</sup> National Institute for War Documentation of the Netherlands, *Appendix II - Intelligence and the war in Bosnia 1992 – 1995: The role of the intelligence and security services Chapter 4 Secret arms supplies and other covert*, available at [actionshttp://213.222.3.5/srebrenica/toc/p6\\_c04\\_s005\\_b01.html](http://213.222.3.5/srebrenica/toc/p6_c04_s005_b01.html): "Approximately 4000 Mujahedin, supported by Iranian special operations forces, have been continually intensifying their activities in central Bosnia for more than two years', according to the American Lieutenant Colonel John Sray, who was an intelligence officer in Sarajevo from April to August 1994", citing John Sray, 'Selling the Bosnian Myth', *Foreign Military Studies*, Fort Leavenworth, Kansas, October 1995 and MoD, *CRST*. Netherlands Army Crisis Staff, Bastiaans to Brantz, 11/07/94 as source.

<sup>169</sup> "Americans Guilty of Afghan Torture", 15 September 2004, <http://www.cnn.com/2004/world/asiapcf/09/15/afghan.prison/index.html>.

(702) The latest examples of mercenaries are to be found in a Zimbabwean court which sentenced a British national and former SAS, Simon Mann, to seven years in jail for attempting to illegally purchase weapons in order to overthrow the government of Equatorial Guinea. Another 65 persons captured in a plane that landed in Harare in March 2004 to pick up the weapons were sentenced to 12 months terms, after being detained for 6 months already. Nonetheless, once more it is not charges of mercenarism that were used to condemn these men, but charges of ‘immigration offences’<sup>170</sup>. Altogether, the crime of mercenarism remains so illusive that nobody has yet to be charged and convicted under its recent descriptions.

**D. THE DISPOSITIONS RELATIVE TO CHILDREN SOLDIERS**

(703) The participation of children in armed conflict dates back to the dawn of humankind. As soon as children could contribute to hunting activities without impeding movements, they accompanied adults and accomplished what tasks they could. This education by participation and observation permitted the transfer of knowledge necessary for survival from one generation to the next.

(704) For the western Aboriginals in the Americas, the ability to ride a horse and to use a bow while riding was taught as soon as possible. These were also the abilities passed on to young Mongols of the nomad tribes of the Asian steppes.

(705) For Europeans, the apprenticeship of young noble knights-to-be to established knights to learn the profession of arms was a common method used to develop an effective new generation of soldiers throughout the Middle Ages. But, with the advent of regular armies in the fifteenth and sixteenth centuries, the roles of the young in the military changed from service and support functions such as the transport of food and supplies, to that of command transmission in the drum corps. During the Napoleonic era, children of 12 years of age were often used as drummers to transmit orders and signals to the commanding officers of regiments, in a manner not too dissimilar to our use of radio today. These children were often caught in the middle of the frenzy of the battlefield and were prime targets of the enemy since they represented the means of command and control of those times.

(706) French and British enrolled 15 and 16 year old volunteers, or forced them into their infantry or navies. This learning “on the job” produced, in the survivors, battle-worthy combatants from the age of 19 or 20. The system of Napoleon’s Imperial Guard firmly rested on this assumption, with its structure of the Young Guard, the Middle Guard, and the Old Guard. The latter was the elite of all elites, cumulating a sum of combat experience, physical strength and will far surpassing that of any other French units.

(707) During the Great War, a conscious effort was made by states at the outset not to enrol children or married persons. However, as millions passed through the grinder, the pool of human resources soon became depleted and selection criteria quickly lowered. German recruiting consciously targeted children of 16 and 17 years old. And, as in other states, many 15 year olds lied about their age and died in the mud.

(708) During the Second World War, the Hitler Youth were a prime example of a ready pool of human resources for the indoctrination and recruiting of children. Children being impressionable and having a malleable spirit, the level of fanaticism they reached had rarely been seen before. Children of 12 to 16 years old were incorporated in the regular German forces after the Allied landing in Normandy and the

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<sup>170</sup> “7 Years for ‘Mercenaries Leader’”, 10 September 2004, <http://www.cnn.com/2004/world/africa/09/10/zimbabwe.mercenaries/index.html>.

Russian summer offensive of 1944. Certainly their most famous engagement was their last stand beside the SS and the *Volksgrenadiers*, elderly and children armed with old rifles and *panzerfausts* (one-shot antitank weapons), offering a last fight to the Russian forces of Marshall Zhukov.

(709) That being said, it would be quite wrong to believe that this type of indoctrination was used only by Nazi Germany or Fascist Italy. The Russian *Komsomols* (*the Young Communist Party League*) had the same purpose. In the British Commonwealth, movements such as the Royal Cadets and the Naval League essentially aimed at the same things: developing loyalty to the state and providing a basis of military training, although at a much lower level of indoctrination. Even the Scouting movement was initially a movement created to provide such training. Indeed, the General commanding the British forces during the Boer War (1900-1902) found that his soldiers did not have the same level of training required to direct oneself by the stars or to operate under harsh conditions in the campaign, contrary to his Boer adversaries who grew on the plains of South Africa. Today, the training of Scouts and Cadets puts much more emphasis on public-spiritedness, but a large part of their organization is still based on military training as well as techniques useful to the military. As proof, one only has to observe the number of members of our armed forces who once were part of these movements. Many can trace their attraction to a military career back to their scouting or cadet days. *This is absolutely not a criticism of these movements: it is only an observation.*

(710) Myths relative to the military use of children throughout the twentieth century certainly abound. Their alleged use by the Viet-Minh and Viet-Cong guerrilla is difficult to verify since it is very difficult to differentiate between children killed as members of the guerrilla or as collateral damages under the “shoot first” policy of U.S. troops in Vietnam. The use of young fanatics by Iran to breach minefields by having them believe that the “Gardens of Allah” were on the other side is another example that is hard to prove. The recent “children armies” from Mozambique and Angola to Sierra Leone further signal these uses.

(711) Confirmed or not, behind every legend there is a factual element of truth. If all the stories and gossip have not been verified and proven, their sheer number might indicate that there is more truth to them than we would like to believe.

(712) In any case, the use of children as combatants in national liberation wars such as in Angola or Mozambique are proven. Often enrolled by force, they are trained in small arms, more often than not the AK-47, and in the removal of mines.

(713) The problem of employing children as soldiers is two-fold. First, their control under fire is extremely difficult. Children do as they are told. If they are told to kill, through conditioning they will kill. The idea of humanitarian principle is nearly impossible for a child to conceive. The ability to discern good from bad cannot apply if the child is told that what he is doing is good. In the terminology of child psychology, the approximate age when a child reaches a stage of **formal cognitive operative development**<sup>171</sup> is anywhere from 7 to 11 years. This means that he acquires the ability necessary to tell good from bad, but only if he possesses the reference points to help him establish the limits of good and those of bad. If he has not been taught these, the child has no reasons to believe that what he is doing is bad. Of course, nobody needs post-secondary education to know this: any adult who has observed children understands it, without the big words. The “commander” using children knows this and uses the knowledge extensively.

<sup>171</sup> See V. Papageorgiou, A. Frangou-Garunovic, R. Iordanidou, W. Yule, P. Smith and P. Vostanis, “War trauma and psychopathology in Bosnian refugee children”, (2000) 9 (2) *European Child & Adolescent Psychiatry* at 84-90.

(714) The second problem is the knowledge acquired by the children while acting as soldiers. They do not acquire “professional competence” during their **formative years**, that is, when it is easier for them to acquire new knowledge. What they learn is to become butchers, to murder, and to pillage. As a result, once the conflict ends, the young adult does not know anything else but how to fight to survive.

(715) All that he has learned is how to stay alive by any means available. After the cessation of hostilities, he keeps only his training as a combatant and his hatred of the enemy. This creates a situation in which the young adult cannot find employment, becomes angry at the political regime for which he fought, and feels betrayed. This explains the cycle of violence that keeps eating some African countries from the inside. From one generation to the other, an ever-greater proportion of the youth grows up with feelings of hatred, creating conditions that lead to the re-creation of the cycle<sup>172</sup>.

(716) **The aim of the LOAC is to reduce the suffering of the victims and to establish conditions favourable to a viable and lasting peace.** The case of child soldiers is most probably the area where this holds truest. This is why it is vital that children receive additional protection within the LOAC system.

(717) The International Committee of the Red Cross, the ICRC, is the organism that best understands this fact and attempts to stop the cycle of violence. After the Nazi debacle, the ICRC quickly recognized the need to protect child victims of armed conflicts. The fourth GC 1949 therefore includes many sections to address this situation. These are the ones we saw in teaching point A of Chapter 3.

(718) Art. 77/AP 1 regulates children’s participation to hostilities in IAC as combatants. Children soldiers considered as combatants receive through this section extensive protection against all forms of indecent assault (art. 77(1)/AP 1). As we have seen with the kidnapping of young girls by the *Groupe Islamique Armé* (GIA) since 1995 in Algeria for the “comfort” of its combatants, this protection is necessary and much violated. These young girls of 14 to 17 years old served as sexual slaves for short periods and were killed after their abuse by having their throats cut.

(719) It is the duty of states to ensure that their respective armed forces do not employ children of less than 15 years old. Furthermore, between candidates of 15 to 18 years old, the state must begin its recruiting with the eldest (art. 77(2)/AP 1). In Canada, enrolment is permitted from the age of 16 as long as the recruit is 17 by July 1st of the enrolment year in the Regular Force, while the age of 16 is sufficient for the Primary Reserve since March 2000. A minor (defined as under 18 in Canadian law, except if emancipated) cannot take part in hostilities or deployment in operational theatres of operations, nor in domestic situations where the potential of injury or death as a result of confrontation could occur (Canadian Forces General Message 115/00 dated 021845Z October 2000 – *CF Members under 18 years of Age in Domestic Operations*). Operational commanders are responsible for assessing that risk and therefore must not subject their personnel under 18 years old to such situations.

(720) If children are enrolled despite this rule and take part in hostilities, they must continue to benefit from the protection of art. 77(1)/AP 1, whether they have been granted the status of PW or not (art. 77(3)/AP 1). Notably, some special conditions apply to their detention, such as their living in quarters separate from the adults’, unless they can be reunited with their families (art. 77(4)/AP 1).

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<sup>172</sup> See. Nathaniel Lao. “Israeli Preschool Children Under Scuds: A 30-Month Follow-up, (1997) 36(3) *Journal of the American Academy of Child & Adolescent Psychiatry* at 349-356 as well as B.Paardekoooper and J. M. A. Hermanns, “The Psychological Impact of War and the Refugee Situation on South Sudanese Children in Refugee Camps in Northern Uganda An Exploratory Study”, *The Journal of Child Psychology and Psychiatry and Allied Disciplines*, (1999) 40 at 529-536.

(721) Also, children cannot be condemned to the death penalty for committing a war crime if they were not 18 years old at the time of the crime (art. 68 *in fine*/GC IV and art. 77(5)/AP 1). In the case of disciplinary punishment for an offence committed in a detention camp, the authorities must take into account the age, sex, and health condition of the children (art. 119/GC IV).

(722) There are many other rules applicable to child soldiers. Art. 38 of the 1989 *UN Convention relative to the rights of children*<sup>173</sup> reiterates the obligation not to recruit children under the age of 15 and obliges states to take all feasible measures to respect and ensure the respect by others of the rules of international humanitarian law applicable to children. The *African Charter of the Rights and Well-Being of Children*<sup>174</sup> states the same obligations at its arts. 2 and 22. art. 2 defines a child as “any human being under the age of 18,” while art. 22 states again the obligation not to enrol children under the age of 15.

(723) If there are any doubts as to the age of a detainee and what protections of GC IV apply to him, art. 45(3)/AP 1 specifies that as a minimum the fundamental rights of art. 75/AP 1 must be granted. It is highly advisable to presume that the detainee is a child until proven otherwise; some persons look much older than their real age. War can make a person grow old fast, but a child is still a child and this can be recognized after a medical exam or the observation of his attitude.

(724) Further to these rules, the 1998 *Rome Statute of the International Criminal Court* includes at its art. 8 the rule that the enrolment or use of children under the age of 15 in hostilities is a war crime.

(725) In the case of NIAC, art. 4(3)/AP 2 applies. This section prohibits the recruiting of children under the age of 15 but does not address the question of children between 15 and 18 years old. It is therefore not illegal to recruit children under the age of 18 in a NIAC, as long as they are 15 years or more of age. Art. 6(4)/AP 2 prohibits the sentencing to the death penalty of a child under the age of 18.

(726) Children must be repatriated as soon as possible when guarantees are given that they will not be used as combatants under art. 117/GC III. However, in the case of wounded or sick children, this repatriation can only be done with their consent (art. 109 *in fine*/GC III), since prisoners of war incapacitated by these situations cannot be repatriated against their will.

(727) If children are interned without having taken part in hostilities, they become protected persons as civilian internees and have the right, in accordance with art. 82/GC IV, to be interned with their families when it is possible or, if this is impossible, in quarters separated from those of the adults (art. 85/GC IV). Their treatment is regulated by art. 76/GC IV.

(728) Also, children have a right to a daily ration of food equivalent to their physiological needs (art. 89/GC IV) and the furtherance of their education (art. 94/GC IV). States, and individuals representing them, such as members of their armed forces, have a responsibility to provide these resources.

(729) In the case of occupied territories, states must permit the continuation of education for children outside of internment camps and cannot force children to work (arts. 50 and 51 respectively/GC IV).

(730) The treatment of children in times of armed conflicts is a determining factor in predicting the

<sup>173</sup> *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

<sup>174</sup> *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.

resurgence on the conflict at a later date. All available means should be taken to prevent this and to treat both civilians and combatants, and especially children, with dignity and humanity. This is the best way to establish conditions favourable to a viable and lasting peace.

(731) The logic is simple: imagine your sons and daughters being captured, raped, tortured and/or killed. Would you be inclined to forgive those who did this? Imagine that your children are subjected to indecent and inhumane treatment but survive. Would they be inclined to forgive? Chances are that they would wait for the occasion and take their revenge when it presented itself. The cycle of violence that reigns supreme around the African Great Lakes is of this kind, and the region is destined to live with this violence for the coming decades unless a humanitarian action breaks the cycle.

**E. PW STATUS IN CASES OF DESERTION AND THE OPTIONS THE DETAINING POWER**

(732) Desertion has historically been the plague of armies. Frederick the Great had such problems with it that he published severe instructions to his officers to limit the occasions available to their soldiers. For example, he forced his officers to establish their encampments far from cities, to post guards around the camps, and to limit rations so that soldiers lacked the energy to run away.

(733) During the War of Conquest (1754-1760), the portion of the Seven Years War in the Americas (1754-1763) that opposed France to Great Britain, desertion among French-Canadians reached such high proportions in 1760 that Knight François-Gaston, Duke of Lévis and Commander of all French Forces in the Americas, qualified it as an “epidemic” in his war journal<sup>175</sup>.

(734) A **deserter** is a member of the armed forces who abandon his or her post. Deserters may decide to join the other side’s forces because they see that their own side is about to be obliterated, or they may simply refuse to continue to fight and attempt to hide until the cessation of hostilities. In most of the world’s armies, desertion has been, and still is, a crime punished by death.

(735) Canada executed 25 of its volunteers during the Great War. Many of them had already been condemned but had been offered commuted sentences, and had deserted yet again. Some were soldiers shell-shocked by the intensity of the battle and were not in a state of mind that allowed them to know what they were doing. Other had the misfortune to fall under the British jurisdiction, which was nowhere as forgiving as the Canadian system and were executed despite repeated Canadian protests. For more on this subject, read Captain Andrew Godefroy’s *For Freedom and Honour?*<sup>176</sup> which explains the circumstances and reasons for the execution of each of the 25 members. These were the last condemned men to be executed by Canada for this crime. During the Second World War, although the law permitted it, no Canadian was executed.

(736) This crime falls under national jurisdiction and its punishment is subject only to national legislation. But what about a deserter who falls under the enemy’s control, whether voluntarily or not: is he granted the status of PW or is he a non-combatant?

(737) The doctrine surrounding the issue offers two alternatives to the detaining power, that is, to the state that captures the deserter. The first is to recognize him in the status of combatant and therefore to

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Louis-Philippe Rouillard, ‘D’une retraite à l’autre: Les efforts de Lévis, 1759-1760’, (1999) 1 *Legion* 24-25.

<sup>176</sup> Andrew B. Godefroy, *For freedom and honour?: The story of the 25 Canadian volunteers executed in the First World War*, CEF, Nepean (ON), 1998, 95.



accord the privileges of a PW; the second is to consider him a civilian.

(738) Where PW status is granted, the reasoning is that even if the deserter refuses to fight, he is still legally a combatant of the state of which he has the nationality. Since he is an enemy national and officially a member of its armed forces, regardless of his desire not to fight, he remains a member of the enemy military organization. Therefore GC III applies in accordance with art. 4A(1)/GC III and arts. 43-44/AP 1.

(739) In the second case, the detaining power could consider him a civilian. The reasoning in this case is that by refusing to fight, the deserter would be refusing combatant status and asking to be considered an enemy civilian, thereby obtaining the status of a protected person (art. 73/AP 1. This would mean that he could only be interned if he asked for internment (!) or if he posed a risk to the detaining power (arts. 42 and 79/GC IV).

(740) However, this latter reasoning leads to a situation where the deserter can claim the status of refugee to powers detaining him under art. 45/GC IV, since he can invoke political or religious reasons to justify his refusal to fight. This refugee status would prevent the state to which he formerly belonged from demanding his repatriation and trying him for desertion and probably treason.

(741) If the country where he asked the refugee status granted him this status and then was afterward occupied by the state of his former nationality, he could not be arrested or tried (art. 70/GC IV). Deserters would therefore escape “national” legislation! This would encourage widespread desertion, as in the case of the second Persian Gulf War (1991) (although in this case the AP 1977 were not applicable to either the United States or Iraq).

(742) Following this interpretation, the political opinions of the individuals would prevail over the needs of the state. It is at the very least doubtful that states would accept this in all circumstances. Therefore, the first approach is advised. It is at any rate the approach taken by the Canadian Government. Art. 54 of the *Canadian Criminal Code* specifies that anybody aiding, assisting or abiding a deserter or a member of the Canadian Forces absent without leave can be tried by summary procedure, which excludes a jury. Art. 56 of the *Canadian Criminal Code* carries a similar infraction concerning the aiding, assisting or abiding of members of the RCMP who desert or is absent without leave<sup>177</sup>. The *Queen's Regulations and Orders for the Canadian Forces - Volume II - Disciplinary* carries desertion as a major military offence<sup>178</sup>.

## F. INTERPRETATING THE COMBATANT STATUS IN RELATION TO CASES OF LEVÉE-EN-MASSE AND RESISTANCE

(743) We have looked at these notions in Chapter 2. The present teaching point aims at bringing some precision to the applicability of the status of combatant to these persons, because there is quite a problem of interpretation in the application of the LOAC regarding irregular combatants during IAC.

(744) This debate is so important that the United States has still not ratified AP 1 because of the largeness of these concepts. Faced with the emergence of revolutionary national movements such as those in Chechnya and Dagestan, the problem of establishing a firm notion of combatant brings with it some confusion in its application.

<sup>177</sup> *Criminal Code of Canada*, *supra*, note 129 at Sections 54 and 56

<sup>178</sup> *Queen's Regulations and Orders for the Canadian Forces - Volume II – Disciplinary*, art. 103.21 Desertion, available at [http://www.admfincs.forces.gc.ca/qr\\_o/vol2/ch103\\_e.asp#103.21](http://www.admfincs.forces.gc.ca/qr_o/vol2/ch103_e.asp#103.21)

(745) How can we differentiate between a clearly established resistance movement representing a state, and an armed group of bandits acting for their own profit? Conditions are provided by art. 4A(2)/GC III and reinforced by art. 44(3)/AP 1, but they still present problems of application.

(746) According to this last section, there are cases where the wearing of a distinctive sign recognizable at a distance is impossible due to the nature of the hostilities. This is precisely what the U.S. disputes, because the resulting obligation of carrying arms openly becomes too vague to be applicable, in the U.S.'s view.

(747) For example, let us consider a situation where the sign of a resistance movement during an IAC is a green baseball cap with a badge representing a closed fist. A partisan dressed as a civilian in a crowd approaches to within 30 meters of a check point and dons his cap while the guards are busy searching a vehicle and throw a grenade, certainly giving the guards no opportunity (which is the aim).

(748) Has this partisan breached art. 44(3)/AP 1? If we read the letter of this section, analysis forces us to say no. Indeed, according to the text, the partisan was in a situation where he could not be distinguished from the crowd. He donned his cap during his deployment, meaning when he reached his throwing position at 30 meters from his objective. Finally, he openly carried his weapon in sight of the enemy.

(749) In a world that still remembers attacks like the one that killed 283 U. S. Marine Corps soldiers in their barracks in Lebanon in 1982 and the recent resurgence of the Islamic Jihad "Holy War" against the U.S., including symbols such as its embassies, how could the American government accept these persons as "combatants" and grant them the status of PW when all human decency is repulsed by these proceedings? Politically it would be suicide for the government that would permit such international norms, and militarily it would be the equivalent of shooting oneself in the foot before going into battle.

(750) Canada accepts this risk. The granting of the status of PW is still left to competent tribunals to determine their status. The status can be refused if the tribunal determines that all conditions were not met by the resistance member, for example, if he has not respected the LOAC. This, however, only takes place (hypothetically) after personnel who have respected the LOAC have been wounded or killed. The fact that the resistance member is tried will not bring back a brother, a husband, a daughter, a mother.

(751) The situation is even more confused with the *levée-en-masse* of art. 4A(6)/GC III, because in those particular cases the only obligations that must be respected are the open carrying of weapons and the respect of the LOAC. How, then, is a combatant supposed to be distinguished from a civilian? More importantly, how can a civilian who has never received instruction on the LOAC and who spontaneously takes direct part in hostilities be expected to know the basic notions of the LOAC? In many cases, these persons do not even know how to read. How are they to know the rules they are subjected to when they barely comprehend the basic manipulation of their weapons? When government broadcasts exhort feelings of hatred, encouraging the killing of as much of a population as possible, how can one expect the comprehension of legal obligations? This situation is made even more difficult because many governments do not want or just simply do not have the resources to fulfill their obligation to propagate the knowledge of the LOAC in accordance with both GC 1949 and AP 1977.

(752) These questions are left without answers, except for the simple one that in reality one cannot expect a professional attitude from amateurs on a battlefield. These situations are the basis of a great debate surrounding the notion of combatant. Fundamentally good people will, while believing they are doing their duty, do extraordinarily bad things. Despite it all, ignorance of the law is not an excuse, nor

will it bring back to life a combatant executed after capture because the partisan did not know his obligations.

### CONCLUSION

(753) Despite these problems, **it is the duty of all Canadians involved in such situations to apply the LOAC and the Criminal Laws of Canada.**

(754) There are many exceptions to the status of combatant. These depend on circumstances. Whether the person is a spy, a traitor, a deserter, a child soldier, resistance members, or civilians participating in a levée-en-masse, you have obligations to apply the LOAC and you must give clear directives to the men and women serving under your command. These directions must ensure the security of this personnel while according all measures of humanity possible in accordance with the GC 1949, AP 1977 and the multiple conventions applicable.

(755) The responsibilities of a commander do not only solely consist in the ability to conduct a battle. They include the ability to give clear orders to establish and keep the control of the personnel under command. This distinction may seem redundant, but it is important that it be repeated as many times as possible.

(756) The American experience in Vietnam and the recent one in Iraq prove how easy it is to lose control when a situation becomes confused. Our own experience in Somalia demonstrates this also. The fact that it was the actions of a small group is not an excuse: it was a loss of control, whether we admit it or not. Whether it is at division, regiment, company, or platoon level, a command position includes the ability to respect and have respected the legal obligations of the Canadian government through our personnel. The commander who loses control may retain his or her command but has lost the status of a leader through losing effective control of the troops. These obligations are states' obligations, but they are also personal obligations. To refuse or even forget to apply them can be crimes punishable by national or international legislation.

### SUMMARY OF TERMS

**Deserter:** member of armed forces who abandons his or her post

**Formal operative cognitive development:** stage in the development of intelligence when a child can make associations and is able to differentiate bad from good

**Espionage:** clandestine search of military or political secrets or information



## CHAPTER 10

### RULES OF NON-INTERNATIONAL ARMED CONFLICTS

#### INTRODUCTION

One of the most controversial sectors of the LOAC concerns the rules applicable in times of non-international armed conflict (NIAC). NIAC differs from IAC in the intensity of the military activities as well as by the reach of the LOAC applicable in those conflicts. Indeed, in most NIAC, hostilities start in the form of terrorism and evolve towards the use of dissenting forces or guerrilla warfare. To demystify the applicability of the LOAC during NIAC, we will examine the rules applicable to dissenting forces and differentiate these forces from guerrillas and terrorism.

#### CONTENT

- a. defining a non-international conflict (NIAC) and its characteristics;
- b. the legal texts relative to NIAC;
- c. the means of actions of dissenting forces;
- d. the means of actions of government forces relative to NIAC; and
- e. the provisions concerning the treatment of prisoners and sick by all parties in a NIAC;
- f. The prohibition of torture under international law.

#### **A. DEFINING A NON-INTERNATIONAL ARMED CONFLICT AND ITS CHARACTERISTICS**

(757) Non-international armed conflicts (NIAC) are characterized by the applicable legal regime as distinct from that applicable in IAC. NIACs historically were subject only to national legislation, meaning that they were regarded as internal affairs of the state. This reasoning was based on the fact that none of the belligerents implicated in the conflict were from another state.

(758) This jurisdiction was, and is still, jealously guarded by heads of states who see it as the right of national governments to repress insurrection and the activities of dissenting forces on their territories, because it allows much wider powers and means of combat to be used against their own population than against a foreign enemy. That is why, during the Algerian national liberation war from 1954 to 1963, the French government refused, against heavy pressure, to recognize the National Liberation Front (FLN) as representing the Algerian government. For France, Algeria was part of the French national territory and, as such, subject to French national legislation. This allowed France to justify the imposition of the death penalty by guillotine against Algerians captured and convicted as traitors. It has also been the case with the United Kingdom applying its legislation against members of the Irish Republican Army (*IRA*) since the Belfast (Londonderry) troubles of 1972.

(759) Before AP 2, the only applicable rights in a NIAC were art. 3/common GC 1949 and art. 19 of the *1954 Hague Convention*. This last section, titled “Conflicts Not of an International Character,” states that in case of a NIAC, all parties to the conflict must as a minimum apply the measures of this convention in relation to respect of cultural properties. Art. 19(2) of this convention states also that all parties must take all measures to apply all other dispositions of the convention by agreement between the belligerents.

(760) Par. (4) of art. 19 has a special disposition that is of interest: it states clearly that nothing in this section modifies the *juridical* status of the conflict. This section has been included in the convention to

prevent dissenting forces from claiming recognition from the international juridical system. This is a major point of concern for some governments which cannot under any circumstances allow a dissenting force to be legally recognized by other states.

(761) Such a recognition could indeed lead to the intervention of international bodies in the internal affairs of a state. Many states, especially those with authoritarian and totalitarian regimes, cannot permit this risk of an implicit recognition as they fear intervention justified on these arguments as they could be applied to them.

(762) GC 1949 recognizes certain fundamental rights in cases of NIAC, such as the right to humane treatment under art. 3/common GC 1949. This guarantees protection against attempts on life or against torture, but in general remains vague and offers only minimal protection.

(763) AP 2 aims at giving supplementary rules to those of art.3/common GC 1949 in times of NIAC. Art. 4/AP 2 reiterates the general protection of humane treatment. We have already looked at this section, but it is important to mention again that it offers fundamental protections against violence, torture, hostage-taking, the denial of quarter (no prisoners order) and attempts against personal dignity (art. 4(2)/AP 2). Furthermore, additional protection is given to children of less than 18 years, and even more specifically to children of less than 15 years (arts. 4(3)(a) and (b), and arts. 4(3)(c) to (e)/AP 2, respectively).

(764) Following the terms of art. 1/AP 2, AP 2 is applicable to all conflicts not falling under the jurisdiction of art. 1/AP 1, thus meaning all conflicts opposing armed forces to dissenting forces or any other armed group organized under a responsible command and occupying a territory large enough to allow concerted and sustained military operations. Art. 2(2)/AP 2 states, however, that AP 2 does not apply in the case of internal unrest such as riots, sporadic acts of violence, or acts of a similar nature. This is why members of the IRA were never given the status of prisoner of war despite their repeated attempts to gain this status after the coming in force of Protocol II.

(765) It must also be pointed out that the criteria of 1(1)/AP 2 are of an utmost importance: even if they answer to the concept of responsible command, wear a distinct symbol recognizable from a distance, carry arms openly and conform to the LOAC, guerrillas cannot be recognized as covered by AP 2 if they do not effectively control a territory large enough to permit them to conduct concerted and sustained military actions. Urban guerrilla, where the fighters disappear within the population but do not effectively control the territory of the city, such as in Iraq since the beginning of operations there in 2003 or a simple hit-and-run guerrilla campaign, even if gaining momentum, cannot therefore claim this protection and would only be protected by art. 3 GC/49 until such time as it succeeds in 'liberating' a portion of territory and control it effectively in such a way as to permit the launching and sustaining of continued military operations.

(766) AP 2 thus tries to combine the concepts of GC 1949 and AP 1 in terms of what is applicable to IAC and sums it up in 28 articles, of which only 18 are directly related to the conduct of hostilities. Therefore, one could assume that these sections are broad and often open to liberal interpretation. However, this is not exactly the case.

(767) For example, art. 13/AP 2 has such broad application that it actually goes beyond the terms of art. 51/AP 1, which contains many exceptions and opportunities for liberal interpretation.

(768) Art. 13/AP 2, however, is clear and concise. Art. 13(1)/AP 2 states that all civilians must be protected from military operations. To this end, no civilians can be the target of an attack or victims of violent acts with the aim of terrorizing the population (art. 13(2)/AP 2). Of course, art. 13 has a derogatory clause at art. 13(3)/AP 2 that affirms that all civilians are protected under Part IV of AP 2, except for those who illegally take part in hostilities.

(769) Art. 14/A 2 prohibits the use of famine or the destruction of goods necessary to the survival of the civilian population, while art. 15/AP 2 protects against attack all works and installations containing dangerous forces, if such attacks would risk causing serious civilian loss of lives, even if the targets are legitimate military ones.

(770) Art. 16/AP 2 emphasizes the *1954 Hague Convention*, while art. 17/AP 2 prohibits the forced displacement of civilians for other reasons than their own security or imperative military necessity. Finally, art. 18/AP 2 states that the efforts of humanitarian organizations such as the Red Cross can be offered and that civilians can participate in assisting with the wounded and dead. Also, art. 18(2)/AP 2 allows agreements between parties to help provide the population with necessary goods, food, and essential medical supplies. Thus a group of civilians can be given permission to collect corpses and bury them according to their customs and traditions.

(771) The protection of medical and religious personnel remains under the terms of arts. 9 to 12/AP 2. These rules apply in the same manner as under AP 1 in the case of IAC. As we can see, AP 2 contains many general sections that have wide application. We will now examine how they are applied during a NIAC to dissenting forces as well as to the legal and illegal means of combat during these conflicts, relative to all parties involved.

## **B. THE LEGAL TEXTS RELATIVE TO NIAC**

(772) The expression **guerrilla** comes from Spanish. At first, during the Spanish campaigns of Napoleon Bonaparte against General Wellington, this meant a “line of sharpshooters.”

(773) Guerrilla warfare is “small war,” a continual series of raids and sporadic attacks. **Guerrilla warfare is not a recognized form of warfare under any international treaty, including GC 1949 and AP 1977.** It falls under the exceptions of art. 1(2)/AP 2 due to its sporadic nature. This might appear confusing since the Geneva Conventions recognise an applicable set of minimum standards in all non-international armed conflicts at their common art. 3, and the more so since the notion of combatant is enlarged in AP 2 to cover precisely these types of conflicts, while art. 43/AP 1 does enlarge the notion of combatant and prisoner of war to ‘irregulars’, that is persons who qualified to its conditions event though they are not members of a government’s armed forces.

(774) Nonetheless, the recognition of the status of combatants and of prisoner of war to persons taking part in hostilities in NIAC does not imply a juridical recognition of guerrilla. Much like a war is a “matter of facts”, whereby a *de facto* situation of an inter-state conflict takes place, and then is subsequently (or immediately) recognised *de jure*, a guerrilla war – or small war – in a non-international setting does not have a legal recognition in international law. It is a matter of fact, but will only be recognise as we will see below, when the rebel/insurgents/guerrillas finally take control of a portion of a national territory and thereby impose their existence. Only at this point does a conflict need be acknowledged as one. And only in non-international armed conflicts is there recognition of a conflict – not of a guerrilla. The semantic

might seem very crude, but it is in fact the very threshold of the applicability of the laws of armed conflicts: prior to the existence of a non-international armed conflict, they are seditious elements, terrorists and rebels. They are common criminals committing acts of violence. Only when they capture and hold a territory that allows them to launch and sustain military operations, they become combatants subject to the applicability of the laws of armed conflicts.

(775) However, the juridical situation of guerrilla movements is complex. Indeed, as we have just seen, they are not covered by AP 2, which deals with internal conflict, or non-international armed conflict (NIAC). Nonetheless, guerrilla warfare is not prohibited under the LOAC; it is simply not recognized. The **guerrillero** (a member of a guerrilla organization) is therefore an illegal combatant, which allows states troubled with such a movement the position that they are civilians illegally taking up arms against the legitimate authority, resulting in their being liable under national jurisdiction.

(776) The very nature of guerrilla activities creates major legal problems as to their legal status and the juridical application of the LOAC. The **theatre of operations** (teaching point B of Chapter 4) is everywhere and nowhere at the same time. The notion of “occupation” is difficult to apply since guerrillas, and in particular urban guerrillas, act inside enemy controlled zones. Also, there rarely is a declaration of hostility. A guerrilla movement often appears suddenly, surprising everybody, as the Chiapas Indians did on New Years of 1995.

(777) In such a context, it is difficult to establish precisely the positive law applicable to guerrillas. Nevertheless, it does not mean that no legal regime applies to guerrillas. Despite the difficulties we have just seen, AP 2 does state clearly that it applies to any internal conflict opposing organized dissenting forces against those of the government. From this definition, it clearly follows that civil wars between factions of political and religious opinions where the state does not intervene are not subject to the regime of AP 2.

(778) How do we then differentiate those cases in which it applies from where it does not? It rests on the facts of the case. The conflict must reach a **certain intensity**, an absolutely subjective measure, in order for AP 2 to be applicable. As for the state of war, the state of NIAC implying organized movements is subject to the evaluation of the facts. The required intensity is often, *de facto*, when the government appears to be **unable to contain the rebel forces’ advances or to recapture lost territories**, thereby responding to the criteria of **effective control over a territory large enough to conduct sustained and concerted military operations**. The case of the Croatian Krajina, where the Serbian community established roadblocks and guarded the entrance to the cities of the like of Knin was, by 1993, clearly along these lines. The same can be said of the Bosnian-Muslims enclaves of Gorazde or the Bosnian-Croat ones of Glamoč, where all these local communities either revolted against the established government or battled on its side (as in Gorazde). In all these examples, the established (even though sometimes illegal) regional and national authorities had lost control to impose their will upon these groups of the population. If AP 2 had been in force for Croatia, Bosnia-Herzegovina or Republika Srpska, the combatants and civilians should have enjoyed the protections of this international instrument (although it is doubtful that these authorities would have truly tried to implement it)<sup>179</sup>.

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<sup>179</sup> Terminology for this may differ, as presented under: “At the fourth one, they consolidated, themselves ‘politically’; thus terminating the three phases of guerilla warfare- ‘preparatory’, ‘resistance’, and ‘active-resistance’ and entered the fourth, which is ‘open/strategic offensive’.” as describe in “Talks' for homeland -'Strategy' for one land” *The Sri Lanka Observer*, 5 February 2006 or at Wikipedia, *Guerrilla Warfare*, available at [http://en.wikipedia.org/wiki/Guerrilla\\_warfare](http://en.wikipedia.org/wiki/Guerrilla_warfare): Maoist theory of people's war divides warfare into three phases. In the first phase, the guerrillas gain the support of the population through attacks on the machinery of government and the distribution of propaganda. In the second phase, escalating attacks are made on the government's military and vital institutions. In the third phase, conventional fighting is used to seize cities, overthrow the government, and take



(779) In terms of *rationae tempis* obligations (conditions relative to time), the actions of a guerrilla movement take place in four phases, unless they are crushed before they reach this intensity. First is the **preparatory phase**, which can be spontaneous. It is followed by **progressive organization** in small units, often “cells,” that grow at varying paces from a conflict and a region to another. If this growth is successful, the “**liberation**” of territories follows, and then the putting in place of a **state system of public administration**.

(780) **The required intensity cannot be reached until the liberation phase** since up to that point there is nothing that allows us to justify the existence of a guerrilla movement. Only from this phase can a guerrilla movement be associated with the concept in art. 1(1)/AP 2 of an organized armed group under a responsible command and that of a territory permitting concerted and sustained military operations. As long as the future guerrilla movement is confined to the first two phases, it is in fact committing sporadic acts of violence called “**terrorism.**” **This is why the IRA** could never succeed in claiming to fall under the protections of AP 2 since it has never “liberated” territory or implemented a state system of public administration parallel to the British system. Closer to home, this was also the case of the *Front de Libération du Québec (FLQ)*, from 1967 to 1970, which was never able to do more than distribute propaganda pamphlets, set off bombs in stores or mail boxes, and carry out a kidnapping or two.

(781) This is why the assertion of U.S. President George W. Bush that the terrorist attack of Sept 11<sup>th</sup>, 2001 is an act of war is at odds with international humanitarian law. If guerrilla warfare is made of sporadic attacks and that those can only fall within the parameters of terrorism until it reaches the liberation phase, as the U.S. government argues by its refusal to ratify both the *1977 Additional Protocols*, therefore it cannot be an act of war falling within the scope of international humanitarian law. It is an act of terrorism, albeit one of despicable nature hardly met in scope before. Keep in mind that a killing use for terrorism is murder under national criminal law, while acts of war are falling under international humanitarian law. With this in mind, also reflect on the fact that insurance companies do not pay the life insurance of a person killed in an act of war, unless otherwise clearly specified in the insured person’s policy. With 3000 persons killed and many more injured, the cost to the insurance companies would be more than they can meet.

(782) Members of terrorist groups, despite their strong claims to the contrary, were never able to reach the level of intensity required to attain the status of combatant provided by AP 2. The Chiapas Indians in Mexico, on the contrary, were able to attain this level by establishing a control zone in only a few days of relatively easy combat, creating popular support, and establishing a local administration. This demonstrates that understanding of the means and methods of combat is not a gift reserved to western societies. The intelligence relative to the conduct of operations by third-world populations is often underestimated by our analysts, and this leads to major counter-guerrilla problems. These conflicts are examples that demonstrate our tendency to overestimate the importance of formal education while under-rating the intellectual capabilities of people who fight for “higher” motivations.

(783) In such conflicts, does it mean that there are absolutely no applicable rules of law before the liberation phase is reached? No. At the very least, art. **3 common GC 1949**, often defined as a “mini-convention in itself,” is applicable in NIAC involving guerrilla operations. Furthermore, the fact that there are no obligations to apply the other provisions of the GC 1949 and of AP 2 does not mean that a guerrilla movement or a dissenting force cannot impose them arbitrarily to its own forces or that a state cannot impose them upon its forces. (The danger in this for a state is that this could be construed as an implicit

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control of the country but it all comes to a progressive development from a slow coalescence to the formation of units, the overtaking of territories and the establishment of a new regime when successful.

recognition of the enemy.)

(784) This is what the *Provisional Government of the Algerian Republic* (GPRA) did on September 26, 1958, by declaring its adherence to the principles of the *United Nations Charter*, including the *Universal Declaration of Human Rights of 1948*. On June 11, 1960, the GPRA declared that it would adhere to the GC 1949. The logic is of course that because a guerrilla movement conducts bloody operations does not mean it cannot subscribe to the humanitarian principles of the LOAC. Its members might not know the full extent of the applicable LOAC with regard to civilians and combatants, but the human spirit is the same everywhere: we know killing is wrong.

(785) We can therefore say that there can be three situations in NIAC involving guerrilla operations where GC 1949 and AP 1977 can apply:

- a. in the case of art. 1(4)/AP 1 concerning the case of wars of self-determination, as in the case of the de-colonization of the 1960s and 1970s, in the measure where these movements respect those conventions (art. 96(3)/AP 1);
- b. by a unilateral decision on the part of either a state or a movement; and
- c. by common agreement of all parties involved, following the terms of art. 3 common of GC 1949.

(786) However, it is important to comprehend the fundamental differences between IACs and NIACs. While the former has a complete set of rules that applies to it, i.e. the entire GC 1949, the Protocols and the multiple treaties, NIAC offer a completely separate legal protection that springs only from 3/GC 49, AP 2 when ratified by the parties, and the multilateral treaties not provided with exception clauses that permit to deviate from them by declaring martial law. As such, one could explain this in a visual form through the help of graphics:

(787) As we can see, the fundamental distinction is quite obvious in this form. While both operate in the frame of international law, and in that of the LOAC, they are two subdivisions with applications that are worlds apart.

(788) This is even more so since the application of these “legal regimes” will apply in different situation. The IAC legal regime is based on art. 2 common/GC 49 and 1(3)/AP 1, in the aim of applying in conflicts where multiple States are involved. This excludes the situation of “entities”, where groups are fighting within only one country. While the term “civil war” is now obsolete, it is a proper illustration of the fact that it is only one and the same civil population of that one State engaged in fighting.

(789) Therefore, as the legal regime of IACs concerns the rights of the enemy, the legal regime of NIACs concerned that of every citizen and is therefore much more adapted to the thinking of human rights. This appears clearly upon reading AP 2. Indeed, nowhere will you find in it the notion of prisoners of war (PW), as it does not exist in a NIAC, since there is no war, but a conflict of an intra-national nature. As a result, the protections of art. 3/GC 49 are not of a PW nature. It is the basic human rights a government must confer upon persons captured in the act of carrying hostile actions or stating hostile intentions. The rights mentioned in this article are not protection of a combatant *per se*, but that of any human person. It does therefore apply as much to civilians as it does to combatants. The same is true of art. 4/AP 2.

(790) This is why we find at the heart of the IAC legal regime the rights of 3/GC 49, while we find at the heart of the NIAC legal regime the notions of human rights, whether of a national (i.e. the *Canadian Charter of Rights and Freedom*, or la *Charte des droits et libertés de la personne du Québec*), of a regional nature (*The American Declaration of the Rights and Duties of Man*, the *African Charter of Rights and Duties*), or an universal nature (i.e. *The Universal Declaration of the Rights of Man*, or the *Social, Economic and Cultural Covenant of the United Nations*).

(791) While governments are encouraged to apply the conditions of GC III concerning prisoners of war, they have no obligations to do so in cases of NIAC. They must only apply the basic notions of 3/GC 49 and the notions of AP 2 when this instrument is applicable.

(792) It is therefore paramount, before pronouncing yourself on which rights apply to whom, to determine as a first step the type of conflict at hand. Once this has been determined through the criteria of intensity, responsible command and effective control over a territory large enough to permit concerted and sustained military actions, you can determine the general principles respected or breaches, and then analyze the particulars.

### C. THE MEANS OF ACTIONS OF DISSENTING FORCES

(793) Once a guerrilla movement takes form, the means of warfare permitted for use are the following:

- a. non-violence;
- b. refusal to collaborate;
- c. civil disobedience;
- d. ruse; and
- e. armed force.

(794) As we have seen in the case of India, **non-violence** is a very powerful mean of action. It can be implemented in diverse forms. It can mean boycotts of products or of governmental institutions, refusal to pay taxes, general strikes, etc.

(795) This first means is often accompanied by the **refusal to collaborate**, although this second means does not necessarily exclude violence. For example, one can refuse to talk to public servants, refuse to answer their requests for taxes, refuse to pay fines, refuse to register on national registries, violate laws (i.e., to prevent justice from being enacted), etc. These are just some examples of the means of refusal to collaborate with the government.

(796) **Civil disobedience** goes much further. It too includes the refusal to collaborate, but can include primitive means of violence, such as rock throwing, the use of booby-traps, “Molotov cocktails” (gasoline-filled bottles sealed with a burning cloth; the glass breaks on impact, spilling the gasoline, which then burns), etc. The case of the Palestinian *Intifada* (popular revolt) during the 1980 is probably one of the best examples that combines all three of the means explained above. For more than a decade, Palestinians first used non-violence, then the refusal to collaborate by boycotting Israeli products, then

civil disobedience by doing general strikes and by repeatedly violating Israel's laws, all the while attacking Israeli troops in Gaza and the West Bank.

(797) As for the means of **ruse**, this has been employed many times to attack border posts. The use of civilians to divert the attention of guards and simultaneous attacks necessitating reinforcement in many places at the same time have been classic tactics of the IRA, allowing them to play the system to their advantage. However, as would be the case of combatants under art. 37/AP 1 in an IAC, these persons do not have the right to commit perfidious acts, meaning to profit from the good faith of their enemy. The use of false information to draw the enemy into an ambush is not perfidy.

(798) As for **armed force**, this is often the highest means of operation for dissenting forces. Such actions escalating over a long period reach a point where, having accumulated weapons and experience, the group can risk wider operations. However, as stated in arts. 1(4) and 96(3)/AP 1, the use of armed force by armed groups that attain the required level of intensity must respect the LOAC as understood by GC 1949 and AP 2, if applicable, to be protected by these conventions.

(799) This includes the humane treatment of civilians, prisoners of war, and wounded or sick persons. Under AP 2, art. 4(1) guarantees the respect of the honour as well as the political opinions and religious practice of these persons. Art. 4(2)/AP 2 guarantees protection against attempts against life, collective punishment, hostage-taking, personal dignity, terrorist acts, slavery (including sexual slavery), pillage, and threats.

(800) When a person is made a prisoner, if wounded, sick or shipwrecked, he or she must benefit from the sections of Part III of AP 2. Dissenting forces' obligations do not stop at providing care for these victims, as stated by art. 7/AP 2. It is also their duty to take all feasible measures to search for such victims after an engagement and, further, to provide for the protection of these victims (art. 8/AP 2).

(801) The very special nature of NIAC leads to a different legal regime that one must apply in all measures feasible. However, once the conflict has reached the recognized level of intensity, all parties must apply all measures of GC 1949 and AP 2 applicable.

(802) Some means of warfare are prohibited in NIAC. These are linked to terrorism, and therefore those who commit them are not subject to protection. They are:

- a. skyjacking;
- b. hostage-taking;
- c. torture; and
- d. reprisals.

(803) **Skyjackings** are prohibited by the *1971 Montreal Convention on the Suppression of Illicit Acts against the Security of Civilian Aviation*<sup>180</sup>. "Air pirates," regardless of their cause, are always committing an illegal act of international terrorism when they attempt to skyjack an aircraft, and they are subject to the national legislation of the state in which they commit the act.

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<sup>180</sup> *Montreal Convention on the Suppression of Illicit Acts against the Security of Civilian Aviation*, Montreal, 1971 at <http://www.icao.int/icao/en/leb/Mtl71.htm>.

(804) **Hostage-taking** is also prohibited, first by art. 147/GC IV, but also by the *1979 UN International Convention against the Taking of Hostages*<sup>181</sup>. This convention explicitly prohibits the threat or the commitment of the detention of a person, the infliction of wounds, or the perpetration of violence against his or her life. This applies to all persons both in peace and war times.

(805) The tourists detained as human shield by Iraq in 1990-1991 fell under this protection. Even if an armed group cannot breach this disposition of the LOAC during the first or second phase of its expansion, since the LOAC are not enacted until the third phase, it will still be guilty of an international crime due to this last convention.

(806) **Torture** is also condemned by GC 1949 and AP 1977, but even in cases where these conventions are not applicable, armed groups cannot use torture, due to the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*<sup>182</sup>. Art. 2(2) of this convention is crystal clear by explicitly stating that “**no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.**”

(807) **Torture, committed by anybody, against anybody, for whatever reason, regardless of the moment, is prohibited.** Only cowards use torture. There is no honour or symbolism in inflicting pain on a person who is bound and alone against many. A man can be afraid under this temporary position of inferiority and probably will break under torture, but he will never respect his torturers. On the contrary, those who respect prisoners stand a good chance of gaining respect and of saving more than a life during a conflict.

(808) Torture is defined at art.1(1) of the *1984 Convention*. It prohibits the intentional infliction of severe pain or suffering, whether physical or mental. Respect for the enemy is an important factor in the good treatment of one’s own troops if they fall under the enemy’s control.

(809) One of the best examples is that of Colonel von Luck, commander of an armoured reconnaissance battalion during the North Africa Campaign of 1943. One day the battalion captured a British officer and his men of the 11<sup>th</sup> Hussar Regiment. The British established contact with the German troops to inquire if the said officer and his man had been captured. Colonel von Luck answered in the affirmative and gave his assurances of their good treatment under his command. For the rest of the hostilities, including when both adversaries were again face to face in Normandy, both sides exchanged news about their prisoners and respected the code of honour of those who practice the profession of arms: regular combat to the finish, but humane treatment once combat ceases. (See von Luck, Hans, *Panzer Commander*).

(810) The result was that when Germans under the command of von Luck were captured, they were treated as well as possible under the circumstances -- as well as von Luck himself had treated the British prisoners. The decision of one man contributed to the saving of many lives while re-establishing a measure of humanity.

(811) While this happened more than 50 years ago and took place in an IAC, there is no reason that this attitude could not be implemented in some NIACs. In fact, armed group movements that take great care to

<sup>181</sup> *International Convention Against the Taking of Hostages*, New York, December 18, 1979.

<sup>182</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 at <http://www1.umn.edu/humanrts/instree/h2catoc.htm>.

respect civilians and enemy combatants often gain the gratitude and respect of both the civilians and the enemy.

(812) This in turns functions as propaganda, permitting them to gain popular support and sometimes the support of the enemy's armed forces. This also favours their chances of good treatment and clemency if captured. An example of unacceptable conduct of a state against armed group movements was that of Israel, whose Supreme Court in 1996 recognized the legality of using torture if the aim was to save lives! This did not prevent assassination attempts and bombings; the decision was overturned in September 1999.

(813) The lesson is that firmness has nothing to do with cruelty. Because a conflict is bloody does not mean that it is impossible to respect persons. To neglect to do so only compounds the situation and leads to a loss of control of both one's own forces and public opinion. One can be firm and still remain humane.

(814) As for **reprisals**, these also are prohibited by GC 1949 and AP 1977. When these provisions are not applicable, the 1984 Convention again is the basis of application. Indeed, reprisals both in times of peace and of armed conflicts are prohibited. In times of armed conflicts, reprisals to force another party to the conflict to respect the LOAC are a violation of the LOAC. Art. 1(1) of the 1984 convention prohibits the use of torture as a form of reprisal against one or many persons for having committed an act.

(815) It must be noted that **reprisals do not include acts that are legal under the LOAC**. Therefore, it is not illegal to attack the headquarters of an armed group to answer in kind a previous action of that group (for example, an attack on a border post). It would be illegal, however, to round up of a village's population to beat them, confiscate their property, burn their houses, etc., in order to make an example of them.

(816) This is why, in international law, there is a movement to adopt a different terminology between what is termed reprisals as such, meaning illegal actions against the civilian population which are always illicit under international law, and **counter-measures**; which are actions that a state may take to make a state stop another from violating international law and force it to either repair the damage done or provide guaranties that it won't commit such an act again. In the spirit of the LOAC, counter-measures such as an attack against the headquarters of an armed group, this being a military objective, in response to an attack on a border post would be legal, as long as the principle of proportionality is respected.

#### **D. THE MEANS OF ACTIONS OF GOVERNMENT FORCES**

(817) As we have seen in the previous teaching point of this Chapter, the protection of both GC 1949 and AP 1977 can only be enacted when the conditions of art. 1/AP 2 have been met. Consequently, there are limitations to the means and methods of warfare that can be employed when GC 1949 and AP 1977 are enacted. When they are not enacted, these limitations are not the same due to the restricted intensity of the conflict.

(818) Nonetheless, some limitations do apply even in the absence of the enactment of these conventions:

- a. **chemical and bacteriological weapons;**

- b. weapons that cannot discriminate in their effects between civilians and combatants (**blind weapons**); and
- c. **antipersonnel mines**.

(819) These named weapons are prohibited in all circumstances and cannot be used, even to stop a riot. In the case of **chemical and bacteriological weapons**, the *1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*<sup>183</sup> applies as a whole since its art. 1 prohibits their use in all circumstances.

(820) As for **blind weapons** (those that cannot discriminate in their effects between civilians and combatants), they are of course prohibited by art. 3/common GC 1949, since its paragraph 1(a) prohibits all attempts against the lives of persons not taking direct part in hostilities.

(821) Finally, concerning **antipersonnel mines**, the *1997 Ottawa Treaty*, called the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction*<sup>184</sup>, states at its art. 1 that their use is also prohibited in all circumstances. Of course, this treaty is only applicable to those states that have signed it.

(822) Apart from these prohibitions, most other weapons are free of use as long as they are used with respect to the LOAC in relation to combatants and civilians. The legal means of government forces can therefore be presumed to be the legal action in respect of the LOAC.

#### **E. THE TREATMENT OF PRISONERS AND SICK BY ALL PARTIES – THE PROHIBITION OF TORTURE**

(823) As we have seen in teaching point B of this Chapter, GC 1949 and AP 1977 apply from the moment the required intensity is reached. But what of the obligations of treatment of PWs, the sick, wounded and shipwrecked before that moment?

(824) **No rules of positive LOAC are applicable before the attainment of the required intensity other than art. 3/common GC 1949.** Nonetheless, voluntary application of the LOAC and of the *UN's Universal Declaration of Human Rights*<sup>185</sup> can be applied when possible.

(825) As there is more and more of an involvement of Western forces in conflicts related to anti-terrorism operations, national operations and coalition force actions to root out terrorism and requires to fight counter-insurgency battles and campaigns, there is a major blurring of the lines between the application of the prohibition of torture in international law. As a result, some have claimed that the use of torture might be warranted in some situations. As we will see here, torture is prohibited in times of armed conflicts, in times of troubles and internal disturbances such as terrorism as well as in time of peace.

<sup>183</sup> *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, Paris 13 January 1993 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>184</sup> *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997 at <http://www.icrc.org/ihl.nsf/WebFULL?OpenView>.

<sup>185</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

**F. THE PROHIBITION OF TORTURE UNDER INTERNATIONAL LAW**

(826) When human rights are confronted with the necessities of the security of the State, it becomes difficult to view torture from a dispassionate perspective. Even known civil libertarians strengthen their opinions, and the limits of the permissible then become more flexible. Such is the case with torture under international law, and nothing illustrates this contradiction as clearly as the U.S. Department of Justice's Office of Legal Counsel's Memorandum in *Re : Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*<sup>186</sup>. Through the prism of sections 2340 and 2340A of the United States' Code, its drafters seek to define and interpret what constitutes torture in order to answer a request for an opinion by the Central Intelligence Agency in relation to the legal norms applicable to methods of interrogations regarding suspected terrorists.

(827) In response to this request, the Office of Legal Counsel offered the opinion that there are circumstances when self-defence and necessity permit the use of force to defend another person and that if "a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network"<sup>187</sup>. That this might be permitted is based upon the advice of the Office of the Legal Counsel that the threshold of what constitutes torture is much higher than mere cruel, inhuman or degrading treatments, which are conceived together as "ill-treatments".

(828) In view of the ongoing war on terrorism, the occupation of Iraq and the peacemaking presence in Afghanistan, there is paramount importance in examining the reach of the prohibition of torture under international law. Therefore, this we will examine the notions of what constitutes torture under international law and whereby the prohibition on torture might be derogated from. There cannot be any doubt that torture is prohibited under international law. That much is limpid from both international humanitarian law and international human rights law perspectives.

(829) As a notion of international humanitarian law, the customary norms regarding torture have evolved in the latter part of the nineteenth and the early twentieth century<sup>188</sup> and have been widely accepted, both in *opinio juris* and practice by States before being codified in the four *Geneva Conventions of 1949*<sup>189</sup> and again later in the *Protocols Additional to the Geneva Conventions*<sup>190</sup>. At the core of this body of law is Article 3 common to the four *Geneva Conventions of 1949*, which presents a core of rights that are applicable as much to international armed conflicts as to non-international armed conflicts. This

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<sup>186</sup> Office of the Assistant Attorney General, *Re : Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, United States Department of Justice, 1 August 2002 at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter *Standard of Conduct Memorandum*].

<sup>187</sup> *Id.* at 46.

<sup>188</sup> These notions were already incorporated in the *Additional Articles relating to the Condition of the Wounded in War*, 18 *Martens Nouveau Recueil* (ser.1) 612, 138 *Consol. T.S.* 189 at Article 11: "Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.", in relation to the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 18 *Martens Nouveau Recueil* (ser. 1) 607, 129 *Consol. T.S.* 361, the Institute of International Law, *The Laws of War on Land* (1880) at Article 63: "They must be humanely treated", *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 26 *Martens Nouveau Recueil* (ser. 2) 949, 187 *Consol. T.S.* 429, at Article 4 : "Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated humanely.", *Convention relative to the Treatment of Prisoners of War*, 118 *L.N.T.S.* 343, at Article 2 : "Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity."

<sup>189</sup> *The Geneva Conventions fo 1949, supra*, note 25 .

<sup>190</sup> *The Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) and (Protocol II), supra*, note 82.



core contains at its heart the prohibition against torture, regardless of the status of the persons concerned, whether they are combatants or non-combatants, including illegal combatants such as spies and *saboteurs*<sup>191</sup>. This notion is so well entrenched in the *corpus iuris* of international law that its status is known and acknowledged as *erga omnes* obligations for States, clearly defined as one owed by a State to all members of the international community, and deemed as having acquired the status of *jus cogens*<sup>192</sup>. During international armed conflicts, all prisoners of war, enemy aliens, spies, saboteurs, illegal combatants and indeed enemy combatants are included in this notion<sup>193</sup>.

(830) However, the notion of the application of this prohibition of torture in time of peace or periods of tensions and internal troubles, including states of emergencies, falls within the realm of international human rights law. It is therefore necessary to define torture and its reach under the applicable international instruments applicable in these situations.

(831) In what is termed the *International Bill of Human Rights*<sup>194</sup> are contained the basic elements of the definition and scope of the application of torture, starting with the *Universal Declaration of Human Rights* in its Article 5<sup>195</sup>. While the force of law of a UN General Assembly resolution remains arguable<sup>196</sup>,

<sup>191</sup> *Geneva Conventions*, *supra* note 25 at Article 3 common to all four conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples “ and Article 5 of the *Fourth Geneva Convention*, *supra* note 3: “(...) Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.”

<sup>192</sup> Robert K. Goldman, *Trivializing Torture : The Office of Legal Counsel’s 2002 Opinion Letter and International Law Against Torture*, (2004) 12(1) Human Rights Brief 1.

<sup>193</sup> Louis-Philippe F. Rouillard, *The Combattant Status of the Guantanamo Detainees*, (2004) 1 *Eastern European Humanitarian Law Journal* 1 at 9 available at [http://www.fwpublishing.net/EEHRLJs\\_Archives.html](http://www.fwpublishing.net/EEHRLJs_Archives.html).

<sup>194</sup> Generally understood as containing the provisions of *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter *Universal Declaration*]; the *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter *ICCPR*]; the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter *ICESCR*]; the *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302; the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty, G.A. Res. 44/128, annex, U.N. GAOR 44<sup>th</sup> Sess., Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989); and of the United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

<sup>195</sup> *Universal Declaration*, *supra* note 185 at Article 5 which provides that : “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”

<sup>196</sup> American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, § 701 (3<sup>rd</sup> ed. 1987) at Reporter’s Note 6: “The binding character of the Universal Declaration of Human Rights continues to be debated, (...) but the Declaration has become the accepted general articulation of recognized rights. With some variations, the same rights are recognized by the two principal covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and

the principles enumerated in it provides the base of subsequent international<sup>197</sup> and regional<sup>198</sup> instruments prohibiting torture<sup>199</sup>, many retaking the original disposition *verbatim*. From their reading, it appears clearly that the prohibition of torture is far-reaching and is covered as much in the regional as the universal human rights systems.

(832) Not only is torture prohibited under treaty law, but it is also prohibited under customary law as a norm of *jus cogens*, not solely in matters related to international humanitarian law, but also to international human rights law<sup>200</sup>. This peremptory legal norm is deemed as so fundamental that no State can contravene it<sup>201</sup>.

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Cultural Rights.”

<sup>197</sup> ICCPR, *supra* note 192 at Article 7 : “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”, reinforced by the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), Annex, U.N. GAOR, 30<sup>th</sup> Sess., Supp. No. 34 at 91, U.N. Doc. A/10034 (1975), retaken in the *Standard Minimum Rules for the Treatment of Prisoners*, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, U.N. ESCOR, 24<sup>th</sup> Sess., Supp. No. 1 at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, U.N. ESCOR, 62<sup>nd</sup> Sess., Supp. No. 1 at 35, U.N. Doc. E/5988 (1977), the *Code of Conduct for Law Enforcement Officials*, G.A. Res. 34/169, Annex, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46 at 186, U.N. Doc. A/34/46 (1979) at Article 5: “No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”, the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 37/194, Annex, U.N. GAOR, 37<sup>th</sup> Sess., Supp. No. 51 at 211, U.N. Doc. A/37/51 (1982); the *Convention on the Rights of the Child*, G.A. Res. 44/25, annex, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) at Article 37 : States Parties shall ensure that : a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. (...).”; the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, Annex, U.N. GAOR, 43<sup>rd</sup> Sess., Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, Annex, U.N. GAOR, 45<sup>th</sup> Sess., Supp. No. 49A at 200, U.N. Doc. A/45/49 (1990). and the *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, 48 U.N. GAOR, 48<sup>th</sup> Sess. Supp. No. 49 at 217, U.N. Doc. A/48/49 (1993); *Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/2002/WG.11/CRP. 1 (2002); and culminating in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)[hereinafter *Convention against Torture*].

<sup>198</sup> In the Inter-American system, there are the provisions of: the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), through Article 1 concerning the right to life, liberty and the security of the person; *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) through Article 5 concerning the right to humane treatment; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 83 (1992). In the European systems of the European Council there is the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, amended by *Protocols Nos 3, 5, and 8* which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively at Article 3: “Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” [hereinafter *European Convention*], while the European Union disposes of the provisions of the *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 1, (Dec. 7, 2000) and the *Draft Charter of Fundamental Rights of the European Union*, CHARTE 4422/00 (July 28, 2000) [hereinafter *Draft European Union Charter*], at Article 4, which retake in full the provision of the *Universal Declaration*: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”. The African system rests upon the *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [hereinafter *African Charter*].

<sup>199</sup> Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 71 (2<sup>nd</sup> ed. 1999).

(833) In view of such a prohibitive expanse of treaty law and of customary law, it would be easy to imagine the debate about torture as being non-existent and that arguments favouring the use of stronger measures of interrogation would be hopeless. Yet, the argument is made that measures of much vigour are not to be deemed torture. The explanation is rather simple: while torture is universally prohibited, the definition of what constitutes torture remains very controversial, as “each perpetrator seeks to define its own behaviour so as not to violate the ban”<sup>202</sup>.

(834) This is explained in part by the entitlement given in the universal and regional instruments applicable to the prohibition of torture, but also to the definition of torture itself and its interpretation by different courts and jurisdictions over time. The basis of this difference of interpretation rests in the initial adoption, in 1975, of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>203</sup> which defined torture as:

“Article 1: 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

(835) 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”

(836) Due to its non-binding nature, this declaration proved largely ineffective and prompted the redaction of a convention to have an effective mechanism by which to prohibit torture. When the codification of this General Assembly declaration came to pass in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, it adopted instead:

“Article 1: 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

<sup>200</sup> American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, *supra* note 196 at §102 and §702, recognizing torture and other cruel, inhuman, or degrading treatment or punishment as part of customary law.

<sup>201</sup> In fact, no State allows torture in its domestic law. See Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 308.

<sup>202</sup> Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 856 (2003/2004), citing RODLEY, *supra* note 14 at 74.

<sup>203</sup> *Declaration against Torture*, *supra* note 197 at Article 1.

(837) In this new convention, many elements of what constitutes torture changed. It shifted from the requirements of the *Declaration against Torture* that it consists of “...(1) intentional infliction of severe pain or suffering, (2) for one of several illicit political purposes (3) by or at the instigation of government official...”<sup>204</sup> to the *Convention against Torture*’s requirements that it consists of “...(1) severe mental or physical pain or suffering must have been inflicted intentionally, (2) for one of a broad range of illicit political purposes, and (3) with a sufficient level of government involvement...”<sup>205</sup>.

(838) This enlarged the notion of what is torture by applying it to a larger scope of reasons of uses. Indeed, the notion of discrimination expanded the notion of torture to encompass torture committed for discrimination of any kind, which surely encompasses hate crimes as much as repression through terror by the use of torture “*pour encourager les autres*”, a reputedly effective and much schooled method of holding on to power by ‘Presidents for Life’ everywhere. Furthermore, the enlargement of its scope to include cases where consent or acquiescence is given by persons acting in an official capacity applies even to undercover operatives. This makes the case for a clearer understanding of the notion of torture. Yet, the excision of the second paragraph, defining torture as an aggravated and deliberated form of ill-treatments, has muddled the ground, permitting the argument that since the difference is not made expressly in the *Convention against Torture*, what constitutes torture and what are ill-treatments remain free of interpretation. This freedom is what permits proponents of a permissive definition to claim that the threshold of what constitutes torture is very high indeed and that what they do might be called ill-treatment but does not amount to torture.

(839) Interestingly, few have signalled this difference in definitions even though the Preamble of the *Convention against Torture* refers in its fifth consideration to the previous declaration, clearly intending to make it an interpretative instrument of the convention itself, in conjunction with Article 55 of the *U.N. Charter*, Article 7 of the *ICCPR* and Article 5 of the *Universal Declaration*. While this interpretative qualification of the *Declaration against Torture* might appear dangerously potent in feeding the argument that some vigorous methods that could be qualified as ill-treatment could in fact be deemed torture, this fear is misplaced. Rather, it is the opposite that should be eyed suspiciously. Not having a precise definition of torture permits proponents of a more muscular approach to interrogation to argue that what they do is not torture and therefore is not actionable under national laws or international law.

(840) But this proposition by the proponents of vigorous interrogation methods does not take into full account the notions of the *Convention against Torture*. What they hold as their means of circumvention of international norms and national legislation is that since ill-treatments are not torture, they can do it without fear of prosecution. This, in international law, is an incorrect interpretation of the applicable norms, as Article 16 of the *Convention against Torture* states:

“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or

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<sup>204</sup> Evelyn Mary Aswad, *Torture by Means of Rape*, (1996) 84 *Georgetown Law Journal* 1913 at 1922.

<sup>205</sup> *Id.* at 1923.

punishment or which relates to extradition or expulsion.”

(841) Under this definition, the instruction of law enforcement, military and public officials against ill-treatment<sup>206</sup>, the review of interrogation methods in order to prevent ill-treatment<sup>207</sup>, prompt and impartial investigations of complaints of ill-treatment<sup>208</sup> and the right of prisoners to complain and have their cases examined in earnest without fear of retribution<sup>209</sup> are all codified to include prevention and resolution of ill-treatment as obligations of States. It results from this that while one can use the definition of the previous declaration to interpret the notion of torture contained in the *Convention against Torture* as an aggravated and deliberate form of ill-treatment, the use of ill-treatment is no more condoned under international law than torture itself. Much as a square is also a rectangle, torture is also ill-treatment and both are illicit and prohibited under international law by treaty law.

(842) Some might want to argue that under customary law, ill-treatment has maybe not attained the status of *jus cogens* and could therefore be resorted to in some circumstances. It is true that the status of *jus cogens* can be argued against for ill-treatment. But it hardly matters when treaty law, which is explicit, edicts the legal norms applicable and the duties of the States party to the treaty. In the case of ill-treatment, the *Convention against Torture* does not provide for an obligation to prosecute perpetrators of ill-treatment, but it does provide for prevention in general, as applicable throughout the convention, and in particular to Articles 10, 11, 12 and 13 regarding prevention. Failing to take adequate measures to prevent ill-treatment from being committed is akin to failing in a State’s international obligation.

(843) Still, some States argue that since there is no obligation to prosecute for the commission of ill-treatment, this may remain the manner by which useful information might be extracted from suspects without fear of lawsuit. This approach would seem to circumvent the prohibition of torture and insure that prosecution is avoided for perpetrators. This is a dilution of the reach of the *Convention against Torture* and is based upon a logic that defeats the purpose of the convention, based on an oxymoron<sup>210</sup> that attempts to substitute the moral high ground that should be taken with a pragmatic and yet self-defeating approach to the extraction of information.

(844) Very sensibly, the Office of Legal Counsel based its interpretation of a very high threshold for torture on the two foremost cases concerning the matter: the *Case of Ireland v. the United Kingdom*<sup>211</sup> and *Public Committee Against Torture in Israel v. State of Israel*<sup>212</sup>. Both these cases appear on the surface to support the contention that measures short of torture could be acceptable in some situations and that the threshold of what constitutes torture is so high that the security services of States party to the *Convention against Torture* can apply a wide range of measures without having to fear breaching its international obligations.

<sup>206</sup> *Convention against Torture*, *supra* note 197 at Article 10.

<sup>207</sup> *Id.* at Article 11.

<sup>208</sup> *Id.* at Article 12.

<sup>209</sup> *Id.* at Article 13.

<sup>210</sup> “We had to burn the village in order to save it” and “In order to defeat your enemy, you must become like him”.

<sup>211</sup> *Case of Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 3 (1976) [hereinafter *Ireland*].

<sup>212</sup> H.C. 5100/94, *Public Committee Against Torture in Israel v. State of Israel* (official translation), available at <http://www.court.gov.il/mishpat/html/en/system/index.html> (last visited 9 February 2004). This case is the consolidation of numerous lawsuits in one to demand Israel to stop using questionable methods of interrogations. These cases are : H.C. 4054/95, *Association for Civil Rights in Israel v. Prime Minister of Israel*; H.C. 6536/95, *Abu Zaida v. General Security Services*; H.C. 5188/96, *al-Ka'ka v. General Security Services*; H.C. 7563/97, *Ghaneimat v. Minister of Defense*; H.C. 7628/97, *Qur'an v. Minister of Defense*; H.C. 1043/99, *Batav v. General Security Services*, P 15 (Sept. 6, 1999).

(845) The *Case of Ireland v. United Kingdom* supports the contention that torture is not the same as inhuman or degrading treatment, which is ill-treatment as understood under the *Convention against Torture*. By a vote of 13 to 4, the court decided that the practices known as ‘the five techniques’, at the heart of the applicant’s claims of breaches of Article 3 of the *European Convention*<sup>213</sup>, did not constitute torture as understood under the treaty. However, it did also find by a vote of 16 to 1 that the techniques under discussion were inhumane and degrading treatment<sup>214</sup>. On these findings, the court found unanimously that it: “cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 (art. 3) found by the Court and against those who condoned or tolerated such breaches”<sup>215</sup>.

(846) It is important to note that the court also did not find any evidence of body injuries; although loss of weight and acute psychiatric symptoms during the interrogation were recorded as medical evidence, while not excluded from post-interrogation findings, had not been observed<sup>216</sup>. Claims by detainees of having been beaten were not substantiated and therefore were rejected by the court.

(847) One could hastily conclude that the court, in this decision, agreed that it is only the fact that the ‘five techniques’ were used in combination that made them “inhumane and degrading” and that on their own these techniques did not reach that level. One could as hastily conclude from the absence of bodily injuries that physical pain inflicted in such a manner that it did not leave permanent marks or impair organs would not constitute torture. Finally, one could also infer from this decision that torture had to be at an extremely high threshold to be viewed as such. Furthermore, the conclusion reached is that since the court examined a case of “severe” and/or “substantial” beatings and that these were not deemed as torture under its test of “severity and intensity”, physical beatings in isolated incidents do not constitute torture. These are certainly the conclusions of the Office of Legal Counsel.

(848) All these conclusions are erroneous, anachronistic and ill-serving. They are erroneous because they interpret very restrictively and within a very limited selection of quotes from the case at hand. They are anachronistic because they base themselves on a case pre-dating the entrance into force of the *Convention against Torture* and instead choose the definition offered in the *Declaration against Torture*. And they are ill-serving because they rest upon a non-applicable definition of international law that has been supplanted by another through the most restrictive case available, distorting the state of international legal norms at this time.

(849) Concerning the interpretation that the five techniques, whether used together or separately, the Office of Legal Counsel fails to mention that on 8 February 1977, the day of the hearing of the case, the Attorney-General of the United Kingdom declared that Her Majesty’s Government would not in any circumstances be reintroducing the five techniques as an aid to interrogation<sup>217</sup>, clearly repudiating the

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<sup>213</sup> Ireland, *supra* note 211. The ‘five techniques’ are described at §96 of the Court’s decision as : (a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described (...) as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers"; (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

<sup>214</sup> *Id.* at §246.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at §104.

<sup>217</sup> Ireland, *supra* note 211 at §102 : “At the hearing before the Court on 8 February 1977, the United Kingdom Attorney-General

legality of these norms, whether individually or in combination.

(850) In the case of “massive”, “substantial” and “severe” beatings not being torture, the Office of Legal Counsel hastily jumps to the conclusion that these are not torture because in the case at hand, the court decided that it was not. But this was based on the simple definition of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* which states solely: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>218</sup> This definition was interpreted by the court with reference to the *Declaration against Torture*’s definition, which is far from the contemporary and applicable definition contained in the *Convention against Torture*<sup>219</sup>.

(851) It is certainly far from the wide-reaching elements examined here above, in particular as to the enlargement of the notion that severe physical or psychological pain and suffering be inflicted intentionally for a broad range of political purposes. In the case of Ireland, the political conflict between the Loyalists and the Republicans has been known for decades and the support of the Royal Ulster Constabulary to the ‘moderate’ Loyalists has never been hidden from the public. Then again, the relation between the court’s decision that the acts reproached to the security forces were not torture but inhumane and degrading treatment did not refer to the beatings, but to the ‘five techniques’ under discussion in the case. Meddling the conclusion of the court with another point of litigation is without object to the interpretation of the case, despite the views of the Office of the Legal Counsel.

(852) Moreover, the Office of Legal Counsel once more shows its selective reading skills by omitting also that these “massive”, “substantial” and “severe” beatings were both the object of denials by fourteen members of the security forces accused of witnessing or perpetrating them (if not believed by the Commission) and that the Commission believed that certain assertions of the claimants were “exaggerated, invented or improbable”<sup>220</sup>. The conclusion from this is that the beatings might have occurred or not, but that if they did, they certainly were not of the intensity alleged by the claimants.

(853) There is one injury sustained by one of the claimants in the case, designated T10, who did have an eardrum perforated during his detention that sustains the contention of the *Standard of Conduct Memorandum* that the court view some physical maltreatment as failing to achieve the status of torture, based on the distinction that the *European Convention* draws between torture, cruel, inhuman or degrading treatment or punishment on the basis of an “intensity/cruelty” distinction<sup>221</sup>.

(854) Of all the injuries sustained and detailed in the case, this is the sole one concerning a body organ that has been impaired, and yet the court concluded that this did not amount to torture as understood<sup>222</sup>. On this point, the Office of Legal Counsel would certainly seem to have made its case, if one did not take into account that since the *Convention against Torture* the definition applicable has been enlarged and case law has also re-interpreted the definition of torture with its legal normative evolution. But the applicable definition has been enlarged, and case law has not remained static since.

(855) The *Standard of Conduct Memorandum* foresees this and attempts to base its finding on a more made the following declaration: "The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 (art. 3) of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation."

<sup>218</sup> *European Convention on the Protection of Human Rights and Fundamental Freedoms*, *supra* note 197 at Article 3.

<sup>219</sup> *Convention against Torture*, *supra* note 197 at Article 1.

<sup>220</sup> Ireland, *supra* note 211 at §111.

<sup>221</sup> *Standard of Conduct Memorandum*, *supra* note 186 at 29.

<sup>222</sup> Ireland, *supra* note 211 at §174.

recent case, that of *Public Committee Against Torture in Israel v. State of Israel*. Based on the four methods<sup>223</sup> presented in that case, the Office of Legal Counsel notes that “while the Israeli Supreme Court concluded that these acts amounted to cruel and inhumane treatment, the court did not expressly find that they amounted to torture”<sup>224</sup>. While this is in essence true, it is not the whole truth as can be read from the case.

(856) In fact, the Supreme Court of Israel, sitting as the High Court of Justice, found nowhere that these acts amounted to cruel and inhumane treatment. Only once did it make reference to the findings of the European Court of Justice in *Ireland v. United Kingdom*, when referring to the use of a “similar - though not identical method” as “inhumane and degrading treatment”<sup>225</sup>. However, nowhere did it define the techniques used by the General Security Services (GSS) of Israel as either torture or inhumane and degrading treatment, because it dealt solely and restrictively with the question of whether the Government of Israel or the Head of the GSS had the authority “to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself.”<sup>226</sup> As important as this is, the Office of Legal Counsel also fails to mention that while the methods used were not described as torture or as inhumane and degrading treatment, the GSS had declared that the use of physical violence and the method of interrogation known as the ‘Shabach’ and physical violence had been stopped or was unused at the stage of interrogation for the separate investigations under discussion prior to the case being heard<sup>227</sup>, although a declaration that these methods would not be used again was not made, as was the done in the case of *Ireland*.

(857) As such, the court did not even address the question of whether the methods used were torture, or not. Had it done so, the Supreme Court of Israel would have had to consider not the *European Convention*, which is not applicable to it, but the notions contained in the *Convention Against Torture*. It

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<sup>223</sup> *Public Committee Against Torture in Israel v. State of Israel*, *supra* note 212 at §10, 11, 12 and 13 : “Waiting in the “Shabach” Position : (...) a suspect investigated under the “Shabach” position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation; The “Frog Crouch”: (...) the suspect was interrogated in a “frog crouch” position. This refers to consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals. The state did not deny the use of this method, and the Court issued an order nisi in the petition. Prior to hearing the petition, however, this interrogation practice ceased; Excessively Tight Handcuffs : (...) petitioners complained of excessively tight hand or leg cuffs. They contended that this practice results in serious injuries to the suspect’s hands, arms and feet, due to the length of the interrogations; and Sleep Deprivation: (...) petitioners complained of being deprived of sleep as a result of being tied in the “Shabach” position, while subject to the playing of loud music, or of being subjected to intense non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion.”

<sup>224</sup> *Standard of Conduct Memorandum*, *supra* note 186 at 30.

<sup>225</sup> *Public Committee Against Torture in Israel v. State of Israel*, *supra* note 212 at §30 : “To the above, we must add that the “Shabach” position employs all the above methods simultaneously. This combination gives rise to pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method is not authorized by the powers of interrogation. It is an unacceptable method. (...) A similar -though not identical -combination of interrogation methods were discussed in the case of *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 3 (1976). In that case, the Court examined five interrogation methods used by England to investigate detainees suspected of terrorist activities in Northern Ireland. The methods included protracted standing against a wall on the tip of one's toes, covering of the suspect's head throughout the detention (except during the actual interrogation), exposing the suspect to very loud noise for a prolonged period of time, and deprivation of sleep, food and drink. The Court held that these methods did not constitute “torture.” However, since they subjected the suspect to “inhuman and degrading” treatment, they were nonetheless prohibited.”

<sup>226</sup> *Ibid.* at § 38.

<sup>227</sup> *Id.*, §6 and 7.



certainly would have considered the notions and the methods used by the European Court of Human Rights, but its examination would not have been limited to *Ireland*, since in the more than twenty years time span between that decision and that of the *Public Committee Against Torture in Israel v. State of Israel*, much case law has been produced in reference to the notion of torture versus ill-treatment. And it would most probably have had to refer also to the case law and advisory opinion of the Inter-American Court of Human Rights, which has also been rich in defining and refining its approach towards torture. The difference, of course, is that the Inter-American Court of Human Rights is based upon the *American Convention on Human Rights* and that this treaty contains both a negative and positive edict at Article 5. The positive one is at § 5(1), where “persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”<sup>228</sup>, while the negative one is contained in § 5(2), where “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment”<sup>229</sup>.

(858) The lasting effect of the *Ireland* decision has certainly proved enduring, as no determination of an act of torture has been made by the European Court of Human Rights between 1978 and 1996. Many a determination relating to inhumane or degrading treatment has been made, mostly of the degrading kind. But no determination of an act of torture took place during that time under the guidance of the Council of Europe’s own *European Convention on Torture*, and this despite considerations from many claimants in numerous countries. Samples of these cases demonstrate that the court has been most reticent to attach what it calls the “special stigma to deliberate inhumane treatments causing very serious and cruel suffering”<sup>230</sup>. However, it must be emphasized that this reticence of the court existed prior to the case of *Ireland*, as the European Commission of Human Rights has always restricted the admissibility of the court to claimants on the basis of the exhaustion of all prior recourses under the national legislation<sup>231</sup>. During that time, the court has had to concentrate on the legacy of the *Ireland* case in conjunction with offences relating to police actions, detention or corporal punishment in schools.

(859) In the matter of corporal punishment, never was it alleged that the punishments imposed amounted to torture. The only questions at hand were whether caning the buttocks with three strokes<sup>232</sup>, the hitting of the hands with a leather strap called a ‘tawse’<sup>233</sup>, the hitting of the buttocks through gym shorts with a rubber-soled gym shoe<sup>234</sup> and the caning of the buttocks four times with a cane through the trousers<sup>235</sup>, were falling within the purview of ‘degrading’ treatments. In the three first cases, the court concluded that corporal punishment in school was an assault on the dignity and physical integrity of an individual, especially in relation to the aggravating factor of the young age of the recipients of the disciplinary measures, but that the force used had been moderate and that the feelings of humiliation were not enough to constitute degrading treatment<sup>236</sup>. However, the court disagreed in the *Case of Y. v. The United Kingdom*, where the pupil disciplined was examined by the family doctor on the day of the punishment and it was found that the pupil had “four wheals across both buttocks, each weal

<sup>228</sup> *American Convention on Human Rights*, *supra* note 197 at article 5(1).

<sup>229</sup> *Id.*

<sup>230</sup> *Ireland*, *supra* note 211 at §167.

<sup>231</sup> *G. Donnelly and Others v. the United Kingdom*, App. No. 5577-5583/72, Eur. Comm’n H.R., Dec. & Rep. 4, 79 (1975) [hereinafter *Donnelly*]. This restrictive approach remains sensible due to the presumably high volume of case that would be directed at the court would this restriction be liberalised.

<sup>232</sup> *Case of Tyrer v. United Kingdom*, 26 Eur. Ct. H.R., (ser. A), at 14 (1978), §10: “where the birching of the caning had “raised (...) but not cut, the applicant’s skin and he was sore for about a week and a half afterward””.

<sup>233</sup> *Case of Campbell and Cosans v. The United Kingdom*, 48 Eur. Ct. H.R., (ser. A), at 12 (1982), § 26.

<sup>234</sup> *Case of Costello-Roberts v. The United Kingdom*, 247 Eur. Ct. H.R., (ser. A), at 52 (1993), §8.

<sup>235</sup> *Case of Y. v. The United Kingdom*, 247 Eur. Ct. H. R., (ser. A) at 7 (1992), §10.

<sup>236</sup> *Case of Campbell and Cosans v. The United Kingdom*, *supra* note 233 at §30.

approximately 15cm in length and swelling of both buttocks”<sup>237</sup>. Since both the police and the lower courts refused to investigate and pursue the matter, the Commission investigated and referred the case to the European court, which found “significant physical injury and humiliation”, to such a level that it attained that of degrading treatment or punishment in contravention to Article 3 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*<sup>238</sup>.

(860) In the matter of detention, the issues at hand were those of the conditions of detention, in particular, the issue of solitary confinement. This method, being widely used as a preventive tool and a punishment in European prisons, was not long in coming to the court. A case referring to a solitary confinement of seventeen months was deemed as not being an inhumane treatment because the detainees could listen to the radio, watch television, exercise one hour per day, obtain books from the prison library, and have personal contacts with the guards and access to controlled family visits<sup>239</sup>. Also, it is important to specify that the detainees had access to legal counsel and to medical care at all times on request. The issue of medical care has been determined as very central to the determination of whether ill-treatment is imposed upon detainees<sup>240</sup>.

(861) But all these factors could hardly be made to reach a threshold of torture. Only police actions seem to have presented the risk of torture in Europe during the period of 1978-1996 and none was judged as attaining this aggravated and deliberate form of inhumane treatment. Faithful to its reticence of branding a High Contracting Party of torture in a manner that would profit a political opponent, the Commission refused to deem admissible as torture cases where physical violence had been alleged<sup>241</sup>, and when it deemed them admissible, the court preferred instead to statute on the fact that a violation to Article 3 of the *European Convention* had indeed happened, but without requiring to characterize it as torture or degrading treatment. Such was the angle of the court in the *Case of Tomasi v. France*<sup>242</sup>.

(862) In this case, a French national of Corsica was interrogated with physical violence at a French police station. The court stated that while the injuries of Mr. Tomasi were slight, the examination of the medical document provided to the court offered enough proof to determine that a violation of Article 3 had occurred<sup>243</sup>. Similar determinations of violations on *prima facie* evidence of degrading treatment had also been rendered in cases of police arrests and detentions<sup>244</sup>.

(863) The breakthrough on the determination of what constitutes torture came finally in the *Case of Aksov v. Turkey*<sup>245</sup>. In this case, the Commission made the determination that the accused had been tortured even prior to the case’s being communicated to the court, and the court itself upheld this

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<sup>237</sup> Opinion of the Commission, *ibid.*, Annex, 10 at 14, §45-46.

<sup>238</sup> *Ibid.* Originally, complaints were both in the name of the mother and of Y. The Commission deemed the complaint of the mother inadmissible while that of Y. was referred to the court. The case was never decided upon as the Government of the United Kingdom reached an out of court settlement with the plaintiff, without admission of wrongdoing, and therefore the case was struck out of the list of the list (at §17).

<sup>239</sup> *R. v. Denmark*, App. No. 10263/83, 41 Eur. Comm’n H.R. Dec. & Rep. 149 (1985) applying the reasoning of *G. Ensslin, A. Bader and J. Raspe v. The Federal Republic of Germany*, App. Nos. 7572/76 and 7587/76 (joined), 14 Eur. Comm’n H.R. Dec. & Rep. 64, 109-110 (1978).

<sup>240</sup> *R., S., A. and C. v. Portugal*, App. No. 9911/82, 36 Eur. Comm’n H.R. Dec. & Rep. 200, 205-207 (1984), on the admissibility. <sup>241</sup> Donnelly, *supra* note 231.

<sup>242</sup> *Case of Tomasi v. France*, 247 Eur. Ct. H.R. (ser. A) at 42 (1992). [hereinafter *Tomasi*].

<sup>243</sup> *Id.*

<sup>244</sup> *Case of Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) at 489 (1995) and in *Raninen v. Finland*, 152 Eur.Ct. H.R. (ser. A) at 771 (1996).

<sup>245</sup> *Case of Aksov v. Turkey*, 100 Eur. Ct. H.R. (ser. A) at 606 (1996). [hereinafter *Aksov*]

assessment<sup>246</sup>. The applicant claimed that he had been ill-treated in many different ways<sup>247</sup>. Of these ill-treatments, specifically the one called the ‘Palestinian hanging’ resulted in a subsequent paralysis of both arms for a period of about two weeks. The court neither minced words nor hid behind juridical language to state clearly that torture had occurred, not merely ill-treatment<sup>248</sup>. It further made the specification that this decision was based precisely on the distinction between torture and ill-treatment, with the one being attached to a stigma of deliberateness and aggravation<sup>249</sup>.

(864) Another determination of torture was made in the case of rape and ill-treatment in the case of *Case of Aydin v. Turkey*<sup>250</sup>. The court determined that rape by an official of the State was in itself grave and abhorrent, and that rape left deep psychological scars on the victim<sup>251</sup>. The court went even further in specifying that it would have reached the same conclusion on each aspect of the violence endured by the applicant, whether on physical or psychological grounds<sup>252</sup>. These two cases represent in themselves a very important departure from *Ireland*. But it is further reinforced by yet another, that of *Selmouni v. France*<sup>253</sup>.

(865) Basing itself on its own precedents in *Aksov* and *Aydin*, the court again determined that the alleged ill-treatment under examination in the case was indeed proven and that it amounted to torture<sup>254</sup>. Here, the facts of the case spoke of blows to the body, sexual humiliation, and threats of bodily harm with

<sup>246</sup> *Id.* at §58 and 61, the medical report, as in *Tomasi*, being considered proof enough of ill-treatment.

<sup>247</sup> *Id.* at §60 : “interrogation, which caused disorientation; to have been suspended from his arms, which were tied together behind his back (“Palestinian hanging”); to have been given electric shocks, which were exacerbated by throwing water over him; and to have been subjected to beatings, slapping and verbal abuse. He referred to medical evidence from Dicle University Medical Faculty which showed that he was suffering from a bilateral brachial plexus injury at the time of his admission to hospital (see paragraph 19 above). This injury was consistent with Palestinian hanging. He submitted that the treatment complained of was sufficiently severe as to amount to torture; it was inflicted with the purpose of inducing him to admit that he knew the man who had identified him. In addition, he contended that the conditions in which he was detained (see paragraph 13 above) and the constant fear of torture which he suffered while in custody amounted to inhuman treatment.”

<sup>248</sup> *Id.* at §64 : “The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture. In view of the gravity of this conclusion, it is not necessary for the Court to examine the applicant’s complaints of other forms of ill-treatment.”

<sup>249</sup> *Id.* at §63.

<sup>250</sup> *Case of Aydin v. Turkey*, 57 Eur. Ct. H.R. (ser. A) at 676 (1996). [hereinafter *Aydin*]. The applicant was a 17 years old girl arrested from her village and brought to the gendarmerie headquarters ten kilometers away and then : “was raped by a person whose identity has still to be determined. (...) [and] was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.” (at §83 and 84).

<sup>251</sup> *Id.* at §84: “Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”

<sup>252</sup> *Id.* at §86: “Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. *Indeed the Court would have reached this conclusion on either of these grounds taken separately.*” [My emphasis.]

<sup>253</sup> *Case of Selmouni v. France*, Eur. Ct. H.R., App. No. 25803/94 (1999) [hereinafter *Selmouni*]

<sup>254</sup> *Id.* at §106.

a blowtorch and a syringe<sup>255</sup>. But the court did not limit itself to characterizing the alleged acts. It went further in expressly mentioning that the severity test previously held in *Ireland* was to be defined within the meaning of Article 1 of the *United Nations Convention against Torture*, and not solely on the basis of the *European Convention*<sup>256</sup>.

(866) Not content with this departure, the court further stated that the *European Convention* was a living instrument and that certain acts classified previously as inhumane or degrading could be classified differently in the future. In effect, the court said that the test of severity of *Ireland* must now be adapted to contemporary understanding and evolution of the law<sup>257</sup>.

(867) This judgment of the European Court of Human Rights certainly flies in the face of the argument presented by the Office of the Legal Counsel, which bases itself on opinion favourable to its argument in jurisprudence which is a quarter of a century old, but failing to mention the evolution of the law in the last decade. While there can be no advocating the evolution of torture as a defined standard prohibiting the argument of the Office of Legal Counsel in U.S. law, neither can it be said that the status of torture has remained static in international law since *Ireland*. Today's threshold of what constitutes torture is certainly much lower than what is proposed in the *Standard of Conduct Memorandum* and remains to be interpreted on the merits and circumstances of each and every case. The result from this is that the interpretation of what torture consists of must be adapted to the times, and certainly the ceiling of tolerated actions has been lowered substantially since the first determination of *Ireland*.

(868) This review of the determination of torture can only lead one to ask a fundamental question: are there any occasions when the prohibition of torture is not absolute? Are there any occasions when one should deem an emergency so important, or a situation so dire, that usual decency and values must be pitted against the inner beast, forcing one to adopt measures that he or she usually would find repulsive and abhorrent to use? The answer is no, none whatsoever.

(869) Some propose that derogations might be possible when the life of the nations is under imminent threat, and self-defence could be invoked during an emergency in order to enact acts of physical and psychological violence to obtain information and therefore save lives. This is, in essence, the proposition

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<sup>255</sup> *Id.* at §102 and 103: "(...) a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report of 7 December 1991 (see paragraphs 18-20 above) that the marks of the violence Mr Selmouni had endured covered almost all of his body. 103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe (see paragraph 24 above). Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition."

<sup>256</sup> *Id.* at §100: "it remains to be established in the instant case whether the "pain or suffering" inflicted on Mr Selmouni can be defined as "severe" within the meaning of Article 1 of the United Nations Convention. The Court considers that this "severity" is, like the "minimum severity" required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."

<sup>257</sup> *Id.* at §101: "the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, the following judgments: *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, pp. 15-16, §31; *Soering* cited above, p. 40, § 102; and *Loizidou v. Turkey*, 23 March 1995, Series A no. 310, pp. 26-27, §71), the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."

brought forth by the General Security Services of Israel in the *Public Committee Against Torture in Israel v Israel* and it was retaken for its own ends by the Office of Legal Counsel in its *Memorandum*. This theory is inaccurate, as while the rights proclaimed in the *Universal Declaration* could be argued as non-binding, those contained in the ICCPR at Article 7 regarding torture and cruel, inhuman or degrading treatment are non-derogable, as is clearly written in § 4(2) of this treaty when it edicts: “No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision”<sup>258</sup>. The notions contained in the regional instruments, with the exception of the *African Convention*, are as stringent<sup>259</sup>. At any rate, the notions contained in the ICCPR are sufficient in themselves to insure that even in case of tensions, troubles, emergencies or war, there can be no use of torture. But, even if they were not, the *Convention against Torture* contains the absolute character of the prohibition in all circumstances, stipulating expressly that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>260</sup>. It cannot be clearer: there are no circumstances that can justify torture.

(870) As a result, there cannot be any doubt that the prohibition of torture is absolutely applicable in times of war and of peace and that of public emergencies. This, however, may not necessarily mean that measures of a physical or psychological violence short of torture are not admissible in such periods. Some have made much of the citation by the Supreme Court of Israel of Pr. Dershowitz’s proposal that measures such as the use of a syringe to break the skin under the fingernails might be a measure that imposes pain but is under the threshold of what would constitute torture<sup>261</sup>. What many do not seem to make much of is the fact that the court, while grudgingly granting the possibility of a ‘necessity’ defence in the case of ‘ticking bombs’ – that is, cases where the immediate obtaining of information as to the location of a bomb could permit the saving of lives and therefore permit the use of certain physical or psychological pressures – sees this defence of necessity as an after-the-fact affair that must then be proven if a security official is indicted. The court reminds the parties that the issue in its case is whether the Government of Israel or the Head of the General Security Services of Israel had the authority to determine guidelines for such situations, a question answered it in the negative<sup>262</sup>.

(871) Furthermore, the court specifies that the necessity defence may prevent one to escape prosecution and liability, but does not add any other normative value. In plain terms, it is not because the agent committing ill-treatment or torture escapes prosecution that the acts committed do not infringe on human rights. Therefore, the necessity defence does not permit anyone to justify torture in international law – if this were indeed a concept of international law in the first place<sup>263</sup>.

(872) Much in the same manner, proponents of the possibility of derogating from the prohibition of

<sup>258</sup> ICCPR, *supra* note 194 at §4(2).

<sup>259</sup> *American Convention on Human Rights*, *supra* note 197 at Article 30: “Scope of Restrictions The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”, where both the positive and negative obligations are non-derogable, and *European Convention on the Protection of Human Rights and Fundamental Freedoms*, *supra* note 11 at §15 “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”

<sup>260</sup> *Convention against Torture*, *supra* note 197 at § 2(2).

<sup>261</sup> *Public Committee Against Torture in Israel v. State of Israel*, *supra* note 212 at § 34.

<sup>262</sup> *Id.* at § 36.

<sup>263</sup> *Id.*

torture have argued that self-defence could permit such derogations. This corrupts the notions of self-defence as understood in international law, which can only occur after an attack or, in the case of anticipatory self-defence, in a set of circumstances that as yet to be demonstrated as existing within a legal norm applicable and recognized in international law<sup>264</sup>. The notion of self-defence does not permit one to take actions unless an attack has occurred or is so imminent that it cannot be denied, and alternative methods are not available. This is not the case during an interrogation, where many methods are available and time is available to extract the information. Contrary to the necessity defence, this defence would create a normative value prior to the fact since it is the basis for justifying the actions to be committed. However, no case is as yet reported of the conditions for anticipatory self-defence to be permitted in line with its stringent requirements.

(873) **Conclusions.** Those supporting the use of physical or psychological pressures short of, or amounting to, torture, in order to guarantee the security of the State, begin their reasoning from the premise that persons of evil intention desire to destroy civil society and democratic values because their own sense of values is warped. As a result, these persons do not deserve the respect of all their human rights, if any at all. They presume that their ‘evilness’ is ingrained and incurable and due solely to their own circumstances. But they fail to understand that each action denying the humanity of the other denies in fact one’s own entitlement to human rights. This unravels the very civil society they purport to protect and undermines the very democratic values they swear to uphold.

(874) Using the very source of their misguided argument, the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. State of Israel*, let us repeat what the most experienced court pronounced in confronting terrorism edicts as final words to its judgment :

“This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”<sup>265</sup>

(875) The Supreme Court of Israel understands that it is only by applying our ideals that we preserve them and that double standards only serve to destroy the very object of our preservation attempts.

(876) The prohibition against torture has been made absolute in universal and regional instruments. It is further supported as prohibited in all circumstances in both treaty law and customary law. There is no circumventing or denying this legal norm. It has acquired the status of *jus cogens*.

(877) The only means available to deny the happenstance of torture is to claim that the physical or psychological pressures exacted upon a person do not amount to the severity and cruelty test required by the general understanding of what torture consists of. However, as the cases of *Aksov*, *Aydin* and *Selmouni* have demonstrated, the interpretation of what amounts to torture must be made in accordance with the times. And the contemporary era we live in has lowered the threshold from what would have been considered “ill-treatment” twenty-five years ago to “torture” today. And selective reading of treaties and

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<sup>264</sup> Louis-Philippe F. Rouillard, *The Caroline Case: Anticipatory Self-Defense in Contemporary International Law*, in Péter Kovács (ed.), *History in International Law*, Tome II, Budapest, Bibor Kiadó, 129-147 (2004), reprinted as Louis-Philippe F. Rouillard, *The Caroline Case: Anticipatory Self-Defense in Contemporary International Law*, (2004) 1 *Miskolc Journal of International Law* 104-120 available at <http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm>.

<sup>265</sup> *Public Committee Against Torture in Israel v State of Israel*, *supra* note 212 at §40.

case law by the Office of Legal Counsel does not change these facts.

(878) As we have seen, you cannot use torture under any circumstances and the use of your fist, a kick and other misdemeanours can be constructed as either inhumane treatment or even torture. Torture is prohibited as much during an international armed conflict as during a non international armed conflict as well as during domestic operations aimed at rooting out terrorists or fighting in a counter-insurgency. It is a war crime. Therefore, be sure that you treat all and any prisoner with due respect and give them a humane treatment at all times, regardless of the individual concerned or the circumstances.

(879) Nonetheless, you will remark that while you are urged to respect the LOAC and the prohibition against torture, you might be tempted to argue that rebels in conflicts such as Iraq and Afghanistan do not abide by these humane standards and therefore are not entitled to receive a fair treatment. That is not acceptable and not an excuse under international law.

(880) Furthermore, the real problems of armed groups are not necessarily the will to abide by the LOAC. It is more a question of resources. Such groups generally do not even possess the infrastructure to capture, detain, and care for enemy PWs. How can they find a safe haven to do this when their very survival depends on the secrecy of their location? How do they feed captives when they have barely enough for themselves?

(881) Prisoner exchanges or releases can take place, but these are risky for such groups. This is why, during the initial period of activities of a dissenting force, there are often massacres of PWs, and the conflict soon looks like total war. It is essentially a question of logistics: not knowing what to do since they have not anticipated the problem, and not knowing all their obligations under the LOAC, they eliminate the problem by eliminating PWs.

## CONCLUSION

(882) For dissenting forces, the respect of the LOAC and the respect of humane treatment are very efficient tools of propaganda for enlisting popular support and encouraging desertion or surrender of the enemy's forces, thereby favouring recognition of the dissenting forces by international organizations and states. Voluntary acceptance and application of the LOAC, despite or in agreement with the power they are fighting, still remains one of the best guarantees of humane treatment for themselves if captured, and of success in the long term. One must keep in mind that by nature NIACs often continue for decades.

(883) NIACs are often described as "little wars," and may represent only part of an armed conflict before it evolves. No armed group can hope to take power through small-war tactics. If they are to succeed, progressively they will have to adopt more and more traditional military structure and fight as a regular army. This is why dissenting forces must establish their forces' respect of the LOAC as soon as possible to keep and enhance their control of the actions of their members.

(884) Torture is prohibited at all times and must be understood in an encompassing manner. This means that acts that were deemed acceptable in the 1960s and 1970s are not acceptable today. Therefore, abstain at all times to impose any treatment on a prisoner that can be construed as inhumane treatment or torture as both are violations of the LOAC and therefore war crimes.

SUMMARY OF TERMS

**Guerrilla movements:** small wars made up of raids or a continual series of raids and sporadic attacks.

**Reprisals:** violation of the LOAC in response to a previous violation of the LOAC, in order to force the respect of the LOAC

**NIAC:** non-international armed conflict involving no foreign belligerent.

**Torture:** the intentional infliction of grave pain and suffering, whether physical or mental, in order to gain information, to punish persons for their actions or that of others, or to intimidate or pressure a third party



## CHAPTER 11

### THE NEW LAWS OF ARMED CONFLICTS

#### INTRODUCTION

The following Chapter is a short presentation of the juridical developments that have emerged since the end of the Cold War. The latest treaty on anti-personnel mines, the 1997 Ottawa Treaty, signals a shift in attitudes and political will to further reduce the collateral damages imposed by certain weapons. The notion of unilateral armed intervention in the internal affairs of states has also taken on a new life of its own since 1993. We will now examine these new developments.

#### CONTENT

- a. the rules applicable to mines;
- b. the need for more precise rules with regards to armed conflicts in space or using space
- c. the new visions regarding the right of intervention that have developed since the Gulf War; and
- d. the enlargement of human rights protections in armed conflicts and in situations short of armed conflicts, termed “situations of exceptions”.

#### OPTIONAL READING

- Meron, T., « A declaration of Humanitarian Standards », (1991) 85 A.J.I.L. 375.
- Meron, T., « Combatting Lawlessness in Gray Zone Conflicts Through Humanitarian Minimal Standards », (1995) 85 A.J.I.L. 215.

#### A. EXPLAIN THE RULES APPLICABLE TO MINES

(885) Since the beginning of this course, we have often alluded to the situation concerning the use of mines in IACs and NIACs, always by referring to a lesson to follow. In this Chapter, we will discuss the LOAC relative to the use of these weapons, which can be as great a danger to their users as to the enemy.

(886) The debate on the use of mines took an unexpected turn in summer 1997 with the tragic death of Princess Diana, one of the most important and leading figures in the fight to ban landmines. Her death created a movement to honour her memory. Her family and friends as well as workers from these movements have capitalized on sympathetic public opinion to promote the prohibition of anti-personnel mines. There is no doubt of the sincerity of the advocates of the 1997 Ottawa Treaty, officially titled the *1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction*; however, it is less than certain that the treaty would have become reality without the sudden loss of the much admired and loved Princess.

(887) By January 1, 1999, more than 63 states had ratified the treaty. As a result, and according to the terms of art. 17(1)/*1997 Ottawa Treaty*, the treaty came into force on March 1, 1999. But before exploring the consequences of this treaty further, it is fundamental to understand the legal regime of the LOAC that permitted, and still permits, the right to use landmines for non-signatory states of the treaty.

(888) First of all, what is a mine? Already by the fifteenth century, human “genius” had realized that gunpowder could be used to propel projectiles, but also that it could be used to breach fortifications. The

problem was not the weapon: it was the vector -- that is, how to get close enough to the barricade, wall, or palisade and at the same time stock enough powder to blow up the obstacle.

(889) In the end, the armies of the time employed civilian manpower to “dig the trench” to approach the walls under a relative degree of cover in order to minimize casualties. Little by little, these trenches reached their objectives and permitted the stocking of powder in enough quantity to breach the structural integrity of the obstacle. Often, the people employed to do this thankless and very dangerous job were local miners who were the first to excavate the ground and store the powder. They were called “pioneers.”

(890) Their example was followed through the centuries, but it was during the First World War that it was used on a grand scale. Pioneers dug for considerable lengths under the enemy’s trench system, which was then blown up from beneath by the use of enormous quantities of explosives. Combat pioneers had this task: they were “mining” the ground.

(891) Today, this “proud” tradition of being able to kill and maim from beneath, because we cannot kill enough from on top, continues through the use of camouflaged or buried devices that explode under the effects of pressure, proximity, angle, or distance control. This is called continuity in change.

(892) The moral debate apart, the right to use mines has always been the right of the belligerents. However, that right was modified in 1996 with the adoption of *Protocol II on the Prohibition or Restriction of the Use of Mines, Booby-Traps and Other Devices*, called afterward *Protocol II of the April 10, 1981 UN Convention*.

(893) As specified in art. 1(2) of *Protocol II*, the prohibitions and restrictions imposed are applicable both in times of IAC and of NIAC. Art. 3 lists a series of restrictions. Art. 3(2) is of great interest since it states that the party that lays mines is responsible for their being deactivated and cleared, following the categories of art. 10, at the cessation of hostilities.

(894) The use of mines under art. 3 is permitted, but it is forbidden to use them jointly with magnetic mechanisms of activation against mine detectors usually employed in mine clearing operations (art. 3(5) *Protocol II*) or with anti-tampering mechanisms, by which a mine explodes if inclined at greater than a certain angle (art. 3(6) *Protocol II*).

(895) Also, their uses as anti-guerrilla weapons and reprisal tools are strictly forbidden by art. 3(7) of PA 2. This includes the indiscriminate use of mines if they are not employed in the aim of contributing efficiently to military operations, if they are not specifically aimed at a military objective, or if the expected civilian losses are disproportionate to the military advantage sought (art. 8 of the protocol).

(896) As for anti-personnel mines, excluding those laid by remote systems, art. 5(2) *Protocol II* prohibits their use if they are not equipped with an auto-deactivation or auto-destruction device, unless they are:

- a. within a militarily patrolled perimeter and clearly marked to prevent the intrusion of civilians; and
- b. deactivated and cleared once the location is abandoned.

(897) Regardless, art. 5(3) *Protocol II* absolves the belligerent from his responsibility if he loses control of the mined zone due to military actions. Art. 5(4) then transfers this responsibility to the force that takes

control of the said zone.

(898) Another exclusion is the obligation to use auto-destruction and auto-deactivation systems. Art. 5(7) Protocol II absolves from this responsibility the state that uses mines with a horizontal arc of projection of fragments of less than 90 degrees for a period of less than 72 hours if:

- a. they are placed in a location immediately adjacent to the unit that placed them; and
- b. they are within a perimeter militarily patrolled to prevent civilian incursions.

(899) With the Ottawa Treaty, this situation changes radically. Art. 1 prohibits in all circumstances:

- a. the use of anti-personnel mines;
- b. the production, acquisition, stockpiling, conservation, transfer, whether direct or indirect, of anti-personnel mines
- c. the assistance or encouragement to anyone to engage in the activities itemized above that are prohibited by this convention.

(900) The only exception to this is contained in art. 3 which states that the conservation and transfer of anti-personnel mines is permitted for the development of detection, mine clearing, or mine destruction techniques. However, this section also specifies that the number of mines thus conserved must be the absolute minimum. In Canada, the law enacting the Ottawa Treaty is the *1997 Anti-Personnel Mines Convention Implementation Act*.

## **B. THE NEED FOR MORE PRECISE RULES WITH REGARDS TO ARMED CONFLICTS IN SPACE OR USING SPACE**

(901) Human colonization of space is a result of the arms race of the Cold War that followed the Second World War and a direct descendant of the V-1 and V-2 rockets developed by German scientists under the Nazi regime.

(902) The first extra-atmospheric excursion were that of Sputnik 1 on 4 October 1957, which broadcasted on 20 and 40 MHz, followed rapidly by that of the dog Laika on board Sputnik-2 on 3 November 1957. These achievements created a psychosis in the collective consciousness of Americans, who saw in it a Soviet nuclear threat. As a result the United States decided that it was in the national interest to finance space programs so as not to be left behind in the vector development race.

(903) Indeed, the capacity to put weapons into positions in the orbit of the earth was a threat that could not be ignored. In the Cold War context, the psychosis was such a threat in itself that authorities had to calm the mood in the East as well as in the West. This is why an international co-operation effort was created in the *1967 Space Treaty*<sup>266</sup>. Its most important section was art. IV, which states:

*“Article IV States party to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The moon and*

<sup>266</sup> *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, London, 27 January 1967 at <http://www.oosa.unvienna.org/treat/ost/outersptxt.htm>

*other celestial bodies shall be used by all States party to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.”*

(904) The problem is that we cannot predict all means that will be available to us in the future for the use of space for peaceful ends. The use of ion reactors, the development of laser, and over the long term the exploration and colonization are still in their infancy. The LOAC applicable to space remain.

(905) The Department of National Defence (DND) published its space policy on September 14, 1998, under the title *Department of National Defence Space Policy*. It recognizes that the technological development and employment of space-based weapons have potential revolutionary implications for the organization of the Canadian defence system and that Canada has an interest in defending its spatial resources and those of its allies, by ensuring the control of any object flying over Canadian territory and Canadian zones of interests. This policy is contained in a 16-page document. DND also publishes the CF doctrine manual over the Internet. Chapter 26 of this manual explains the Canadian doctrine in relation to space operations.

(906) For some, these observations of the DND may seem to be obsolete due to the diminishing of the Soviet threat, but adopting this attitude is reactionary and dangerous, not proactive, since the development of the spatial field is in constant growth, despite the United States' setbacks following the explosion of the Challenger shuttle in 1987. More and more, interest in space exploration is being renewed. But, as in all places where many humans live together, the scale of conflicts continues to escalate as well. How much time until the next “hot war” during a time of “relative peace”? No one knows, but human nature being what it is, chances are: quite soon.

(907) As technologies develop and humans start to reach deeper in the cosmos, a pressing need for regulating the use of space in the case of armed conflict also develops. The last space law initiative dates from 1996 with the *Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interests of all States, Taking into Particular Account the Needs of Developing Countries*. This is only a call for international co-operation, not further rules of LOAC.

### C. THE NEW VISIONS REGARDING THE RIGHT OF INTERVENTION DEVELOPED SINCE THE GULF WAR OF 1991

(908) Positive public international law is not a monolithic legal regime. There are so many uncompleted sectors of the law, contradictions between treaties and customs, different interpretations of the applicable laws, etc., that countries hire battalions-worth of renowned international law practitioners to plead for their respective advantages.

(909) Also, international law is not pure abstract law *per se*. It is a type of law that remains intertwined with the political will of states, since customs themselves create the continual practice of states, *ergo* the law itself. The result is that public international law is an evolving legal regime which evolves with nations.

(910) For example, we have seen that the conduct of hostilities in the third century A.D. was harsher than in the nineteenth century. Through the spread of Christian religion and its influence on three-quarters of the globe, humanitarian ideas progressed to favour the protection of the victims of armed conflicts.

(911) With the treaties of the League of Nations, then of the United Nations organizations, these ideas progressed even further, but not with the agreement of all states. Indeed, the character of what is or is not the applicable public international law and LOAC to new states and to socialist states has long been the subject of a debate. Since public international law was in a large measure developed by European “bourgeois” states, the former USSR long refused to adhere to its regime. Nonetheless, socialist states did join the ranks of the international community and now accept the legal regime.

(912) As for public international law, the LOAC are subject to many different interpretations and debates. One such debate concerns the right to intervene in one country’s internal affairs if that state contravenes the LOAC, human rights, or public international law.

(913) This debate is not new. It took root in Grotius’ fifteenth-century publication but acquired a life of its own in the nineteenth century with the beginning of much more intricate relations in the realms of commerce, international organizations, diplomatic and military alliances, etc. In the post-Cold War era, this debate is once again an actuality. It certainly did take a wider effect in the W.M. Reisman vs. Oscar Schachter academic argument.

(914) The 1991 Gulf War was the triggering element that brought this debate to the forefront in academic circles as a result of the numerous questions surrounding the new interpretations of sovereignty. Indeed, at the end of the conflict, the United States imposed on Iraq “no-fly zones” in the north and the south of the country to protect the Kurdish population that was the target of a new Iraqi offensive and to prevent a consolidation of Iraqi positions in case of a flare-up of the conflict. This imposition violates the notion of sovereignty. Further, these zones were not part of the armistice agreement.

(915) The question that arose was whether, in the “New World Order”, state sovereignty was giving ground to permit the intervention of states in the internal affairs of other states.

(916) Two premises were proposed to answer this. The first is that the new world situation finally allows the full application of the UN Charter as its founders intended and, as such, allows intervention in case of gross and grave violations. This is maintained by W.M. Reisman.

(917) Reisman argues that the *UN Charter*, by its art. 2(4), permits the unilateral use of armed force to intervene in the affairs of other states. He bases his arguments on the interpretation of two principles of art. 2(4) that:

- a. the state that unilaterally intervenes does so in the interest of the international community; and
- b. the state that unilaterally intervenes does so in the aim of protecting international peace and security, the first goal of the UN.

(918) He argues that humanitarian intervention is legal under international law if one liberally interprets the term “sovereignty.” He explains that any gross, grave and/or continued violations of human rights demonstrate a breakdown of the social structure of a country, therefore denying the exercise of popular sovereignty. This intellectual gambit is in line with the defence of democratic ideas of western democracies.

(919) According to Reisman, as soon as the exercise of popular sovereignty is denied, the international

community as a whole, and states individually, are justified in taking necessary actions to re-establish the situation. Under this thesis, intervention is not contradictory to the preservation of state sovereignty or the territorial integrity as understood by art. 2(4) *UN Charter*. As long as the intervention aims at preserving the right to life of inhabitants of the state where the intervention takes place, that intervention cannot be considered a violation of sovereignty or political independence, since its aims, goals, length, and reach are restricted to the bare necessity of the re-establishment of this sovereignty.

(920) Further, Reisman argues that art. 2(7) *UN Charter*, the prohibition against intervention in the domestic affairs of a state essentially of a national character cannot include human rights, since they are broadly part of the public international law regime due to many treaties such as the *UN Charter* itself, and the *Universal Declaration of Human Rights*, etc, which have, he argues, made them part of international law, not national law. At best, this would involve a shared command still permitting international supervision.

(921) One has to admit that many UN resolutions and declarations agree with this interpretation, while states' practice completely disavows them. Despite this, not all of states' practices run counter to this interpretation. The UN intervention in Belgian Congo in 1964-65 has gradually permitted intervention on an ever-widening scale, including the use of force.

(922) Thereafter, many traditional peacekeeping missions of the UN, permitted under Chapter VI of the *UN Charter* and concerning the Pacific Settlement of Dispute, have evolved towards the use of armed force when required. But it was only with the UN intervention in Somalia in 1993 that the use of force on a wide scale during a peacekeeping mission was permitted. During this conflict, at least 18 American and 23 Pakistanis peacekeepers died because the applicable rules of international law and the rules of engagement were too vague to permit quick decisions on the ground.

(923) Since the conflict was under Chapter VI and force can only be taken under Chapter VII Concerning Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggressions, jurists started to envision the interpretation of the charter through the existence of a Chapter VI½, a mechanism whereby international law would give the right to use force to protect humanitarian missions during peacekeeping and peacemaking operations.

(924) Resiman's thesis goes beyond this. It would effectively allow intervention and the use of force in any situation where there are gross, grave and/or continued violations of human rights. Therefore, if a state abuses its population by repression, the use of summary execution, etc., any state could intervene militarily. This could as well be the relocation of refugees outside the country as it could be a full-fledged invasion to re-establish democratic government. This is what the United States did in Haiti with its partners, including Canada, in 1994.

(925) It is also what Canada tried to do by unilaterally sending troops to Zaire in 1997 without the permission of that government, without any mandate from the UN, to prevent the spread of ethnic conflict in the Central African Great Lake region.

(926) The implications of this thesis, if accepted by the international community, are immense. Indeed, a snowball effect would probably follow and many states, by this new interpretation of international law, would justify their intervention in a state acting counter to their national interests. Further, this could exacerbate inter-ethnic conflicts, which would in itself be a contradiction to the spirit of the *UN Charter*.

(927) One of the problems with this thesis is that it has an inherent limit to its reach since, to intervene,

a state must have the will and the capabilities to do so. Imagine the case of Communist China: if repression and human rights violations in China answered to Reisman's definition, what country could indeed intervene? Could even the whole of Russia and NATO combined take on the Popular Armed Forces of the Republic of China?

(928) This limit indicates that only a powerful state against a small one could really intervene and succeed in imposing peace or re-establishing democracy. This alone is reason enough to be very cautious in support of Reisman's thesis.

(929) This is why the second thesis refutes the right to unilateral intervention. **Oscar Schachter refutes categorically the existence, the applicability and the right to unilateral intervention.**

(930) According to Schachter, art.2(4) prohibits clearly the use of armed forces in all circumstances except three, as provided by the *UN Charter*, those being:

- a. when these measures are authorized by the UN Security Council under Chapter VII of the *UN Charter*;
- b. when a regional organization has been mandated by the UN Security Council; and
- c. when a state uses its inherent right to self-defence under art. 51 or the *UN Charter*.

(931) For Oscar Schachter, art. 2(4) is a recognized norm of *jus cogens*, and nothing can permit the violation of the sovereignty or territorial integrity of a state, except the three exceptions above. This interpretation is certainly the one that has the blessing of most Third World and dictatorial states, for whom the threat of such intervention is a constant danger against their hold on their state.

(932) To summarize, there are two theses concerning the right to intervene in the internal affairs of a state. W.M. Reisman believes it is permitted by a liberal interpretation of the notion of sovereignty of art. 2(4) of the *UN Charter* and a restricted interpretation of what constitutes an essentially domestic competence under art. 2(7). Oscar Schachter believes such intervention to be prohibited under the traditional interpretation of art. 2(4) *UN Charter*. At the moment, States continue to favour Schachter's approach, as it protects States' sovereignty, while Reisman's thesis obviously renders it weak. Nonetheless, a continued debate is raging and the arguments for interventions are more forcefully heard since UNPROFOR's difficulties in Bosnia-Herzegovina in 1993-1994.

(933) The recent interventions in Kosovo, East Timor and Macedonia certainly indicates a shift in the West's legal and practical approach when gross and major violations of human rights are certainly signalling a vision that State sovereignty may be discarded when it is grossly abused. While the successive British government still resist this shift, evidence of the French government (OP TOPAZE in Rwanda), of the American government (OP JOINT FORGE) and of the Canadian Government convergence of law and morality seem to pave the way to a more interventionist approach to these situation. This situation may revert back to the Schachter approach, but a window of opportunity for this type of actions has opened. Since State practice is a fundamental element of customary law, many activists in this field propose that custom may be forming permitted the intervention to stop gross and major violations of human rights. Once declared and acted upon, only a serious reversing of the situation could permit the return to the more Westphalian approach of Schachter.

**D. THE ENLARGEMENT OF HUMAN RIGHTS PROTECTIONS IN ARMED CONFLICTS AND IN SITUATIONS SHORT OF ARMED CONFLICTS, TERMED “SITUATIONS OF EXCEPTIONS”**

(934) Still, assuming that the situation remains as it is and that Mr. Schachter’s position is affirmed, what means do we have to ensure that human rights are respected in peace and in armed conflicts?

(935) The thesis of Theodor Meron addresses precisely the legal void between the respect of human rights in peacetime and their respect applicable at all times, including in times of armed conflicts.

(936) This is because the charters of human rights (of France, Canada, the UN, etc.) are intended to apply at all times, but can be suspended in times of martial law, in areas such as freedom of association, etc. This “suspension” takes place in certain countries over the course of decades to maintain the government in power. Since the LOAC do not apply in cases of internal tensions, a juridical lacuna or gap results where neither international conventions nor the LOAC apply.

(937) To remedy this situation, Theodor Meron proposes the adoption of international instruments that would guarantee the respect of fundamental rights (e.g., the right to life). His argument is based on the fact that the LOAC, like human rights, have in large part a common root both in terms of *rationae personae* and *rationae materiae* obligations and that they are based on the same notion: that of **humanity**.

(938) He proposes a brief convention that would state those fundamental rights that cannot be taken away under any circumstances, whether in peace or in armed conflicts. In fact, he proposes a third Protocol to GC 1949 that would list the rights of art. 3/common GC 1949 and the guarantees of art. 75/AP 1, as well as the common rights listed in regional and universal legal instruments.

(939) This reasoning may disturb some who believe that state control and national sovereignty have already been threatened enough without creating even more obligations for all involved.

(940) But, peace and war are not separated by a thin line on the ground. There are different phases to the state of war ranging from economic wars to unlimited total war, passing through cold wars and small wars. Each hold a place on the **scale of conflicts** up to **absolute peace**. The rest of the spectrum includes a relative peace, in which the world is always in a state of tension, thereby justifying the preparation of international instruments for a state of armed conflict that is not what is called a “hot war” -- the use of armed force under all its forms.

(941) Whatever our take, the trend is toward the enlargement of human rights in peacetime and the protection of victims in time of armed conflicts. Events such as the Chechen crisis of 1991 and of 1995 have already pressed the issue, but this has given the legal debate a life of its own. More recently still, the intervention in Afghanistan (2002) and Iraq (2003), if justified in part by a much arguable theory of pre-emptive self-defence, have been also justified on the basis of the protection of human rights at large.

**THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS**

(942) These human rights do not cease to exist during a period of armed conflict or, even less, during periods of internal disturbance, tension or trouble such as terrorism. International conventions exist that define the minimal rights that protect human beings. The problem is that while these norms protecting human rights continue to exist, some can be suspended for the duration of an emergency.



(943) But these instruments all possess derogatory clauses that permit to suspend some rights. Note that a suspension does not mean that it ceases to exist: on the contrary it means that it continues to exist but its *application* is suspended in part or in whole and therefore limited. Therefore, international law has international conventions (i.e. *International Covenant on Civil and Political Rights*<sup>267</sup>, *International Covenant on Economic, Social and Cultural Rights*<sup>268</sup> applicable to its members whatever their region may be, and regional conventions, applicable to only a number of states regrouped under geographical features (i.e. *American Declaration of the Rights and Duties of Man*<sup>269</sup>, *American Convention on Human Rights*<sup>270</sup>, *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>271</sup>, *African Charter on Human and Peoples' Rights*<sup>272</sup>).

(944) The instruments that do not have derogatory clauses have limitative clauses that rest on the principle of legality. Such clauses can be found at art.4 of the *International Covenant on Civil and Political Rights*<sup>273</sup>, art.27 of the *American Convention on Human Rights*<sup>274</sup> and 15 *European Convention on Fundamental Human Rights and Freedoms*<sup>275</sup>. To these measures, one could add the proposed derogatory clauses of article 4(b) of the *Charter of the Arab States League*<sup>276</sup> and article 35(1) of the *Convention of the Commonwealth of Independent States (CIS)*<sup>277</sup>.

(945) But even instrument not possessing derogatory clauses possess limits based on the principle of legality, such as in the case of the *International Covenant on Economic, Social and Cultural Rights*<sup>278</sup> or the *African Charter on Human and Peoples' Rights* at its articles 9(2) and 10<sup>279</sup>, or with general limitation clauses such as article 30 of the *Universal Declaration on Human Rights*. The latter states: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein"<sup>280</sup>. In the former case of legality clauses, the *African Charter* states: "...within the law ..." and "... provided that he abides by the law...."<sup>281</sup>.

<sup>267</sup> *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>268</sup> *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

<sup>269</sup> *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>270</sup> *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>271</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and Protocol 11 on November 1, 1998 respectively.

<sup>272</sup> *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. [hereinafter *African Charter*]

<sup>273</sup> *International Covenant on Civil and Political Rights*, *supra*, note 267 at art. 4..

<sup>274</sup> *American Convention on Human Rights*, *supra*, note 270 at art. 27. Canada has not ratified it.

<sup>275</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra*, note 271 at article 15.

<sup>276</sup> *Charter of the Arab States League*, 15 September 1994, in 18 Hum. Rts. L. J. (1997) 15. It is not in force.

<sup>277</sup> *Convention of the Commonwealth of Independent States*, adopted in May 1995, it is not in force.

<sup>278</sup> *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR 21<sup>st</sup> Sess., Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter *ICESCR*].

<sup>279</sup> *African Charter*, *supra*, note 272 at articles 9(2) and 10.

<sup>280</sup> *Universal Declaration*, *supra*, note 185 at Article 30.

<sup>281</sup> *African Charter*, *supra*, note 272 at Articles 9(2) and 10.

(946) The problem in such case is to define what an emergency consists of or what the limits imposed by the law can be. Article 27 (Suspension of Guarantees) of the *American Convention* provides such a definition, edicting an emergency as one of: “time of war, public danger, or other emergency that threatens the independence or security of the States party” and follows by precisizing that the guarantees of the *American Convention* can only be suspended “for the period of time strictly required by the exigencies of the situation”<sup>282</sup>.

(947) By opposition to this approach, Article 15 of the *European Convention* permits to take the derogatory measures necessary in “In time of war or other public emergency threatening the life of the nation”<sup>283</sup>. The problem with such a liberal definition is obviously that it leaves a large margin of appreciation to the States as to know whether there exists a public danger menacing the life of the Nation.

(948) The most interesting example concerning the regime of the Council of Europe’s *European Convention* is that of the *Case of Ireland v. United Kingdom*<sup>284</sup>. In this affair, the reach of Article 15 was examined by the European Court of Human Rights in a State to State request of the government of Ireland, alleging that the 1922 law of the United Kingdom concerning the emergency powers on the civilian authorities and the systematic practices of the United Kingdoms’ officials on Northern Ireland’s soil contravened Articles 2 (Right to Life), 3 (Protection against torture and cruel and inhumane treatments), 5 (Deprivation of Liberty) and 14 (Non-discrimination) of the *European Convention*. It must be noted that at the time of this affair, only *Protocols 1* and *2* to the *European Convention* were in force<sup>285</sup>.

(949) Referring to Article 15, the Irish Government argued that Her Most Britannic Majesty’s measures largely over-stepped the reach of the strict exigencies of the situation, since these measures were not in accordance with international law, as stipulated by article 15<sup>286</sup>. In the second part of its request, the Irish Government furthermore argued that the Law of 1972 on Northern Ireland, attributing large powers to the Northern Ireland Parliament concerning the use of British Forces, contravened article 7 (*Nullum Crimen Sine Lege*). The European Court of Human Rights based itself on the previous claims of the first *Case of Cyprus*<sup>287</sup>, the *Case of Greece*<sup>288</sup> and on the *Case of Lawless*<sup>289</sup>, and judged that the state concerned was best placed to decide the necessary reaches of a derogation, even though that derogation was not unlimited and subject to judicial revision by stating:

“ It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it

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<sup>282</sup> *American Convention, supra*, note 269 at Article 27.

<sup>283</sup> *European Convention, supra*, note 271 at Article 15.

<sup>284</sup> *Case of Ireland v. United Kingdom, supra*, note 211 at 3.

<sup>285</sup> By opposition, the other Protocols entered into force on: *Protocole n° 3*, 21 September 1970; *Protocole n° 4*, 2 May 1968, *Protocole n° 5*, 20 December 1971; *Protocole n° 6*, 1 March 1985; *Protocole n° 7*, 1 November 1988; *Protocole n° 8*, 1 January 1990; *Protocole n° 9*, 1 October 1994, *Protocole n° 10*, 25 March 1995 and *Protocole n° 11*, 1 November 1998.

<sup>286</sup> *European Convention, supra*, note 271 at Article 15.

<sup>287</sup> *Eur. Comm. HR, Application No. 6780/74 and 6950/75, Cyprus v. Turkey*, Report adopted on 10 July 1976, Vol. 1, although this affair did not reach a decision stage due to a joint demand at the Council of Ministers of the European Council. See Council of Europe, Committee of Ministers, *Résolution 59(12)*, dated 20 April 1953; reprinted in (1953) 1 *Yearbook of the European Commission on Human Rights* 690.

<sup>288</sup> *Case of Greece (Greek case)*, dated of 1967, (1967) 11 *Yearbook of the European Commission on Human Rights* 701. Following four separate request by Norway, Danmark, Sweden and the Netherlands, an aborted procedure similar to that of the Cyprus case took place.

<sup>289</sup> *Lawless Case, Eur. Court HR. (Ser. A)*, n<sup>os</sup> 1, 2 et 3. In this affair, the Court defined was constitute a danger menacing the life of the Nation. It came to the conclusion that it consisted in a crisis of an exceptional danger that affects the whole of the population and constitute a menace for the organised life of a community that composes the State..

is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57-59, paras. 36-38). The domestic margin of appreciation is thus accompanied by a European supervision.<sup>290</sup>

(950) As a result, the court refuses to allow the argument of the Irish Government and recognised that the actions of British officials did not over-step the strict necessity of the situation<sup>291</sup>. It follows from this decision that the States is tributary of adjudging the reach of the derogation it intends to take. This margin of appreciation left to the State makes it both judge and party, although subject to judicial revision, and therefore creates quite a dangerous precedent. As remarked the renowned Canadian jurist L.C. Green, the Court in effect : “ ... held that the burden of proof was on the complainant, and that the standard to be applied was ‘beyond reasonable doubt’ (...) the chances of a Party being found guilty of wrongly declaring an emergency are somewhat remote... ”<sup>292</sup>.

(951) Not only did the Court agreed in full bench to this benchmark ruling on this score, but not even an *obiter dictum* suggested that the Court could have been convinced otherwise if, in the use of its discretionary powers, the United Kingdom had exceeded and/or continued to exceed the restrictions imposed by Article 15<sup>293</sup>. The Court seems to have kept firmly in line with its decision of the *Case of the SS Wimbledon*<sup>294</sup>, where it opined that it cannot, nor even should contemplate such situations where it would have to interpose its judgement *in lieu* of the States.

(952) It is interesting to note that this is totally opposed to the approach of the Inter-American system, where the Court did not hesitate to substitute itself to States in order to determine the limits of the suspension of guarantees in the *American Convention* and to objectively define what constitute a war, a public danger or a situation of crisis menacing the independence or security of the State. In its advisory opinion of the *Habeas Corpus in Emergency Situations*<sup>295</sup>, the Inter-American Court presented the reasons that could be invoked to claim the suspensions of Article 27.

(953) In its opinion, the Court takes the direct approach and clearly announces that rights cannot be denied or suspended unless the circumstances leave only this sole recourse to preserve the most fundamental values of a democratic society<sup>296</sup>. The Court therefore puts the legitimacy of the democratic system of government as the ruling principle when it comes to the evaluation of the legitimacy of the use

<sup>290</sup> *Ireland*, *supra* note 211 at 68.

<sup>291</sup> A.S. Calogeropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 81.

<sup>292</sup> L.C. Green, *Human Rights in Emergency Situations*, Conference of the Canadian Council on International Law, University of Ottawa, 1978, 19 at 5.

<sup>293</sup> *Id.*

<sup>294</sup> *Case of SS Wimbledon*, (1923) *I.P.C.J. (Ser. A)*, n° 1, 163 at 180.

<sup>295</sup> *Habeas Corpus in Emergency Situations*, *Advisory Opinion AO-8/87*, *Inter-Am. Ct. HR (Ser. A)*, 1, 27 I.L.M. 519. [hereinafter *Habeas Corpus*].

<sup>296</sup> *Ibid.* at 38, para. 20.

of derogatory measures. It further adds in the same paragraph that the suspension of guarantees may not be dissociated from the “effective exercise of representative democracy”, and that any use of derogation in the aim of undermining a democratic system is an illegitimate use of Article 27. Non content with this, the Court finally opined that the exercise of democratic rights can only be suspended if the strictest conditions of Article 27 are met. By this, the Court states without the inkling of a doubt that it meant : “...rather than adopting a philosophy that favors the suspension of rights, it establishes the contrary principle, (...) rights are to be guaranteed and enforced unless very special circumstances justify the suspensions of some, and that some rights may never be suspended, however serious the emergency.”<sup>297</sup>. Contrary to the European approach, which seems to permit the wider latitude possible to the State with the reservation of judicial review, albeit only subsequently to a previous action of the State, the Inter-American Court emitted its opinion before any situation concerning such cases reached it and choose to apply a *stricto sensu* interpretation of the suspension clause of Article 27 of its *American Convention*. It is also capital to note that the Court did not authorise the proscription, full interdiction of exercise or the eradication of a right ; at the most, the Court allows the State meeting the strict condition of Article 27 to suspended the exercise or to limit the full and complete exercise of the right in question. The rights in themselves survive this regime of suspension and are deemed inherent to the human being<sup>298</sup>, and therefore inalienable<sup>299</sup>.

(954) These approaches of the Inter-American and European system are distanced in part by the approach of the *African Charter*. Still, one must emphasise that it is so *in part* only because while the African Charter adopted a new approach by including the rights of collectivises into its framework, it was neither the first nor the only one to include individual, economic, social and cultural rights with obligations in a regional system of protection of human rights.

(955) The *American Declaration on the Rights and Duties of Man* incorporate respectively these at its Articles XIII, XXIX, XXX, XXXI et XXXIV : the right to benefit from cultural life in one’s community (XIII); the right to social security (XVI), the obligation of having an individual deportment permitting the development of the potential of others (XXIX); the obligation to support parents (in particular the aide of children and the honouring due to parents) (XXX); the obligation to receive at the minimum a primary education (XXXI) and the obligation to serve the community and the Nation (XXXIV)<sup>300</sup>.

(956) The *Draft Charter of Fundamental Rights of the European Union* <sup>301</sup> also incorporated some of these notions. As does, in a more restrictive measure, the rights and obligations to participate in the cultural and intellectual life of the *Charter of the Arab States League* at its Article 35: “Citizens have a right to live in an intellectual and cultural environment in which Arab nationalism is a source of pride, in which human rights are sanctified and in which racial, religious and other forms of discrimination are rejected and international cooperation and the cause of world peace are supported.”<sup>302</sup>.

(957) Nonetheless, it is exact to claim that the *African Charter* seems to accord a prominence to these

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<sup>297</sup> *Ibid* at 38 and 39, para. 21.

<sup>298</sup> *Ibid.* at 37.

<sup>299</sup> A.L. Svenson-McCarthy, *The International Law of Human Rights and States of Exception*, Coll. International Studies in Human Rights, vol. 54, Boston, Martinus Nijhoff Publishers, 1998, 780 at 254

<sup>300</sup> *American Declaration, supra*, note 261.

<sup>301</sup><sup>30</sup> *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 1, (Dec. 7, 2000) and the *Draft Charter of Fundamental Rights of the European Union*, CHARTE 4422/00 (July 28, 2000) [hereinafter *Draft European Union Charter*]. The proposed charter of the Praesidium includes economic and social rights at Article 31. A particular attention is given there to the “familial” application of this article.

<sup>302</sup> *Charter of the Arab States League, supra*, note 276 at Article 35.

rights and that its dialectic of individual rights as opposed to collective rights in much more pronounced than in other systems.

(958) Still, the writing of Articles 9(2) and 10 forces one to ask himself if the protections of the *African Charter* are not illusionary<sup>303</sup>. The question is not solely or the abstract : in determining the true force of the legal limitation clauses, one can discover if the *African Charter* is a juridical instrument or a political instrument serving the ends of non-democratic regimes. The problem of the *African Charter* was, at first, that its *African Commission on Human and People's Rights* had not, for the longest time after its implementation, had the occasion of pronouncing itself on the important question. Rather, indication of its potential was given through à

(959) Articles 60 and 61 as to its capacities to acquire a viable juridical strength opposable to States. Article 60 reads as directing principles : “ The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members. ”<sup>304</sup>

(960) And Article 61 attempts to enlarge this reach by edicting: “ The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine. ”<sup>305</sup>.

(961) It is important to note here that while the African Court was created following the redaction and adoption of its founding *Protocol*, its article 7 retakes *expressis verbis* the notions of the *African Charter* edicting that in its deliberation: “...the Court shall be guided by the provisions of the Charter and the applicable principles stipulated in Articles 60 and 61 of the Charter.”<sup>306</sup>.

(962) There is therefore a need to set and determine the legality principle from other instruments. An extraordinary analysis of this kind was made by A.L. Svensson-McCarthy and permits to define in a large measure this principle of “legality”<sup>307</sup>. First, the question is to know what sources of law are included in this principle.

(963) At the universal level, the principles invoked flow from Articles 29 and 30 of the *Universal Declaration*. The question of legality does not pose serious problems when concerning the elaboration of the both *International Covenants* of 1966<sup>308</sup>. When it came to refer to Articles 29 and 30, the debate

<sup>303</sup> A.H. Robertson and A.J. Merrills, *Human Rights in the World*, New York, Manchester University Press, 1989, 314 at 209.

<sup>304</sup> *African Charter*, *supra*, note 272 at Article 60.

<sup>305</sup> *Ibid.* at Article 61.

<sup>306</sup> *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) following the *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*, (1997) AU/LEG/MIN/AFCHPR/PROT.1 rev.2.

<sup>307</sup> Svensson-McCarthy, *supra*, note 299.

<sup>308</sup> *Ibid.* at 54 and 59 respectively.

concerning the legitimacy principle and its link with legality addressed mainly the notion that rights could only be limited by law.

(964) Many countries of the British *Commonwealth* founded this sentence much too limitative in the residual power that it left to the States. The principal argument was that there existed more than the sole means provided by law to impose justified limits on the exercise of human rights in the *Universal Declaration* and that often the law itself was the very source of contravention to human rights. These countries preferred a mention to the concept of justice, which had in their eyes a superior level to that of the law. After many discussions, Article 29 incorporated nonetheless the notion of law in its paragraph 2, but the criteria of satisfaction of the just exigencies of moral, public order and general good were adjunct to it in order to complete it. Further to this debate, common law countries asked themselves whether the notion of law included solely the notion of statutory law or also the non-written notions often found in the *stare decisis* system of case law and soft law. The decision of the participants was definitive on the matter in that it included all sources of laws, whether of a traditional, case or statutory source<sup>309</sup>.

(965) It results from this interpretative statement that the notion of legality implies a notion of legitimacy, that is a pre-established legal norm of law originating from a competent legislative authority. This was deemed necessary in order to protect individuals from abuses and arbitrary actions of the executive and judiciary branches of governments.

(966) Also, the criteria of the exigencies cited above guarantee that the limitations are only legitimate if they meet the norms justifiable in a just and democratic society. Since the *Universal Declaration* made a direct reference to the *Charter of the United Nations* in its Article 29(3), by stating that these rights and freedoms cannot be fully exercised in contradiction to its aims and principles, it appears clearly that the legitimacy of the universal system has a specific and independent sense<sup>310</sup>.

(967) At the regional level, this question of legality has been retaken in the Inter-American System in Article 30 of the *American Convention*, whereby: « *The restrictions (...) may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purposes for which such restrictions have been established.* »<sup>311</sup>. And this question was rapidly addressed and dealt with, at unanimity, by the advisory opinion of the Inter-American Court at the request of the government of Uruguay: “it means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of States Parties for that purpose...”<sup>312</sup>. For the Inter-American Court, there exist a clear link that is inseparable and indissociable between legality, democratic institutions and the rule of law. It reaffirms the notions of the *Habeas Corpus* advisory opinion<sup>313</sup>.

(968) The *European Convention* follows a similar line of thought when concerned with the principle of legality. In the *Case of Silver and Others*<sup>314</sup>, the European Court of Human Rights confirmed the notion of

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<sup>309</sup> *Ibid.* at 58.

<sup>310</sup> *Ibid.* at 58 and 59.

<sup>311</sup> *American Convention*, *supra*, note 270 at Article 30.

<sup>312</sup> *The Word ‘Laws’ in Article 30 of the American Convention on Human Rights, Advisory Opinion, AO-6/86, Inter-Am. Ct. HR (Ser. A)*, No. 6, 1 at 37. The Court further opined: “[in] a democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the ‘effective exercise of representative democracy’, which results in the popular election of legally created organs, the respect of minority participation and furtherance of the general welfare, inter alid...” *Ibid.* at 35.

<sup>313</sup> *Habeas Corpus*, *supra*, note 295.

<sup>314</sup> *Silver and Others, Eur. Court HR, (Ser. A)*, n° 61, 1 at 33.

its previous cases whereby the “conditions, restrictions or sanctions of the law” are to be interpreted first as a reference to the fact that interferences in the exercise of human rights must have a juridical base in national law and that this must be *a priori* because the Court confirms only later that this includes common law with statutory laws.<sup>315</sup>

(969) The concept of legality forged a minimal norm of the respect of national laws within the larger interpretative concept of international instruments when concerned with the application of derogatory norms. Still, such a norm remains incredibly fragile in the European system, in particular in the case of countries having a centralised government or a unitary method of governance. Through the concentration of power, ones concentrates the States’ decision and influence in the determination of what constitute a legitimate suspension of rights and a derogation to the *European Convention*. Simply by restraining the protections given by the national legislation, a State can easily overturned or circumscribe the provision of the *European Convention*. Still, the basis of the *European Convention* is that of a voluntary system of ratification and therefore there is some understanding that States do not forgo every aspect of their sovereignty upon ratifying it and therefore interpretation is left in part to their margin of appreciation, until review by the judicial process if necessary.

(970) As such, we can therefore assert that their exist limitative systems of derogation that permits to suspend rights and that the *European Convention*’s system is in part as much as risk as even the *African Charter*’s system if one considers only its own limitation of legality. The American Convention system would seem more established that these both at first glance. But this would not be a complete understanding of these different systems, as it would not take into account the very rights they permit to derogate from and the limitations it permits to impose.

(971) As opposed to the limitations of the general clauses and clauses of derogations of the *Universal Declaration* and of the *International Covenant relative to Economic, Social and Cultural Rights*<sup>316</sup> at the universal level, and of the *African Charter* at the regional level, both the *European Convention* and the *American Convention* adopt the approach of the *International Covenant Relative to Civil and Political Rights*. Article 27(2) of the *American Convention* edicts : “ 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. ”<sup>317</sup>.

(972) By contrast, Article 15(2) of the *European Convention* states : “ 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision ”<sup>318</sup>.

<sup>315</sup> *The Sunday Times, Eur. Court HR (Ser. A)*, n° 30 1 at p.30.

<sup>316</sup> *ICESCR, supra*, note 268 at Articles 4 et 5(2). Respectively: “ The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society ” and “...2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.. ”.

<sup>317</sup> *American Convention, supra*, note 2 at Article 27(2).

<sup>318</sup> *European Convention, supra*, note 30 at Article 15(2).

(973) This compares to the *International Covenant Relative to Civil and Political Rights* at its Article 4(2) which proclaims: “2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”<sup>319</sup>.

(974) On this comparative basis<sup>320</sup>, one can represent schematically the protection offered by each system, whether universal, American or European by comparing which rights are non-derogable in all and any circumstances. These cannot be suspended, limited or otherwise infringed upon in any circumstances or for any reason whatsoever.

(975) A synthesis of these non-derogable rights clearly shows that solely the rights which are universally recognised, and those of the two *Covenants* of 1966, due to their different reach are: the right to life, the prohibition of torture and inhumane and degrading treatment, the interdiction of slavery and the principles of legality and non-retroactivity. Within the concept of legality, it is important to note that none covers the right to an equitable judgement and that the *European Convention* does not contain the recognition of the legal personality.<sup>321</sup>.

(976) It is possible, on this basis, to distinguish rights protected as “fundamental rights and freedoms”, which are generally protected within international universal or regional instruments, and a “minimal non-derogable core” of human rights, which can perhaps be seen as fundamental rights in a *stricto sensu* interpretation<sup>322</sup>. Those not part of this core may not survive limitations during periods of emergencies and situations of exceptions.

(977) Further, the question is to know whether one can claim a universal application of these rights as their force of law remains to be proven. Indeed, in the international legal regime, only customary law is applied universally, while treaty law can only be opposed to states which have ratified the conventions and treaties under discussion. We must then discern between the rights opposable to all and those

<sup>319</sup> ICCPR, *supra*. note 267 at Article 4(2).

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DISPOSITION	UNIVERSAL DECLARATION*	COVENANT ON POLITICAL AND CIVIL RIGHTS	COVENANT ON ECONOMIC AND SOCIAL RIGHTS	EUROPEAN CONVENTION	AFRICAN CHARTER	AMERICAN CONVENTION*
Right to life	ARTICLE 3	ARTICLE 6		ARTICLE 2	ARTICLE 4	ARTICLE 8
Freedom from torture, inhuman, degrading treatments and punishments	ARTICLE 5	ARTICLE 7		ARTICLE 3	ARTICLE 4 ET 5	ARTICLE 8 (1)
Freedom from slavery and servitude	ARTICLE 4	ARTICLE 8 (1) & (2) RESPECTIVELY		ARTICLE 4 (1)	ARTICLE 3	ARTICLE 6
Legality and retroactivity	ARTICLE 11 (1)	ARTICLE 15		ARTICLE 7	ARTICLE 7 (1)	ARTICLE 8 (1) & (2)
Legal personality	ARTICLE 6	ARTICLE 13			ARTICLE 3	ARTICLE 3 ET 14
Freedom of thought, conscience and religion	ARTICLE 18	ARTICLE 18			ARTICLE 9	ARTICLE 12
Non-imprisonment for debt		ARTICLE 11				
Protection of the family					ARTICLE 18	ARTICLE 17
Right to a name						ARTICLE 12
Right of children						ARTICLE 19
Right to nationality	ARTICLE 15					ARTICLE 20
Political rights	ARTICLE 21				ARTICLE 13	ARTICLE 23
Freedom of expression	ARTICLE 19				ART. 9 (1)	
ECOSOC rights	ARTICLE 22		ARTICLE 1			
Right to primary education	ARTICLE 26		ARTICLES 13 (2)(a) ET 14		ARTICLE 17	
Right to cultural life	ARTICLE 27		ARTICLE 13			
Equality of the sexes	ARTICLE 1	ARTICLE 3	ARTICLE 3			ARTICLE 24

\* This table is based upon that presented by A.S. Calogropoulos-Stratis, *Droit humanitaire et droit de l'homme : la protection de la personne en période de conflit armé*, Genève, Institut Universitaire des Hautes Études Internationales, 1980, 258 at 131, but joins together all major instruments in one comparative schematics.

<sup>321</sup> *Ibid.* at 132. The protection to an equitable trial is found at Article 10 of the ICCPR, 14 of ICESCR, 6 of the *European Convention*, 7 of the *African Charter* and 8 of the *American Convention*.

<sup>322</sup> *Ibid.* at 135.



opposable to the states which have signed and ratified a treaty, this in accordance with their sources.<sup>323</sup>

(978) The first source applicable to International Human Rights Law is of course the one that demonstrates the explicit consent of states to be held accountable: treaty law. It is important to distinguish between **treaties**, done in multilateral fashions of in a regional setting, and **declarations**.

(979) A **treaty** is an agreement between two states or more, and/or with an international organization. It is a negotiated and agreed document, to which a state adhere freely upon ratification. A **declaration** is a statement issued either by a state, in the case of unilateral declaration of intent, or by an international organization to state the intentions and aspirations of such an organization and its members.

(980) A treaty is opposable to states and legal redress can be obtained for its breach because it contains formal obligations to which a state has voluntarily subscribed. A declaration is usually not opposable to states; it provides for a restatement of a will or an intention to reach some objective, but it itself, it does not carry a constraint of opposability.

(981) This, however, is not absolute: a declaration may become opposable as would a treaty if it is recognized and adhered to by states, either because they reached such a conclusion in agreement or through the formation of a customary norm which recognizes its evolution into an opposable norm of international law. The *American Declaration of the Rights and Duties of Man* is such a declaration which started as non-opposable to states members of the Organisation of American States (OAS) in 1948 and became opposable over time because the states member adopted it as a part of the Charter of the Organisation of American States<sup>324</sup>. Further to this recognition, both the juridical organs of the OAS, the *Inter-American Commission on Human Rights* and the *Inter-American Court of Human Rights* have reached the legal conclusion that it has become opposable to states<sup>325</sup>.

#### UNIVERSAL PROTECTIONS APPLICABLE REGARDLESS OF REGIONS

(982) Since there exists such a case of development from non-opposable to opposable in a regional convention, the question becomes very important with regards to the potential opposability of the *Universal Declaration of Human Rights* made by the General Assembly of the United Nations in 1948.

(983) As the title mentions, it is a declaration and therefore, in principle, non-opposable unless there has been a development. Three theses are presented in this regard.

(984) The first thesis presents the *Universal Declaration* as opposable in the measure whereby its dispositions are based upon the state obligations of the *Charter of the United Nations*.<sup>326</sup> The second gives

<sup>323</sup> P.J. LaRose-Edwards, *Universal Human Rights Law*, Master's thesis, University of Wales, 1986, not published. The author presents 7 sources in a hierarchal order : treaties, customs, general principles, legal decisions, publicists (doctrine), natural law and inter-gouvernemental organisations.

<sup>324</sup> *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>325</sup> See Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 18989, Ser. A No. 10 (1989), paragraphs 35-45; AICHR, James terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, September 1987, Annual 1986-1987, paragraph 46-49, Rafael Ferrer-Mazorra et al. v. United States, Report N° 51/01, Case 9903, April 4 2001. See also Article 20 of the Statute of the Inter-American Commission on Human Rights.

<sup>326</sup> *United Nations Charter*, *supra*, note 25.

it a limited opposability, non imperative as such, whereby a violation to the Universal Declaration is not *ipso facto* considered as illicit under international law if the state takes corrective measures. A state which would not take such measures would then become accountable for it. Finally, the last thesis is that the Universal Declaration is opposable in full.<sup>327</sup> From the 1960s, already, some commentator argued the superior character of this document since it was accepted at unanimity<sup>328</sup>. This acceptance without opposition is seen under this light as a common will of the states to proclaim an ***opinio juris* – a recognition of its legal force and opposability** – and that its violation by a state would entail state responsibility because of its violation to a norm of international ethic. Also, these commentators argue that state practice proves with its influence on all subsequent conventions of human rights and treaties that it has by far surpassed the status of a simple decision by the General Assembly.<sup>329</sup>

(985) This argument is notably supported by a portion of academics and practitioners of the time, whether from the West or the East. For example, Blishtshenko declared in 1971 that the *Universal Declaration* is not only a mandatory document with a moral value but a document with a legal force, which implies the recognition of its dispositions by states and their applications, even in case of armed conflicts.<sup>330</sup> However, these seems to have been a tad premature, as it precedes in the abstract without taking the limitative clauses into account, whereby: “*The Travaux préparatoires make it clear that the overwhelming majority of the speakers did not intend (...) the Declaration to become a statement of law or of legal obligations, but a statement of principles devoid of any obligatory character, and which would have moral force only.*”<sup>331</sup>

(986) Richard B. Lillich, a most renowned jurist of human rights and humanitarian law, mentions that we can find in the debates of the *Travaux Préparatoires* a suggestion from which the *Universal Declaration* is considered a complement to the *United Nations Charter*., or as an interpretative instrument, or finally as the formulation of the general principles of law recognised by civilised nations, as understood under Article 38(1)(c) of the *Statute of the International Court of Justice*<sup>332</sup>.

(987) This later argument suffers from a lack of solid bases. As Lillich remarks, the General Assembly of the United Nations does not have the authority to interpret the Charter of the United Nations. Furthermore, its recognition as a formulation of the general principles of law also suffers from profound deficiencies. Indeed, while one may take a liberal interpretation of article 38(1)(c) of the *Statute of the International Court of Justice* to recognise many sections of the *Universal Declaration* as general principles or law, one cannot use this argument to explicitly recognise by it a codification of these principles<sup>333</sup>.

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<sup>327</sup> Calogeropoulos-Stratis, *supra* note 286 at 120.

<sup>328</sup> K. Suter, “An Inquiry of the Phrase : “Human Rights in Armed Conflicts” ”, *Revue de droit pénal militaire et de droit de la guerre* (Bruxelles), XV-3-4, 1976, 393 at 399 citing Louis B. Sohn who in 1969 affirmed : « *In a relatively short period, the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community and, together with the Charter of the United Nations, it has achieved the character of a world law superior to all other international instruments and domestic laws.* ».

<sup>329</sup> Calogeropoulos-Stratis, *supra* note 286 at 121.

<sup>330</sup> I.P. Blitchenko, « Conflits armés et protection des droits de l’homme », (1971) 18 *Revue de droit contemporain* (Bruxelles) 23 at 27. Based on the conclusion of the International Conference that underlined that the Universal Declaration translates a general accord of the peoples of the world as to the inalienable and inalterable rights of each and every human being and constitutes a commitment from the members of the international community.

<sup>331</sup> R.B. Lillich, *International Human Rights*, 2<sup>nd</sup> ééd., Toronto, Little, Brown & Company, 1991, 1062 at 121.

<sup>332</sup> *Statute of the international Court of Justice*, I.U.N.T.S. xvi, at article 38(1)(c).

<sup>333</sup> Lillich, *supra* note 84 à la p. 122.

(988) As a result, one must distinguish between the force of law of treaties and of declarations. While treaties may be opposed to states, declarations cannot unless one can prove that its status has evolved in international law either through custom, practice or *opinion juris* of states.

(989) Of course, the *Universal Declaration* remains a matter of controversy. And it is the more so because it has been adjuncted a surveillance mechanism through *Resolution 1503*<sup>334</sup>. This resolution gives the Human Rights Commission a procedure by which it can examine complaints of violations to human rights and fundamental liberties. However, this procedure has a limited reach and the extent of its resolution is often misunderstood as all-encompassing. In fact, it does not give the Economic and Social Council a power of condemnation over states, but rather a softer power of inquiry and reconciliation. One cannot invoke the force of law over a power of inquiry as this mechanism rests on the cooperation of states<sup>335</sup>. Therefore, invoking *Resolution 1503* to argue for the force of law of the *Universal Declaration* would be erroneous in premises. Therefore, one must conclude with the fact that, for the foreseeable future, the *Universal Declaration* does not have force of law.

(990) However, this is not the cases of the *1966 Covenants*, which have been ratified by states and are treaties; as such, they are clearly and unarguably opposable to states. It is true that the universal mechanism it establish is weak<sup>336</sup>, since the Commission examining the communications made to it can only draw the conclusion of the existence of a violation only after all the national recourses have been exhausted<sup>337</sup>. Nonetheless, such a conclusion may lead to a reference to the Security Council if the breaches are serious enough to entail a breach of peace or a menace to international peace and security. Nonetheless, the best hope of applying human rights, even though their sources are mainly universal at first, seems to rest with the regional instruments, such as those we have seen above.

## REGIONAL PROTECTIONS

(991) For example, as one can see from the table of comparison of non-derogable rights seen above, apart from the *International Covenant Relative to Economic, Social and Cultural Rights*, it appears at first that the *European Convention* protects fewer rights than any other instruments. Indeed, solely the four rights enumerated above can be seen as being non-derogable.

(992) In the case of the European system of protections, the case law does provide for a mature set of protections and does appear to have proportionality and due diligence well-entrenched within its *corpus juris* when concerning the right to life. Whether from the Commission's previous decisions, such as in the

<sup>334</sup> Economic and Social Council, *Procedure for dealing with communications relating to violations of human rights and fundamental freedoms*, Off. Doc. UNESCO, 1970, 1693<sup>e</sup> sess., U.N. Doc. E/1970/1503/SR.1693.

<sup>335</sup> M. El Kouhene, *Les garanties fondamentales de la personne en droit humanitaire et en droit de l'homme*, Boston, Martinus Nijhoff Publishers, 1986, 258 at 221.

<sup>336</sup> Through the *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, (entered into force March 23, 1976), today completed by the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), (entered into force July 11, 1991). Canada ratified the first *Optional Protocol* on 19 May 1976.

<sup>337</sup> El Kouhene, *supra*, note 335 at 214.

cases of *Steward*<sup>338</sup>, of *Farrell*<sup>339</sup>, or of *Cyprus v. Turkey*<sup>340</sup> or the Court's decisions such as in *McCann*<sup>341</sup>, the differentiation between lawful deprivation of the right to life and unlawful ones has been extensively explored and have resulted in a solid and logic system of law.

(993) In the case of the right to freedom from slavery and servitude, the Court has rarely had to deal with cases of forced or compulsory labour and many of the cases sent to it were either frivolous or groundless. Overall, the best known example is that of *Van Droogenbroeck*, which concerned the obligation for a prisoner to earn money during his detention in order to save a certain amount prior to his release from prison<sup>342</sup>. In most other cases, it is clear that the member States of the Council of Europe have had a low ceiling of tolerance for slavery and servitude and have enacted and implemented the proper legislation to curb abuses at the national level<sup>343</sup>.

(994) Where the *European Convention* is weak is definitely where it concerns judicial guarantees. While the first two sentences of its Article 7(1) are very comparable to that of Article 15(1) of the *International Covenant Relative to Civil and Political Rights*, its third sentence lacks the protection of guilty parties to benefit from the lighter penalty available. Still, the guarantees do provide for protection of *ne bis in idem* with the addition of Article 4 of *Protocol 7*<sup>344</sup>, and does provide for the principle of *nullum crimen, nulla poena sine lege*<sup>345</sup>. Overall, these protections certainly are limited compared to that of the Inter-American regime.

(995) Perhaps where the Court held on the longest to a wrong interpretation of the *European Convention* is where it concerned itself with the right to freedom from torture, inhuman, degrading treatment and punishment at Article 3. Too long did the Court uphold its own interpretation of the case of *Ireland v. United Kingdom* and too long did it impose an unduly strict interpretation of a severity/intensity test. Too long it interpreted the *European Convention* within its own syllogisms, and forgot to add interpretative additions from applicable international law such as the *Convention against Torture*. Only with the *Case of Aksov* a breakthrough was achieved and the threshold of what constitute torture has been lowered, finally applying not the *Declaration against Torture*, but the *Convention against Torture*.

(996) Meanwhile, both the Inter-American and the African systems are developing, now with increasing

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<sup>338</sup> *Eur. Comm. HR, Application No. 10044/82, K. Steward v. the United Kingdom*, decision of 10 July 1984 on the admissibility, 30 DR, 162 at 167, determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life.

<sup>339</sup> *Eur. Comm. HR, Application No. 9013/80, O. Farrell v. the United Kingdom*, decision of 11 December 1982 on the admissibility, 30 DR, 96 at 97, also is determining the criteria of "absolute necessity" on the use of force resulting in a deprivation of the right to life, but settle out of court by friendly settlement upon admission of State responsibility.

<sup>340</sup> *Eur. Comm. HR, Application No. 6780/74 and 6950/75, Cyprus v. Turkey*, Report adopted on 10 July 1976, Vol. 1, 110-119 at paras. 315-329, differentiating between lawful acts of war and unlawful deprivation of the right to life.

<sup>341</sup> *McCann and Others judgement, Series A, No. 324, 46 at 62*, where the Court determined that while the actions of agents of the State sincerely believing the dangers against which they were advise to shoot to kill was lawful in itself, the lack of good intelligence – or indeed the very intent of agents of the State to deceive other agents – can lead to violations of Article 2.

<sup>342</sup> *Eur. Court HR, Van Droogenbroeck judgement of 24 June 1982, Series A, No. 50, 17 at 18*.

<sup>343</sup> That is not to say that such abuses do not exists in States Parties to the *European Convention*: it means that in most States, the abuses are dealt with under national law and that not many issues arise from this and that in cases of States where such legislation and execution of the laws are weak, cases do not succeed in getting through the national system and exhaust available remedies before reaching the Court. The case of sexual slavery and immigrant servitude to repay illegal immigration fees to organised crime remain untractable problems even in such progressive places as the United Kingdom or the Netherlands, and are even more pronounced in places such as Bulgaria, Romania, Bosnia or the Ukraine.

<sup>344</sup> *Protocol 7, supra*, note 14.

<sup>345</sup> The principle of non-retroactivity includes as much the very existence of a delinquent conduct in accordance to national laws as well as a proper definition and understanding of such possible violation by the reading of the law from the point of view of a reasonable person. See *Kokkinakis judgement, Series A, No. 260-A, 22 at para 52*.

speed since the adoption of enhancing instruments<sup>346</sup>. As such, through the development of regional systems, whole regions have been stabilised in the application of human rights whether in times of peace and troubles, such as Western Europe through the 1950s through the 1990s, despite the Cold War and terrorism, and then in Central and Eastern Europe through the transitions of the 1990s after the end of the world bipolarity, or again in the Americas after the end of ‘international socialism’ and the development of democratic regimes. Even Africa, long-plagued by the war by proxy and the trampling of human rights everywhere, does progressive development of the respect of human rights appear to be on the up-take. However, these developments are in times of peace or internal disturbances. The real question becomes to know what protections of human rights do exist in times of armed conflicts.

#### HUMAN RIGHTS APPLICABLE IN ARMED CONFLICTS

(997) **Human rights applicable in armed conflicts.** As we have seen, the existence of an armed conflict is the *sine qua non* condition (condition without which) the law of armed conflict applies. If the existence of a conflict is not proven, then one cannot invoke the protection of its legal regime.

(998) Furthermore, the existence of an armed conflict, especially in the early stages, is always difficult to prove. Let us take as an example the most recent violence between Israel and Lebanon, starting on June 25, 2006 by a raid of Hamas fighters against an Israeli position on the border with Gaza and killing 2 Israeli soldiers and kidnapping one as hostage for a prisoner exchange.

(999) At that stage, there was a use of force whereby terrorists crossed a border from the territories of the Palestinian Authority by use of a tunnel, emerged on Israeli soil, engaged Israeli forces and retreated after accomplish parts or all of their objectives. Was this an act that would fall under the premises of the law of armed conflicts?

(1000) While this may be arguable as being so, it is not clear and the argument to the opposite may be made. Indeed, while there has been a clash of arms, there has not been a mention of a state of war at that time. Since the attack came from another countries’ national and territories, the regime of a non-international armed conflict does not apply. And since Hamas and the Palestinian Authority are not High Contracting Parties to the *Geneva Conventions*, nor the *Additional Protocols*, they cannot claim it application to their fighters.

(1001) What would remain is solely the application of Article 3/common GC 1949, as this applies in contradistinction to international armed conflicts to encompass all other kinds of armed conflicts<sup>347</sup>. This

<sup>346</sup> *Protocol to the African Charter on Human and Peoples' Rights*, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), entered into force January 25, 2004, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005, the *Inter-American Democratic Charter*, Inter-American Democratic Charter, OAS Doc. OEA/Ser.P/AG/Res.1 (2001); 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289 (2001) and the *Human Rights and the Environment*, AG/RES. 1926 (XXXIII-O/03), Adopted at the fourth plenary session held on June 10, 2003 are recent additions that further enhance and solidify the legal regimes of human rights protections piece by piece in their respective jurisdictions.

<sup>347</sup> *Hamdan*, supra note 466 at 68, which refers in its footnote 63 in the following: “See also GCIII Commentary 35 (Common Article 3 “has the merit of being simple and clear. . . . Its observance does not depend upon pre-liminary discussions on the nature of the conflict”); GCIV Commentary 51 (“[N]obody in enemy hands can be outside the law”); U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’ ” (quoting *Nicaragua v. United States*, 1986 I. C. J. 14, ¶218, 25 I. L. M. 1023)); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶102 (ICTY App. Chamber, Oct. 2, 1995) (stating that “the character of the conflict is irrelevant” in

would however be a double-hedge protection for Hamas fighters as this article also prohibits the taking of hostages, which their member clearly committed and claimed after the fact. Regardless, it is clear that the intensity and the seriousness of that particular incident created an armed conflict, albeit one only covered by the protections of Article 3/common GC 1949.

(1002) Following this incident, Israel undertook military actions on June 28, 2006 by entering the Gaza strip in an effort to rescue the kidnapped soldier, root out insurgents and take out positions from which Palestinians had been firing home-made Quassam rockets into Israeli territory.

(1003) On July 12, 2006, bolstered by the Hamas action of June 25<sup>th</sup>, Hizballah fighters attacked an Israeli position from Lebanon in Northern Israel. In this attack, 8 Israeli soldiers were killed and 2 kidnapped. Again, as for the events of June 25<sup>th</sup>, Hizballah is not a High Contracting Party and the sole applicable instrument would be Article 3/common GC 1949, for the same reason as above.

(1004) Israel then undertook harsh retaliation measures against Hizballah targets and other targets that supported Hizballah. This resulted in effect in attacks against the whole infrastructure of Southern Lebanon and attacks on ports, airports and the capital of Bayreuth in an effort to destroy means of displacements of the kidnapped soldiers to recuperate them, destroy the support of Hizballah's infrastructure and stocks of munitions, destroy Hizballah's credibility and cripple its organisation and personnel while also pressuring the Lebanese government to disarm Hezbollah.

(1005) This situation is further compounded by the fact that Hezbollah is linked to Hamas and both are supported financially and logistically by Syria and Iran. Furthermore, Hezbollah does have 23 elected member of the Lebanese parliament on a total of 128 members, has the only standing force beside the Lebanese army in Lebanon and, at the time of the beginning of the hostilities, had two cabinet members of the Government of Lebanon.

(1006) By the end of July 12, 2006, Israel had already retaliated and warned of continuing military attacks. By the 13<sup>th</sup>, it had bombarded Bayreuth's airport and begun bombing the road infrastructures and ports. By the 19<sup>th</sup> of July, ground incursions took place along the border to secure an area against Hezbollah rockets launching places.

(1007) By this point, Israel's armed forces had used bombardments against coastal installations, civilian infrastructure used for military purposes (roads, bridges, electrical generation plant), destroyed the offices of Hezbollah, deliberately targeted the head of Hezbollah, destroyed over half of Hezbollah ammunition and rockets, and continued its incursions within Lebanon, while stating that troops will withdraw once the destruction of Hezbollah has been accomplished. On the morning of July 21<sup>st</sup>, news reports indicated 258 civilian killed with 582 wounded in Lebanon, while Israel stated 19 military personnel dead and 15 civilian killed by Hezbollah rockets targeting the tourist industry in Haifa and other coastal cities of the north of Israel.

(1008) At that point, one notices that Israel does not 'as such' deliberately target Lebanese forces; its target is Hezbollah. Nonetheless, the Lebanese army attempts to defend its territory against the incursions of Israeli forces and against warplanes. The result is that of a double conflict, asymmetrical in nature, but nonetheless amounting to a international armed conflict, to which the full regime of the *Geneva Conventions* and/or *Additional Protocols* may apply (Lebanon has ratified both *Additional Protocols*, while Israel has not signed nor ratified either).

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deciding whether Common Article 3 applies)". See *infra*, note 508.

(1009) The conflict ended with Hezbollah's victory in strategic terms against Israel (since its only objective was to survive the onslaught and therefore point out Israel's failure in its eradication of the group) after a month of fighting and 116 Israeli soldiers, 43 Israeli civilian lives, 530 Hezbollah's fighters and over 1500 Lebanese civilians killed. United Nation Security Council Resolution 1701 put an end to the fighting, but Israel looks set to occupy a 'buffer' zone until such time as the reinforced UNIFIL mission fills its ranks with European Union forces and South-Asian troops, all the while living with the illusion of disarming Hezbollah and keeping Israel at bay.

(1010) The United Nations High Commissioner for Human Rights, Louise Arbour, warned that both parties could be held liable for possible war crimes<sup>348</sup>. Therefore, the regime protection would apply to all after the events of July 12<sup>th</sup>, 2006. But what of the populations within these two countries. During this state of war, what can Israel and Lebanon do to their citizens, residents and foreigners and what are they prohibited to do?

(1011) This is the whole dialectic of armed conflicts, whereby the rights of combatants are protected and civilians are afforded protections by the opposing forces, but whereby a state may decide to impose harsh conditions such as evacuation, forced labour or conscription on its own citizens. This is because of the separation of the jurisdiction of international humanitarian law, resting on the "Geneva stream" and the protection from means and methods of combat from the "Hague stream", both applying only in periods of armed conflicts under *rationae conditionis, tempi et loci*. They attempt to offer the maintenance of fundamental rights and freedoms through their conventions and protocols<sup>349</sup>. However, its jurisdiction is limited to four situations: international armed conflicts, non-international armed conflicts, 'internationalised' non-international armed conflicts and situations of crisis. The application of the law of armed conflicts depends on the intensity of the conflict, its geographical spread and its belligerents.

(1012) In the case of international armed conflicts, the *Geneva Conventions* apply to all states which have ratified them (all but 2, if one excludes new states to which the law of treaty succession applies or might be contested), and which edicts its jurisdiction in article 2 common to these conventions, as well as to *Additional Protocol I* under its article 1(3)<sup>350</sup>.

(1013) In the case of non-international armed conflicts, which are more and more predominant, the situation becomes even harder as one must evaluate the intensity of the conflict and the organisation of the belligerents to know whether article 3/common GC 1949 applies and if it is complemented by *Additional Protocol II*. This latter consideration is not only concerning whether or not a state has ratified the protocol, but because the level of intensity it requires is much higher than the level required for the application of *Protocol II*, as we have seen above in Chapter 10<sup>351</sup>.

(1014) As for article 3/common GC 1949, it is often qualified of mini-convention, as it contains the rights of protected persons in all situations during an armed conflict of any kind<sup>352</sup>, enumerating the basic protections against which combatants and civilians are all entitled<sup>353</sup>. It is an unreductible minimum and is composed of four basic sets of protections that we have identified above in times of peace or of internal

<sup>348</sup> "U.N. rights boss slams war on terrorism abuses", CNN, 23 June 2006 available at <http://www.cnn.com/2006/WORLD/europe/06/23/geneva.human.rights.reut/index.html>

<sup>349</sup> *Geneva Conventions of 1949*, *supra*, note 25 and *Additional Protocols of 1977*, *supra*, note 82.

<sup>350</sup> *Ibid.*, *Geneva Conventions of 1949* at article 2.

<sup>351</sup> See Chapter 10 above at paragraph 764.

<sup>352</sup> See *supra*, note 502

troubles<sup>354</sup> and enlarging its reach to other protections, such as that against mutilations. *Protocol II* enlarges even more these protections through its article 4<sup>355</sup>.

(1015) But again, one must be clear. While article 3/common GC 1949 applies to all conflicts, *Protocol II* only applies under the conditions of its article 1(1) which edict : “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.”<sup>356</sup>

(1016) Only if under a responsible command and controlling effectively a territory permitting the conduct of sustained and continued military operations can the protections of Protocol II be invoked. This is only attained by insurgent forces at the operational stage of the “liberation phase”<sup>357</sup>.

<sup>353</sup> *Article 3 common to the Geneva Conventions of 1949: “Article 3-* In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

<sup>354</sup> *Supra*, note 75.

<sup>355</sup> *Protocole II, supra* note 92 à l’article 4 : “*Article 4.-Fundamental guarantees* - 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (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; (g) Pillage; (h) Threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular: (a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (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 the provisions of sub-paragraph (c) and are captured; (e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.”

<sup>356</sup> *Ibid.* à l’article 1(1).

<sup>357</sup> Rouillard, *supra* note 19 à la p. 188. The development of the guerrilla is mainly done in four phases : 1) preparations, 2) organisation 3) liberation and 4) imposition of an administrative system. If the insurgents cannot breach phase 2 to attain phase 3,



(1017) This is complicated enough in cases of non-international armed conflicts, but become even more difficult to decide upon in the case of ‘internationalised’ armed conflicts. This springs also from *Nicaragua*<sup>358</sup> and was confirmed in *Tadic*<sup>359</sup>. In effect, the problem sprung from the Cold War’s ‘war by proxy’, whereby a third-party state supports one or the other of the protagonists. This was the case in Nicaragua, when the United States supported the Contras rebels against the Sandinista regime during its civil war. The International court of Justice differentiated in this affair the dependence of the contras from the effective control of the American government on their actions<sup>360</sup>. From this differentiation, it determined that in an armed conflict, the participation of a third state can implicate the ‘internationalisation’ of a conflict, but with regards to this state only.

(1018) In this case, the Contras were deemed to be subject only to article 3/common GC 1949, while the United States were subject to the application of the full range of the Geneva Conventions<sup>361</sup>. The applicable regime must therefore be established with regards to the party concerned and the offence concerned.

(1019) This was confirmed in the first instance of the *Tadic* case. As in *Nicaragua* by the ICJ, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), analysed the conflicts in the former Bosnian territories of Yugoslavia in the light of knowing whether the Serbian forces of Bosnia-Herzegovina remained under the effective control of the government of the Federal Republic of Yugoslavia (RFY), in order to determine if grave breaches of the law of armed conflict was imputable to it.<sup>362</sup> It found that the RFY was not.

(1020) However the Appeal Chamber took another approach, asking instead if acts accomplished by

it is condemned to die as it cannot make the government forces lose control over the territory. If so, it remains a terrorist organisation can cannot claim the protections of article 1(1) of Protocol II, although the application of article 3/common GC 1949 might apply, depending on the type of activity. For example, the suicide bombing of a pub frequented by servicemen would not be considered as covered by article 3/common GC 1949, and conspirators of the suicide bombers would be accused of conspiracy to murder and accessory while the attack of a military armoury might fall under article 3. This interpretation springs from article 1(2) of *Protocol II*: “2. This 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.”

<sup>358</sup> *Nicaragua, supra*, note 71.

<sup>359</sup> *Procureur c. Dusko Tadic* (1995), Case n° IT-94-1-AR72 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), available at <http://www.un.org/icty/tce14.htm>. [Hereinafter *Tadic*].

<sup>360</sup> *Nicaragua, supra*, note 71 at para. 115: “United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian (...). Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.

<sup>361</sup> *Ibid.* at para. 219: “The conflict between the contras’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; while the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflict”.

<sup>362</sup> *Tadic, supra*, note 359 at para. 588: “must consider the essence of the test of the relationship between a *de facto* organ or agent, (...) and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opstina Prijedor, can be imputed to the (...)Yugoslavia”.

non-state agents can bring about state responsibility, 'internationalising' a non-international armed conflict and in fact making it an international armed conflict. This would bring about state and personal responsibility of grave breaches of the law of armed conflicts<sup>363</sup>.

(1021) Confronting the test of responsibility of *Nicaragua*, the Appeal Chamber of the ICPY distinguished situations where a state mandates individuals to commit illegal acts from situations where a state mandates a states to commit legal acts, but where such individuals act *ultra vires* (outside of their range of devolved powers). The Appeal Chamber concluded that article of the International Law Commission's Project on State Responsibility imputed such responsibility on the Federal Republic of Yugoslavia<sup>364</sup>. It did so not because of a mandate of actions, legal or otherwise, of the FRY over Bosnian-Serb forces in Bosnia-Herzegovina, but because it found that the FRY had effective control over the Bosnian-Serb forces<sup>365</sup>. As such, this created an internationalisation of the conflict, since it now implicated directly the FRY as a party to the conflict and made Tadic an agent of the state<sup>366</sup>. Therefore, the *Geneva Conventions* applied in full. If Protocols I or II had been ratified, their regimes might have been applicable, depending on the *rationaes conditionis, tempi* and *loci*.

(1022) As we can see, there is no doubt that there is a basic protection of fundamental rights guaranteed in the legal regimes applicable to all armed conflicts, albeit with major differences of jurisdiction and application. The question is now to know what protections are offered whilst no armed conflicts are taking place, but rather during times of internal troubles, disturbances and emergencies,

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<sup>363</sup> *Procureur c. Dusko Tadic*, (1999), Case n° IT-94-1-AR72, (International Criminal Tribunal for the Former Yuoslavia, Appeal Chamber), available at <http://www.un.org/icty/tadic/appeal/judgement/main.htm>, at para. 104 : "the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a state, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international". [Hereinafter *Tadic Appeal*]

<sup>364</sup> *Report of the International Law Commission on the work of its Thirty-second session*, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10, 32<sup>e</sup> sess., UN A/35/10, (1980) 31 at article 10, which provides that: "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.". The Appeal Chamber of the ICTY specifies in *Tadic (Appeal)*, *supra* note 363 that: "121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,<sup>139</sup> a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives."

<sup>365</sup> *Tadic (Appeal)*, *supra* note 363 at para. 121 : "This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities."

<sup>366</sup> *Ibid.* at para. 167: "167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals."

which will be referred to as “situations of exception”.

(1023) In these cases, human rights may be limited or suspended and the protections of international humanitarian law remain inoperative. There is what is called the ‘gap’, the legal void, between international human rights law and international humanitarian law, and what has been referred by some as ‘the Meron Gap’.

#### THE PROTECTION OF HUMAN RIGHTS AT ALL TIMES

(1024) The juridical void that exists in situations of exceptions is due to the difference of application of the treaties pertaining to international humanitarian law and international human rights law as described above. However, not solely the jurisdiction is an obstacle to the establishment of minimal norms of protection of human rights applicable at all times, or “minimal humanitarian standard”.<sup>à</sup>

(1025) Added to the limitation and derogation contained in the human rights instruments we have seen with regards to international humanitarian law, we must also consider the legal status of the non-state entities in the context of the systems of protections of human rights, and the fundamental limitation they carry with their limitative clauses and derogation clauses<sup>367</sup>.

(1026) Such groups are not bound by international or regional treaties; the universal and regional mechanisms have only effects upon states parties to their constituting treaties. Furthermore, human rights treaties protect human rights in the context of the relation between the individual and the state, not between individuals themselves. While the preamble of the *Universal Declaration* and the *1966 Covenants* recognise the individual obligation to promote human rights, it does not explicitly give a legal responsibility between individuals even in relation to a violation of this obligation<sup>368</sup>.

(1027) While individual responsibility in international exists in some treaties (e.g. slavery, genocide, international court of justice), the United Nations’ Secretary-General has warned against seeing an over encompassing obligation as this would give incentive for repression against members of armed groups and this repression itself would be contrary to the principles of the protection of human rights<sup>369</sup>.

(1028) Also, the protection systems are themselves limited in effect because they lack specificity in the breadth and width of the rights protected. In fact, international humanitarian law provides a clearer outlay of the rights protected than do most of the treaties pertaining to human rights, but as they do not apply in situations of exception, this does not help in providing for a clear protection. In international human rights law, most rights and freedoms are mentioned in general terms and are free to be interpreted liberally or conservatively<sup>370</sup>. This legal void leaves an abyss where rights are lost to individual.

(1029) This situation has been known for long. Already in 1968, this problem is recognised in Resolution XIII of the International Conference on Human Rights held in Teheran from 22 April to May 1<sup>st</sup> of that year<sup>371</sup>. For the next twenty years, the problem has been mentioned and cursorily examined, but precious little was accomplished.

<sup>367</sup> *Minimum Humanitarian Standards, Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21*, Doc. off. CES NU, 53<sup>e</sup> sess., Doc. NU E/CN.4/1998/87 (1998). [Hereinafter *Analytical Report*].

<sup>368</sup> *Ibid.*, at para. 62.

<sup>369</sup> *Ibid.* at para. 64.

<sup>370</sup> *Ibid.* at para. 66.

(1030) Under the efforts of Hans-Peter Gasser and Theodor Meron, and many others who brought forth their contribution, efforts were made to identify the rights to be protected. These authors converged together at the Institute of Human Rights of the University of Turku, Finland, and drafted the *Turku Declaration*<sup>372</sup>.

(1031) The approach taken was that, under the quasi-universal character of the *Geneva Conventions* of 1949<sup>373</sup>, the norms of human rights' protection that it contained have become opposable to all, even those states not party to the Geneva Conventions, and even those who would attempt to denounce them since the *Vienna Convention on the Law of Treaties* prohibits denunciation or interpretative declarations incompatible with the aims and principles of a treaty<sup>374</sup>. This *lex specialis* is even clearer as article 60(5) prohibits such denunciation against treaties of a humanitarian character with regards to the protection afforded by them to protected persons<sup>375</sup>.

(1032) This reasoning is further pursued by stating also that no state shall be absolved from responsibility for violations of obligations of international law despite a denunciation if that obligation exists independently of the denounced treaty, for example an obligation of *jus cogens* or contained in another treaty not denounced<sup>376</sup>.

(1033) Even if a customary norm is codified and that the treaty containing this codification is denounced, the customary norm continues to exist parallel to the treaty norm and must be submitted to<sup>377</sup>. This recognition of the customary norm is recognised in the Martens Clause seen above<sup>378</sup> to remain under the principles of humanity and from the dictates of public conscience<sup>379</sup>. These principles of international law are the *lex corpus* in which custom evolves. But the Martens' clause goes further by associating this to the public conscience. To many who drafted the *Turku Declaration*, amongst which Professor Meron, this weights if not legally, at least morally, in a manner to force states to recognise as universal the protections of human rights.

(1034) He bases his opinion on the *Barcelona Traction Case*<sup>380</sup>, in which the International Court of Justice recognised the *erga omnes* obligations, meaning those obligations applicable to all at all times. The interpretation from this case suggests that the obligation to respect and to ensure respect contained in article 1/common GC 1949 would be such *erga omnes obligations*, as applying to all and are already

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<sup>371</sup> *Proclamation of Tehran, Final Act of the International Conference on Human Rights*, Tehran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) at article 10 : "10. Massive denials of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery, engender reactions which could engulf the world in ever growing hostilities. It is the obligation of the international community to co-operate in eradicating such scourges". This was also preceded by the *Protocol to the Convention on Duties and Rights of States in the Even of Civil Strife*, Opened for signature on 1st May 1957, but this protocol strictly concerned the responsibility of states with regards to one another with due regards to the notion of the principle of non-intervention.

<sup>372</sup> See *supra*, note 25.

<sup>373</sup> With the adhesion of Eritrea in 2000 only the Nauru and the Marshalls Islands have not ratified the Geneva Conventions bringing 191 on 193 recognised states. None of these countries have armed forces apart from a constabulary.

<sup>374</sup> *Vienna Convention on the Rights of Treaties*, (1969) 331 U.N.T.S 1155, at article 18 (entered in force on 27 January 1980). [Hereinafter *Vienna Convention*].

<sup>375</sup> *Ibid.* at article 60(5).

<sup>376</sup> *Ibid.* at article 43.

<sup>377</sup> *Corfu Channel Case*, *supra*, note 71.

<sup>378</sup> See above at paragraph 530.

<sup>379</sup> *Geneva Conventions of 1949*, *supra*, note 25 at articles 63 of the *First Convention*; 62 of the *Second Convention*; 142 of the *Third Convention* and 158 of the *Fourth Convention*.

<sup>380</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, [1970] I.C.J. Rec. 3, 32.

accepted in the *lex corpus* of international law since they have a quasi-universal recognition<sup>381</sup>.

(1035) Since article 3 is recognised in a quasi-universal manner, it is argued that the rights it contains are of such an elementary ethical order and retake in so many international treaties of human rights and humanitarian law that the convergence of these norms forms the basis of a customary right applicable in situations of exceptions<sup>382</sup>.

(1036) It is therefore aimed to bring together the fundamental rights seen in the case of international human rights law and bring them together with the basic human rights' protections contained in international humanitarian law in order to create a non-derogable 'minimal humanitarian standard', that is a core of fundamental right that cannot be limited, suspended or violated at all times.

(1037) What is attempted is to create, through the unifying of the Martens' Clause, the inclusion of recognised norms of *jus cogens* and of *erga omnes* obligations, is a renewed and modernised version of the *jus gentium*<sup>383</sup>. This means that what is attempted is to create an ethical law system based upon rules of natural law applicable to all at all times. It is argued that an advantage of such a system would be to formally recognise the international legal norms of natural law, which are inherent to the individual<sup>384</sup>, leading to its absolute non-derogable character. This approach is further supported by the *American Declaration*, which recognises explicitly the principles of natural law<sup>385</sup> and of the *African Charter* which permits the African system to found its applicable principles in other instruments as interpretative sources in order to find the most favourable to the individual safeguarding of human rights<sup>386</sup>. In so doing, this brings forth a universal interpretation of the rights to be recognised and of their application. This becomes even more so if one interprets *erga omnes* under the guiding lights of articles 55 et 56 of the *Charter of the United Nations*<sup>387</sup>. Still, it is the lack of specificity that remains problematic.

(1038) While the *Charter of the United Nations* and the *Universal Declaration* draw the overall rights, it is the multi-lateral and regional treaties, to which a relative few states are part of, that determine the reach and jurisdiction of the protections contained thereof.

(1039) This is why it is argued that norms applicable in situations of exceptions should be found through the powers contained at article 38(1)(c) of the Statute of the International Court of Justice<sup>388</sup>. By applying general principles of law, the ICJ can bring about the maturation of these norms so they can be incorporated as *jus cogens* in this new *jus gentium*. The advocated approach therefore aims at multiplying

<sup>381</sup> Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon, Oxford, 1989 at 31.

<sup>382</sup> *Id.*

<sup>383</sup> *Ibid.* at 188, affirming the existence of *erga omnes* obligations as dating from at least Hugo Grotius' period.

<sup>384</sup> *Ibid.* at 80.

<sup>385</sup> *American Declaration*, *supra*, note 270 at the second paragraph of its introductory considerations ('Whereas'): "The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the *essential rights of man* and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness", recognising from the outset the existence of essential rights of man, on the premise of natural law, as understood in the theological sense of Christianity's perspective."

<sup>386</sup> *African Charter*, *supra*, note 272 at article 60.

<sup>387</sup> *United Nations Charter*, *supra*, note 25 at articles 55(1)(c) and 56, where article 55(1)(c) edicts that the United Nations shall promote "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" while article 56 extend this commitment in an *erga omnes* obligation by edicting: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

<sup>388</sup> *Statute of the international Court of Justice*, *supra* note 332 at article 38(1)(c) edicting that the Court is subject to "c. the general principles of law recognized by civilized nations."

the references from one treaty to another in order that the norms contained therein are progressively incorporated in international judgements and therefore that their opposability to states be recognised as coming from their status as *jus cogens* in international law. One step of this approach was to draft the rights to be recognised and this was done in a large part through the *Turku Declaration*.

### THE TURKU DECLARATION

(1040) The *Turku Declaration*<sup>389</sup>, as stipulated in the *Background Paper to the Declaration of Minimum Humanitarian Standards*<sup>390</sup>, aims at the concept of a declaration on a ‘minimal humanitarian standard’, which emerged at the beginning of the 1980. It led to a preparatory document was made by the *Norwegian Institute of Human Right* in Oslo in 1987. This document was examined by a second committee of experts at *Abo Akademi University Institute for Human Rights* in Turku, Finlande from November 30 to December 2, 1990.

(1041) This first document contained 18 articles incorporating the essential elements necessary to its recognition as established previously. First, one notes its preamble, which establishes a clear notion of universality and a direct link with the Charter of the United Nations as well as with the Universal Declaration by stating: “Recalling the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person...”<sup>391</sup>.

(1042) From there, the reach and scope of the declaration is made to define situations of exceptions, all the while specifying that the rights contained in the declaration these rights remain applicable and absolutely non-derogable at all times, in all situations and everywhere, whether a state of emergency or has been declared or not<sup>392</sup>.

(1043) Article 2 specifies that the norms contained are to be respected by all, including individuals,

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<sup>389</sup> Institutue for Human Rights, *Declaration of Minimum Humanitarian Standards of 2 December 1990*, Åbo Akademi University, Turku/Åbo, 1991, 17 et publié dans T. Meron, « A declaration of Humanitarian Standards », (1991) 85 *A.J.I.L.* 375. Declaration of Turku, 2 December 1990 [Hereinafter *Turku Declaration*]. The project of 1990 was transmitted to the Human Rights Committee of the Economic and Social Council of the following resolution E/CN.4/1994/26 of the Sub-Commission on Prevention of Discrimination and protection of Minorities, and was subsequently adopted as its *Declaration of minimum humanitarian standards, revised by an expert meeting convened by the Institute for Human Rights*, Déc. CES, Doc. off. CES NU, 1995, Doc. NU E/CN.4/1995/116. [Hereinafter *Declaration of Minimum Humanitarian Standards*]. This was based upon professor Meron’s series of articles on the subject of the legal void over a period of 15 years, among which on can find T. Meron, “On the Inadequate Reach of Humanitarian and Human Right Laws”, (1983) 77 *A.J.I.L.* 589; T. Meron, “Towards a Humanitarian Declaration of Internal Strife”, (1984) 78 *A.J.I.L.* 859; T. Meron, “Combatting Lawlessness in the gray zone”, (1995) 89 *A.J.I.L.* 215. These resulted in part or in a symbiotic manner from and with the previous work on the matter made by Nicole Questiaux, *Study on the Implications for Human Rights of Recent Developments Concerning Situations Known as State of Siege or Emergency*, drawn up for the Sub-Commission on Prevention of Discrimination and protection of Minorities of 27 July 1982 (E/CN.4/Sub.2/1982/15), which further brought about the publication of International Commission of Jurists, *States of Emergency, Their Impact on Human Rights*, 1983, and also led much publications in the International Review of the Red Cross, in particular by Hans-Peter Gasser, then Legal Advisor to the Directorate of the International Committee of the Red Cross and later editor of the International Review of the Red Cross, which provided much inspiration for this project in its article “A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct” (1988) 262 *International Review of the Red Cross* 38. Like many such projects, some individuals are recognised more than others, but it should not be forgotten that the impetuous actually sprang from the UN’s effort and these were afterward appropriated by academics, leading to them smith-working the formula and finally re-proposing the idea to its original source.

<sup>390</sup> *Declaration of minimum humanitarian standards, revised by an expert meeting convened by the Institute for Human Rights*, *supra*, note 387 at 8.

<sup>391</sup> *Turku Declaration u*, *supra* note 389 at preamble.

<sup>392</sup> *Ibid.* at article 1.

states, entities and authorities of all kinds without regards to their juridical status and without discrimination, establish a clear precedent in international by explicitly stating individual responsibility at all times for the violation of norms of human rights.

(1044) Article 3 then proceeds to defining the precise rights protected and to which derogations are prohibited at all times. It retains the protections of humanitarian law concerning the humane treatment of persons without discrimination as found in article 75(1) of *Protocol I* and of article 4(1) of *Protocol II*<sup>393</sup>. However, to these are added the notions of freedom of thought, conscience and religious practice, usually find in human rights instruments, although the right to observe religious practices is contained in humanitarian law for those interned or detained during hostilities<sup>394</sup>.

(1045) It is interesting to note that the *Turku Declaration* follows the structure not of human rights treaties, but of humanitarian law instruments, principally of the *Geneva Conventions of 1949*, in that its first article immediately defines the obligations to respect and ensure respect of the declaration, the second article defines its reach and scope of application, while the third enumerates the rights protected.

(1046) From there, however, it adopts another structural approach, whereby from article 3(2)(a) et (c) covers as much points (a), (b) et (c) of the article 3(2)/common GC 1949 as well as the ones enumerated in articles 11 and 75(2) of *Protocol I* and 4(2) of *Protocol II* but with two major exceptions: the protection against corporal punishment edicted at article 75(2)(a)(iii) of *Protocol I* and the protections against terrorism and slavery found in article 4(2)(d) and 2(g) of *Protocol II*. Nor do we found in them the judicial guarantees and special protections normally devolved to women and children under the age of 18. Instead, the *Turku Declaration* has opted for the formulation of *Protocol II* that separates these articles in specific dispositions. It does, however, include the notion of protection against involuntary disappearances, which is was first found in an instrument of human rights and is now also found under the International Criminal Court's Statute<sup>395</sup>, as well as the protection against privation of goods necessary for survival, as found in articles 54 of *Protocol I* and 14 of *Protocol II*.

(1047) Following on the case of judicial guarantees as mentioned with regards to article 3 above, article 4 immediately specifies the rights of detainees to obtain recognition of their detention in order to avoid disappearance and the granting of the rights of communication with the exterior, as well as the notion of *habeas corpus*. This brings about a potential problem as it enlarges the provision of the rights of communications, which can be restricted under article 5 of the *Fourth Geneva Convention* in the case of spy, saboteur and persons under definite suspicion of hostile activities. No reconciliation with this enlargement problematic has been proposed either by providing for a definite period of possibility of being held *incommunicado* (i.e. a month), which would be preferable than a blanket prohibition since it would allow states to agree to a norm that provides for its own security while also providing true and verifiable relief for the individual. This, as we will see in the following article of the *Turku Declaration*, remain one of the major problem that would prevent its adoption at large as a treaty, rather than as a non-opposable declaration, as it now stands.

(1048) Carrying on, article 5 concentrates on the principles of the protections of humanitarian law: the inviolability of persons not taking part in hostilities and, in the case of those taking part, the application of

<sup>393</sup> See *supra*, note 82.

<sup>394</sup> At articles 18 of the *Universal Declaration* and of the *European Convention*, article 8 of the *African Charter* and 12 of the *American Convention*.

<sup>395</sup> But is the object of the *Declaration on the Protection of All Persons from Enforced Disappearances*, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992).

proportionality<sup>396</sup>. However, while it is the aim of the Turku Declaration to merge the protections of international humanitarian law and those of human rights in one set of norms, an anomaly takes place at its article 5(3). There are enumerated means and methods of combat prohibited in armed conflicts and that cannot be employed in any circumstances. This is not a ‘child’ of humanitarian law as understood in the sense of the Geneva stream, and therefore not a typical notion of human rights contained in humanitarian law, but rather a descendant of the Hague stream concerning means and methods of warfare. This anomaly is somewhat worrisome as it states: “Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.”<sup>397</sup>.

(1049) In so doing, it further muddles the differentiating regimes set in the Hague stream of the laws of armed conflicts on the uses of some methods and means of combat since the aim of the declaration would be to be applicable at all times. It would supplement and enlarge the scope of application of previous treaties which provided for clear limitations on the restrictions of uses of certain weapons. One only needs to think of the *Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*<sup>398</sup>. This convention prohibits the use of gases at all times, but provides for exceptions concerning ‘tear gas’ and cayenne pepper spray<sup>399</sup>. These are permitted for uses of the maintenance of public order by police forces. If the Turku Declaration was to apply at all times by prohibiting the uses of tear gas and pepper spray in armed conflict, which international humanitarian law does, then it follows that the use of tear gas and pepper spray would become forbidden at all times, especially in situations of exceptions. But it is precisely in these situations that this anti-crowd tool is mostly used and necessary as it prevents the escalation of violence and permits a relatively ‘mild’ method of dispersing crowds, therefore saving lives instead of resorting to brute force or even live fire with either rubber or real bullets.

(1050) To accept the text of this article would in fact be to deny police forces and anti-riot squads the most potent and least lethal of method to de-escalate a rising challenge, leaving them to resort either to the baton and water-canon, or to the use of charges and fire-power.

(1051) Article 5 is therefore in need of revision, which must allow for a drafting that accepts that the limitations that apply to treaties applying in international humanitarian would see their limitations transposed into this merged minimal humanitarian standard. Such a drafting would not be easy; for example, one could also think of the case of hired security forces, which are in fact ‘guns for hire’. Under the law of armed conflicts, mercenaries are illegal combatants and therefore proscribed of used in an international armed conflict<sup>400</sup> under *Protocol I*, but which are not illegal under the Geneva Conventions, as long as they are incorporated within the structure of the armed forces of a country or assimilated as one of the combatants categories of article 4/GC III, nor illegal under *Protocol II*<sup>401</sup>. This would take the larger

<sup>396</sup> By far a fundamental precept, proportionality states that there must be a clear equilibrium reached between the means used and the objective aimed. If the foreseeable consequences are disproportionate in effects, then the attack must be suspended.

<sup>397</sup> *Turku Declaration*, supra note 389 at article 5(3).

<sup>398</sup> *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, supra, note 143.

<sup>399</sup> *Ibid.* at article 1(5), which prohibits the use of anti-riot means as means of warfare or combat and at its article 9(d) which edicts: “ ‘Purposes Not Prohibited Under this Convention’ means: (...) (d) Law enforcement including domestic riot control purposes. ».

<sup>400</sup> See article 47 of *Protocol I* and *The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries*, G.A. Res. 34, U.N. GAOR, 44th Sess., Supp. No. 43, at 590, U.N. Doc. A/44/43 (1989), 29 I.L.M. 91, which, although not in force, represent a statement of intention by many to recognise the illegality of their use.

<sup>401</sup> This would however be enlarged in scope and reach for Africa, due to the *OAU Convention for the Elimination of Mercenaries in Africa*, O.A.U. Doc. CM/433/Rev.L, Annex 1(1972), which has been ratified by 13 African states so far (see list available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/List/Convention%](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Convention%224)



prohibition of *Protocol I* and apply it to those states which have not ratified it, or even opposed it. One can obviously argue that such an enlargement of protection can only be good for the consolidation of the legal regimes and the standardisation of the applicable law, but this does not take into account the political reality of international politics.

(1052) A state which has not consented to be bound by *Protocol I*, the example of the United States being foremost, can hardly be tempted into adhering to a declaration not only applying a notion of international humanitarian law to human rights violations, but further enlarging in to any and all situations of armed conflicts where it surely does not want it to apply. For example, the current use of private security forces in Iraq under the term ‘civilian contractor’ is not illegal as such: the United States have signed but not ratified *Protocol I* and while the notion of an ‘authorized’ ‘supply contractor’ who “accompany the armed forces without actually being members thereof” as contained at article 4(A)(3)/GC III<sup>402</sup> might be a stretch of its meaning, it is not altogether an unreasonable interpretation. At the very least, no positive notion of the law of international armed conflict short of *Protocol I* prohibits the use of mercenaries, and even less of those private contractors which provide security services without answering to the full definition of mercenaries as understood in article 47/AP I.

(1053) For these examples, which might very well not be the sole in existence, there is a definite need to revise article 5 of the *Turku Declaration* in a manner that addresses the need to incorporate the limitations of international humanitarian law into the minimal humanitarian standard. This declaration then follows through article 6 by prohibiting the use of terror, menace of or act of violence. This adopts the notions of articles 51(2) of *Protocol I* and 13(2) of *Protocol II*. It does so in conjunction with its article 7 that prohibits forced movements of the civilian population, as do articles 49 of the *Fourth Geneva Convention* and 58(1)(a) of *Protocol I* (as relating to article 49/GC IV) and as does article 17 of *Protocol II*.

(1054) These articles present no difficulties of interpretation as such, but extend their reach to not only the ‘enemy’ civilian population in occupied territories, but also to one’s own population, which is not the case under the law of armed conflicts. This has a gigantic impact; had it been applicable at the time, this would have applied to Stalin’s deportation of Cossacks, Georgians and others, which tallied to an estimated 14 million deaths over the length of his rules<sup>403</sup>, would have applied to mass deportations by Nazi Germany of Jews, Gypsies and others (which is the root of article 49/GC IV), and more recently to Serbian, Croatian and Bosniak ‘ethnic cleansing’ as well as to Iraqi actions against the Kurd population. This extension of the notion to times outside of the reach of non-international armed conflicts having the application of Protocol II or to international armed conflicts would greatly enhance the protection regimes of human rights, but again it ignores political reality and its interpretation can be objected to numbers of states having indigenous populations, such as American and Canadian Indians as well as Australian Aboriginals, which would be ill at ease with their policies of ‘reservations’ for tribes and/or peoples. This article could become a potent legal weapon against these official policies and internal legal regimes. As a result, most of these countries could only with difficulties attach their ratifications to such a declaration.

(1055) Then comes the novelty of its article 8, which defines the rights against the death penalty. It

20for% 20the%20Elimination%20of%20Mercenarism.pdf.

<sup>402</sup> *Third Geneva Convention*, *supra* note 25 at article 4(A)(3).

<sup>403</sup> While no numbers will ever have any precisions, Stalin can be seen as the ‘acting’ element of the ‘Communist block’ and his influence can be attributed to all and any actions of the communist regimes in Eastern and Central Europe for the length of his rules. For one estimate, see Robert Conquest, *The Great Terror: Stalin’s Purge of the Thirties*, The Macmillan Company, New York, 1968, pp. 711-12.

prohibits the execution of a death sentence against pregnant women, mothers of young children as well as of children under 18 years of age and stipulates a 6 months stay of execution for people nonetheless subjected to the death penalty as do articles 68 of the *Fourth Geneva Convention*, 76(3) and 77(5) of *Protocol I* and article 6(4) of *Protocol II*. However, one has to wonder whether this formulation is not a pace backwards when compared to the notions of the law of armed conflict.

(1056) Indeed, while article 68 of the *Fourth Geneva Convention* prohibits the pronouncing a sentence of death against children of less than 18 years of age, article 76(3) of *Protocol I* prohibits the execution but not its pronouncement. And article 77(5) *Protocol I* follows the lines of article 68 of the *Fourth Geneva Convention*. Further, article 6(4) of *Protocol II* prohibits this pronouncement against children under 18, but not against pregnant women nor women with young children.

(1057) This might seem like semantics, but it is in reality an important point: a guiding principle of the law of armed conflict is that in no circumstances can one allow the bar to be lowered against the ‘acquis’ of this legal regime. Doing so establishes a precedent that can be used for justification in another completely different protection of the legal regime. As with the sources of international law, the accumulation of argumentative elements can have the effect to slowly unravel parts of the legal regime and this effect is unacceptable.

(1058) Furthermore, article 8 suffers from a serious deficiency in the way it is written when it states: “In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crime...”<sup>404</sup>. The aim being to diminish the use of the death penalty or at least to strongly regulate its process, the use of the verb *shall be* instead of *may be* actually dictates that states *must use* the death penalty for the most serious crimes, instead of giving them a choice. This was a serious mistake guaranteed to please some countries, but not advocates of international human rights and humanitarian law.

(1059) Afterwards, one finds at the declaration’s article 9 the all important judicial guarantees. This further retakes the notions of articles 3(d) common of the *Geneva Conventions*, of article 75(4) of *Protocol I* and article 6(2) of *Protocol II*. While the norms presented in the declaration encompass all that are enumerated in article 6(2) of *Protocol II*, simply inverting its sub-paragraphs (c) with its sub-paragraph (g), it remains worrisome that once more the bar has been lowered comparatively with article 75(4) of *Protocol I*. Indeed, article 75(4) has four of the most important notions of law attached into it, these being: *litis pedentes* or that of thing already judged upon or being pursued in the courts in another case; the right to cross-examination of witnesses; the right of a public sentence; and the right to being informed of the appeals recourses available as well as being permitted the use of these recourses after condemnation<sup>405</sup>. While the notions of article 9 contains most of the notions of article 6(2) of *Protocol II*, it does not incorporate the four principles contained in article 75(4) of *Protocol I*, including the notion of article 6(2) of *Protocol II*, which does required the accused to be informed of his appeal recourses.

(1060) Article 10 then takes on the principles of the rights of children edicting that they must be granted protections as required by their status. This mostly retakes the notions of the *Fourth Geneva Convention*, but the problem with this article is that it chooses to adopt the general guidelines of the Geneva Conventions, while the aim of the declaration is precisely to adopt specific and clear enunciation of the rights to be protected at all times. Doing so defeat the purposes of the declaration.<sup>406</sup> On the positive side, it does specify the clear prohibition of enrolling children under the age of 15 in armed forces (implicitly

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<sup>404</sup> *Turku Declaration*, *supra* note 389 at article 8(3).

<sup>405</sup> *Protocole I*, *supra* note 82 at article 75(4), sub-paragraphs (g), (h), (i) et (j).

including all types or military, para-military, insurgent or even terrorist organisations)<sup>407</sup>.

(1061) Article 11 then addresses the internment conditions for state security reasons, thereby re-stating the terms of article 5 of the *Fourth Geneva Convention*.

(1062) Following this, article 12 combines the protections to be afforded to the wounded and sick with the right to a humane treatment as well as that to receive medical treatment. It edicts that these rights are due to a persons, whether or not he or she has taken part in the violence, thereby establishing the link with the notion of combatant of article 4 of *Third Geneva Conventions* and 41 of *Protocol I*, as well as with the notion of humane treatment contained in articles 3/common GC 1949, 75(1) of *Protocol I* and 4(1) du *Protocol II*. Are also retaken the notion of *triage*, making it once more the sole legitimate criteria in determining the order of provision of treatment by adjudging the gravity of the wounds<sup>408</sup>. This is intrinsically linked to the obligation to search and care for wounded and sick as well as missing persons in the best delays possible, as enumerated in article 13 of the declaration<sup>409</sup>.

(1063) In the same manner of logic, article 14 of the declaration recognises the right of medical and sanitary as well as religious personnel to help and care for wounded and sick, as well as to be respected and have this respect ensure in the course of doing their humanitarian duties<sup>410</sup>. This provision is laudable as such, but then comes the difficulty of having it obeyed as doctors treating a wounded insurgent in some countries are perceived as conspirators (which they sometimes are) and often treated as accessories to murder or other insurgent actions or terrorism charges. It is precisely that which it attempts to correct, but its enforcement by the agents of the state makes it very hard to obey.

(1064) In the spirit of the enlargement of protections, article 15 then offers an open door to humanitarian organisations when, under the law of armed conflicts, solely the existence of an armed conflict gave them liberty to offer their services and only due reasons prohibit their activities.<sup>411</sup> This article could have serious repercussions<sup>412</sup>, as this merging of humanitarian provisions into a mixed 'minimal humanitarian standard' brings also a blurring of mandates between organisations primarily involved with human rights such as Amnesty International and humanitarian organisations, such as the Red Cross. This is not necessarily a welcomed addition to the whole project of a minimal humanitarian

<sup>406</sup> Articles 50 (rights to medical care and education in occupied territories) and 51 (interdiction of forced labor) could have been expressed clearly as they are quasi-universally recognised.

<sup>407</sup> Respecting amongst other the dispositions of the *Declaration of the Rights of the Child*, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) and of the *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, as well as those of articles 77(2) of *Protocol I* and 4(3)(c) of *Protocol II*. It is somewhat regrettable, however, not to see the full protections of article 77(2) of *Protocol I* whereby it would force to choose children by priority of age when enrolled in the armed forces between the age of 15 and 18.

<sup>408</sup> Retaking the dispositions common to articles 12(3) of *Conventions I and II*, as well as those of articles 10(2) of *Protocol I* and 7(2) of *Protocol II*.

<sup>409</sup> Re-stating *verbatim* the notions of articles 15 of *Convention I*, 18 of *Convention II*, 17 and 33 of *Protocol I* as well as 8 of *Protocol II*.

<sup>410</sup> *Turku Declaration*, *supra* note 389 at article 14(1) *in fine*: « They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission. », stating the exact terms of articles 15(2) of *Protocole I* and 9(2) of *Protocole II*.

<sup>411</sup> Articles 142 of *Convention IV*, 70 of *Protocol I* and 18 of *Protocol II*.

<sup>412</sup> When we think for example of the enlargement of the mandate of *Amnisty Internationale* to include the case of children-soldier, one perceives overlapping of mandates of private or non-governmental organisations dealing with either human rights or humanitarian aid. The debate has reached the Red Cross in the middle of the 1990, and thankfully the ICRC has resisted being drawn into the human rights debate. Since resources in humanitarian aid are fairly stretched to start with, a mandate enlargement would provoke certain deficiencies in aid and further threaten the essential notion of impartiality that permits it to operate.

standard. In effect, it plunges ahead in a widening of mandates of a flurry of organisations which already have enough problems with coping with their own specialty and give them incentive to broaden their horizons to ever more complex situations.

(1065) In effect, this ignoring once more the political reality that states are not interested in ever more interventions into their internal affairs at all times and further that such interventions by all kinds of interventions from the very efficient and serious such as the Red Cross movement to the ‘mom & pop’ volunteer organisation that will criticise willy-nilly without proper knowledge of the facts in a country. This leads only to more antipathy from government and lessen the chance of a broad accord on a minimal humanitarian standard.

(1066) Once more, this is the heaviest criticism that can be made of the whole project of a humanitarian minimal standard applicable at all times: it has to rest on a broad agreement of *minimal* norms in order to reach the acceptance of states. Trying to enlarge this to unnecessary fields does not give better chances of such a project being accepted nor can an agreement be made upon what truly constituted the *minimal* standard to be applied.

(1067) Again, this danger lurks in article 16, whereby the notion of the protection of the rights of groups, minorities and peoples, to include their dignity and identity is included. Inspired by the *travaux préparatoires* of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*. The protection of minorities and the notion of groups can be explicitly found in it, clearly intending to link this inclusion with the declaration. Again, this aim at creating an interdependence of international instruments in order to have it further embedded within the *lex corpus* of international law, this is even more the case as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* has a throve of references to other instruments itself precisely in the aim of using the referring approach to establish its force of law<sup>413</sup>.

(1068) But, once more, the addition of such an article is a guarantee of creating further more reason for reticence by states with large minorities or with many peoples or nations composing them. Such as article would be a reference as an argument in justifying such issues as the recognition of Spanish as an official language in at least some parts of Western and Southern United States, or that of the Russian very large minority of Ukraine, or indeed the Kurd minority of Iraq. Applying the principles contained in a United Nations’ General Assembly declaration, which is non-opposable to states, in order to create and then extend its applicable force of law is a sure way to further turn away states from recognising its principles.

(1069) The arguments of the drafter of the *Turku Declaration* is that such arguments are rendered inoperable by its article 17, which edicts clearly that nothing contained in the declaration modifies the legal status of any entity, thereby once more retaking the notions of articles 3(2)/common GC 1949 in fine and of article 3 of *Protocol II*.

(1070) But again, the problem is not so much this argument, although clearly it is a major part of the

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<sup>413</sup> *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993) at preamble: “Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations.”

issue, but rather it is that the drafter have taken notions which are establish as norms of international law and attempted not only to impose an effective opposability through force of law, but even go beyond by extending that reach and its scope of application. Doing so is the only sure way to prevent any consensus from emerging. And again, this is the downfall of jurists everywhere: they see life in terms of legal terms, but forget that they application of law depends on governments and that government are driven by interests. In short, they forget that law is a product of politics as defined as “*who gets what, when and how*”. Any course in political science will teach as much, but jurist forget this and try to impose a juridical view of ‘what should be’, forgetting often ‘what is’.

(1071) This is again apparent in article 18(1), which states that nothing the *Turku Declaration* contains affects can limits the reach of other international instruments and further stipulates at article 18(2) that: “No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent.”<sup>414</sup>.

(1072) The result is that while the objective of the *Turku Declaration* is very laudable, it departs from its concept of being inclusive and of merging existing rights by attempting to encompass domains outside its true scope of a *minimal* humanitarian standard and further tries to create principles of international human rights law that do not even exist as of yet and attempt to go beyond in their reach, by applying at all times, all the while being confusing on very important notions such as that of the use of gases, the question of mercenaries, the blurring of mandates and the recognition of linguistic and religious minorities as protected.

(1073) The *Turku Declaration* was revised in 1994 in Oslo and its change were adopted as the *Declaration of Minimum Humanitarian Standards* by the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, which is part of the Human Rights Commission of the Social and Economic Council of the United Nation’s Organisation<sup>415</sup>.

#### DECLARATION OF MINIMUM HUMANITARIAN STANDARDS

(1074) As it now stands, the modifications brought to the *Turku Declaration* differ little from the initial proposal, which is why the *Turku Declaration* was first analysed herein even though only the *Declaration of Minimum Humanitarian Standard* has a recognition by the UN. Overall, the structure and content has hardly change, but with some notable corrections.

(1075) These result in a large part from Pr. Meron’s revision of his initial declaration as modified in *Turku* and sporting a number of propositions, including a re-drafting of article 18, a new article 19 including individual responsibility and a new article 20 concerning the obligation to respect the rights protected wherein without any derogation<sup>416</sup>.

(1076) This was the proposal that led to the modification put into the *Declaration of Minimum Humanitarian Standards* into which the first correction that was brought was the use of the word shall

<sup>414</sup> *Turku Declaration*, *supra*, note 389 at article 18.

<sup>415</sup> *Declaration of Minimum Humanitarian Standards*, reprinted in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).

<sup>416</sup> T. Meron, “Combatting Lawlessness in the gray zone”, (1995) 89 *A.J.I.L.* 215

instead of may at article 8(3). This was an obvious correction and has been correctly addressed.

(1077) Other changes result not of a juridical interpretation, but rather of an evolutionary adaptation due to the multiple conflicts of the 1990s. As the *Background Paper* mentions: “Because of the most recent conflicts, the words ‘ethnic, religious and national conflicts’ have been added in all pertinent paragraphs.” Which after examination means articles 1(1), 15 and 17<sup>417</sup>.

(1078) The structural changes that take place are those whereby article 7 is given a second paragraph that protects the rights of persons to stay in place. Flowing from refugee law, this signals the intention of having an instrument that protects while projecting the interdependence of many fields of international law. However, once more it is a dangerous addition with regards to the acceptance of the declaration as this could prohibit state expropriation, with or without compensation as the internal legal regime permits, and again would bring to the fore the issue of indigenous populations.

(1079) Article 15 is then rewritten to encompass not only the rights of international organisation to provide help, but also of persons to have this aid reach them. Once more, the comment made above remains intact and this addition does not help to a future adoption as positive norms of international law by states by giving ever more access to escapist means to individuals, which can be as much insurgents, combatants as civilians.

(1080) Finally, the last change is that adding a paragraph to article 18 of the *Turku Declaration* transposing clearly the concept of non-derogation from Pr. Meron’s article 20 into a second paragraph of article 18.

(1081) Nonetheless, these changes bring little to change the initial direction and offering of the *Turku Declaration* and of its final accepted version of the *Declaration on Minimum Humanitarian Standard*.

#### CONCLUSIONS ON THE HUMAN RIGHTS APPLICABLES IN ALL SITUATIONS

(1082) What must be concluded from this example of a ‘minimum humanitarian standard’?

(1083) Firstly, one must take into account the fact that a legal void exists between the application of the law of armed conflicts and that of international human rights law in situations of exceptions where limitations or suspensions, termed derogations, of human rights are permitted under treaty law.

(1084) Further, the non-derogable human rights covered even in situations of exceptions are rather limited. The core rights are composed of the rights contained in applicable treaties of international human rights law as applicable by regional systems of protection and universal norms and by the application of the basic notions of international humanitarian law and/or their applicable *Geneva Conventions* or *Protocols*. The legal void is not a gap; it remains an abyss that needs to be bridged.

(1085) This leaves the efforts of finding a minimum humanitarian standard applicable at all times a very difficult project that must ally the extension of protections beyond the basic protections and yet not try to over-reach and create entirely new norms of international law that have not been agreed upon by states previously.

(1086) The project of bridging this legal void is laudable and must be pursued, but it must be so in a

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<sup>417</sup> *Ibid.* at p. 8.

narrower scope in order to guarantee the minimal norms in order to be realistic and practical as without state support, such a project will never rise beyond paper wishes and noble speeches.

(1087) And this project must be done in the aim that either treaty recognition is the aim or the recognition by the International Court of Justice in a piecemeal manner of each and every right contains within the declaration. This second approach would hardly be practical and may take decades, if not centuries: and there are no guarantees that the present system of international law will survive in its present form for such a long period.

(1088) Finally, we need to remember that this protection of human rights at all times attempt to bring together the notions of international human rights law and the protections of human rights provided for in the law of armed conflicts. To do so mixes two very different system and either brings about a third one or will re-structure the current universal human rights system.

### CONCLUSION

(1089) We have seen three domains of the LOAC in which short, middle and long term development will be critical. The question of anti-personnel mines already leads some to address the issue of small arms. The right to unilateral intervention in the internal affairs of a state brings with it the debate about human rights within the LOAC. As for LOAC in space, this is an extremely young sector that will require much work. Only as Humans progress in our common history will we be able to know if the work of those who believe in the protection of the victims of armed conflicts has worked.

(1090) As you are called upon to carry operations that are not covered by the full extent of the law of armed conflicts and that might imply derogations to the human rights legal regime applicable to your region or country, inspire yourself of the *Declaration on Minimum Humanitarian Standard*: this will cover both the infractions to international human rights law and gross violations of the law of armed conflicts, keeping you far from prosecution by the International Criminal Court, which has adopted many of these norms as its own.

### SUMMARY OF TERMS

**Merón Gap:** theory attempting to fill the juridical gap between the application of treaties concerning human rights in peacetime and in the LOAC in war time.





## CHAPTER 12

### THE EVOLUTION OF THE LOAC SINCE 1990

#### INTRODUCTION

There have been many developments on Nations to adopt more stringent norms of international law. While the optimism of the Second Gulf War (1991) at first gave way to a wave of humanitarian interventions, it very shortly fell upon the harsh reality of casualties in Somalia. It resulted in a very clear desire to avoid entanglements in foreign conflicts. As a results conflicts like those of the Balkans (1991-1995), Burundi (1992-1995), Rwanda (1994) and Afghanistan (1979-1996) were left unchecked for long period and only extremely intense public pressures forced intervention; most of the time, too late. Nonetheless, there have been evolutions and these may well reflect in progresses made with the latest invasion of Afghanistan (2002) and Iraq (2003), as well as Lebanon (2006).

#### CONTENT

- a. Combatant status in the view of international terrorism;
- b. *The Rome Statute of the International Criminal Court* (1998);
- c. *The Convention on the Safety of United Nations and Associated Personnel* (1999);
- d. *The Statute of the Iraqi Special Tribunal*;
- e. Further development anticipated.

#### A. THE COMBATANT STATUS IN THE LIGHT OF INTERNATIONAL TERRORISM

(1091) Following the September 11, 2001 terrorist attacks and in order to protect American lives and property, the Republic of the United States of America has undertaken several military and anti-terrorist actions in the past two years. As a result, persons connected to the Taliban regime in Afghanistan or the Al Qaeda terrorist network across the world have been killed or captured and held *incommunicado* in the US Naval Base at Guantanamo, Cuba. So far, the United States' government has refused to recognise some or all of these detainees as prisoners of war on the basis of their different citizenship and upon different interpretations of international law.

(1092) It has clearly stated its position that detainees at Guantanamo are persons associated with terrorism and therefore not entitled to either the full protection of the United States Constitution or to protections given by international humanitarian law. Some human rights and international humanitarian law standards, such as the prohibition on torture, have been acknowledged as a basic minimum that is to be met, but no other protections were to be afforded.

(1093) This position has been presented in the media on the basis of the notions of "enemy combatant", "unlawful combatant" and "acts of war". American civil rights activists have brought forward many questions regarding the status of these detainees, but most have done so on the basis of the right of *habeas corpus* and the Constitutional protections of the United States. But, conveniently, Guantanamo is not deemed American soil: it is Cuban soil lent to the American government. Even the Cuban government states that it is still its territory. As such, the jurisdiction of the American Constitution is claimed not to apply in this case.

(1094) Furthermore, based on notions dating from the Second World War, the US claims that there are

no measures of protection that are to be afforded to the detainees. It states that international humanitarian law does not apply because the persons captured were either not party to the conflict, not combatant or not respecting the laws and customs of war. Confusing the very notion of “war” and muddling legal concepts, the US government has accomplished a most impressive act of magic: making people believe that American and international laws do not apply to these detainees. In fact, the US administration has made such a good use of confusion that hardly any article in the current literature fully addresses the international norms denied to the detainees. And of those who have dared confront the legal grounds upon which the United States government rests its case, there is such a miscomprehension of humanitarian and of human rights that one is inclined to question the agenda behind the writings.

(1095) The present essay will therefore analyse the notion of ‘combatant’ and the status of persons captured under arms in combat actions. It will differentiate between Taliban fighters captured in Afghanistan as well as Al Qaeda fighters captured alongside them during the combat operations undertaken by American and Coalition forces in Afghanistan. It will further differentiate between Al Qaeda members captured during the so-called “war on terrorism”, especially those captured outside the theatre of war that was Afghanistan, in such places as Pakistan, the Philippines or the United States. Due to the complexity of the multiple American engagements and the differences in legal regime applicable to the United States and some of its allies (in particular the First and *Second Additional Protocols of 1977* for Canada in Afghanistan and the United Kingdom in Iraq), this essay will concentrate solely on the American legal perspective, with the *Geneva Conventions of 1949* as the applicable humanitarian law.

(1096) In doing so, it is the author’s hope to deny some very disturbing twists of interpretation that the American government has tried to make in international law and still maintain that the United States stands for higher and better values than their enemy, that they must uphold the highest standard of justice and fairness—even to their most die-hard enemies—by the full application of humanitarian law.

(1097) **A State of War?** The terrorist attacks of September 11, 2001 killed an estimated 3,000 persons and wounded scores of others, not to mention the physical destruction and the psychological impact of an attack on American soil. These acts of cowardice were met with incredible courage by many. However, prejudice and racial abuse increased to unheard of levels against persons of Arabic or Asian origin in North America. The US Government quickly established that the perpetrators of these terrorist attacks were members of the Al Qaeda network, a loose association of fundamentalist Islamists led by Osama Bin Laden. His whereabouts were traced to Afghanistan and the United States gave the Taliban regime, ruling Afghanistan under a fundamentalist interpretation of the Sharia, an ultimatum to deliver Bin Laden for prosecution<sup>418</sup>.

(1098) Whether through lack of power or lack of will to do so, the Taliban regime did not deliver him. The United States subsequently invaded Afghanistan with the help of Afghan dissenting forces, in particular the Northern and Eastern Alliances. The Taliban fought a defensive campaign and was utterly crushed under the weight of American conventional weaponry and Special Forces tactics.

(1099) The first question that arises from these facts is whether a war existed at any time between

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<sup>418</sup> Security Council demanded that “the Taliban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted,” SC Res. 1267, UN SCOR, 4051st mtg., UN Doc. S/RES/1267 (1999) 2, and that they “stop providing sanctuary and training for international terrorists and their organizations”, SC Res. 1214, UN SCOR , 3952nd mtg., UN Doc. S/RES/1214 (1998) 2, and “take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps” SC Res. 1333, UN SCOR, 4251st mtg., UN Doc. S/RES/1333 (2000) 2. Moreover, the Security Council noted that the failure of the Taliban to comply with Resolution 1214’s obligation of cooperation to bring indicted terrorists to justice constituted a threat to international peace and security, thereby making Chapter VII applicable.

September 11, 2001 and the end of combat operations in Afghanistan and its replacement by the UN-sanctioned, NATO-led peacemaking mission in Afghanistan. Indeed, the US were very quick to point out that it considered the terrorist attacks perpetrated against civilian and military targets as acts of war. Some authors definitely support the existence of a state of war from the moment these attacks were committed<sup>419</sup>.

(1100) This interpretation is based on the chain of events leading to the September 11, 2001 attacks, including: the attempts to kill American troops in Aden on the way to Somalia in 1992, as well as the 1993 Mogadishu ambush that killed 19 US troops, the 1993 bombing of the World Trade Center, the bombing of the Khobar Towers American barracks in Saudi Arabia, the destruction of two American embassies in Africa and the bombing of the USS Cole in Yemen<sup>420</sup>. It is also based on the perception that the scope of the act, killing more than 3,000 persons from more than 87 countries is in itself enough to warrant the interpretation of these attacks as acts of war<sup>421</sup>. As such, it is seen as a “war against terrorism” and the adoption of this new conception of war is deemed more expedient in dealing with the acquisition of evidence to prevent further acts of terrorism.

(1101) Such an interpretation is quite unsettling as it confuses cause and effect and certainly does not correspond to the current legal notion of war. Indeed, whether in American law or in international law, war as been defined as taking place only between States<sup>422</sup>. In fact, the mere proposition that war could be wage by individuals has been repeatedly and most vehemently decried by most, if not all, States<sup>423</sup>. Some commentators nonetheless affirm that the attacks of September 11, 2001 were of such scope and that the link between Al Qaeda and Afghanistan was such that for all effects and purposes the attacks were in fact committed by a State<sup>424</sup>.

(1102) Failing acceptance of this interpretation, some commentators suggest that the *Charter of the United Nations* is a living document and as such can adapt itself to a new form of violence that constitutes an armed attack and therefore be interpreted as an act of war<sup>425</sup>. This perception is supported by some

<sup>419</sup> “The New Enemy,” *The Globe and Mail*, (15 September 2001) 15.

<sup>420</sup> Wedgwood, Ruth., “Military Commissions: Al Qaeda, Terrorism and Military Commissions,” (2002) 96 *A.J.I.L.* 328 at 330.

<sup>421</sup> *Idem*.

<sup>422</sup> Alexander, Keith S., “In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists”, (2003) 78 *Notre Dame Law Review* 885 at 895 as to American law: “...the Supreme Court in 1800 defined war as “every contention by force between two nations, in external matters, under the authority of their respective governments...”, citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800). See also Drumbl, Mark A., “Victimhood in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order”, (2002) 81 *North Carolina Law Review* 1 at 27, interstate context may be clouded by the fact that Article 51 mentions armed attacks, not armed attacks by a state.

<sup>423</sup> *Ibid.*, at p. 27 footnote 85. “The [U.N.] Charter was drafted on an assumption that all force was inter-state and that it governed inter-state relations...” citing Duffy, H., “Responding to September 11: The Framework of International Law”, (Oct. 2001) 11 at <http://www.interights.org>. Giorgio Gaja observes: “When stating the conditions for individual and collective self-defence, neither Article 51 of the UN Charter nor Article 5 of the NATO Treaty specifies that an ‘armed attack’ has to originate from a state. However, this condition may be taken as implicit (...) Moreover, armed attack is a subcategory of aggression, as explicitly said in the French text of Article 51 of the Charter, and also aggression clearly has to come from a state.” in Gaja, G., “In What Sense was There an ‘Armed Attack?’”, (2002) *European Journal of International Law Discussion Forum*, at <http://www.ejil.org/forum> (last visited Nov. 11, 2002). See also Megret, F. “War? Legal Semantics and the Move to Violence,” (2002) 13 *European Journal of International Law* 361 at 379 (noting that “self-defence was clearly only ever meant to be against states”). One immediate exception to the interstate requirement is the fact that armed attacks can occur in internal civil war, as organized insurgency movements can initiate armed attacks against a state government. See Slaughter, A.M. and Burke-White, W. “An International Constitutional Moment”, (2002) 43 *Harvard International Law Journal* 1 at 8.

<sup>424</sup> Drumbl, *supra*, note 422 at 27.

<sup>425</sup> Schrijver, Nico J., “Responding to International Terrorism: Moving the Frontiers of International Law for Enduring Freedom?” (2001) 48 *Netherlands International Law Review* 271 at 284, cited in Drumbl, *supra*, note 422 at 27.

commentators who argue that the nature of war has changed and therefore the legal interpretation should change with it. Such interpretation has been set upon the traditional vision of war as an extension of politics by other means, as expressed by Carl von Clausewitz in his famous—and unfinished but posthumously published in 1832 book—“On War”. This definition is presented as meeting the criterion of the FBI’s own definition of terrorism, therefore further supporting a redefinition of war<sup>426</sup>.

(1103) Others further argue in favour of such a view based upon the new doctrinal views of major Western armies. These arguments are set upon confusing legal and secular notions and muddle international law generally and international humanitarian law especially. For example, one author affirms that international humanitarian law defines some acts as illegal warfare and that the use of incendiary and attacks on civilians are clearly illegal under international humanitarian law. He concludes that the attacks of September 11, 2001 were severe enough to constitute war crimes<sup>427</sup>, therefore justifying the US government in prosecuting Al Qaeda members in military commissions. The author did not bother to prove the existence of a state of war, or of a war at all, without which humanitarian law is inapplicable. It does not seem to be of any concern to him. The scope of the attack seems enough to warrant his interpretation. But that is not what international or US courts have determined before.

(1104) While it is true that a declaration of war is not required, the notion of war and indeed that of civil war includes some prerequisite. In the case of war, there is no doubt that the actors concerned are High Contracting Parties to the *Geneva Conventions*:<sup>428</sup> states that have signed the *Conventions* or the other which are not Party to the *Conventions* but are held accountable as to the respect of the notions of *jus cogens* contained in them.<sup>429</sup> Civil wars are not recognised under the *Geneva Conventions*. They are, however, recognised under 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)*.<sup>430</sup> The United States of America has not ratified the *First* or the *Second Additional Protocol*. It would be rich for them to claim the existence of a state of war which they do not recognise by treaty. Furthermore, a civil war under *Protocol II* is one between the armed forces of a High Contracting Party against a dissenting or other organised armed forces group. This is clearly not the case between Al Qaeda and the United States, since Al Qaeda is neither a dissenting force nor another organised armed forces group. It is a foreign organisation of a terrorist nature. Wars that include foreign factions or control from foreign countries are

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<sup>426</sup> Keith, *supra*, note 422 at 895. He defines terrorism as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives,” citing Crona, S.J. and Richardson, N.A., “Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism”, (1996) 21 *Oklahoma City University Law Review* 349 at 371, quoting Terrorist Research and Analytical Center, U.S. Dept. of Justice, *Terrorism in the United States 1982-1992*, 1992 at 20, and professor Christopher Blakesley who: “identified five elements of what constitutes terrorism. They are: (1) the perpetration of violence by whatever means; (2) against ‘innocents’; (3) with intent to cause the consequences of the conduct or with wanton disregard for its consequences; (4) for the purpose of coercing or intimidating an enemy (government or group) or otherwise to obtain some political, military, or religious benefit; [and] (5) without justification, citing Blakesley, C.L., “Terrorism, Law, and Our Constitutional Order,” (1989) 60 *Colorado Law Review* 471 at 480. Also see the *International Convention Against the Taking of Hostages*, signed at New York, December 18, 1979 ; *International Convention for the Suppression of Terrorist Bombing*, adopted by the General Assembly December 15, 1997 ; *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly December 9, 1999 ; *International Convention for the Suppression of Unlawful Seizure of Aircraft* , 860 UNTS 105, entered into force Oct. 14, 1971; *International Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*, opened for signature at New York, December 14, 1973.

<sup>427</sup> Evans, Christopher M., “Terrorism on Trial: The President’s Constitutional Authority to Order the Prosecution by Military Commission,” (2002) 51 *Duke Law Journal* 1831 at 1847.

<sup>428</sup> The *Geneva Conventions*, *supra*, note 25.

<sup>429</sup> See International Committee of the Red Cross, *Customary Rules of International Humanitarian Law*, Cambridge, Cambridge University Press, 2003.

<sup>430</sup> *Protocol II*, *supra*, note 82.

civil wars, but become “internationalised” non-international armed conflicts; in effect becoming international armed conflicts. The International Tribunal for the former Federal Republic of Yugoslavia has clearly established this in its *Tadic* case<sup>431</sup>. But again, that is not the case with Al Qaeda.

(1105) Such confusion is compounded by the lack of a precise international definition of what terrorism is. Indeed, while there are treaties on particular aspects of terrorism, there is no clear and large view of what constitutes terrorism<sup>432</sup>. And this confusion is further helped by opinions of commentators that the United Nations Security Council resolution 1368 clearly established the right of self-defence of the United States due to the occurrence of an armed attack against American soil<sup>433</sup>. For some, that notion of self-defence and the invocation of NATO’s Article 5 prove the existence of a war since the right of self-defence is invoked. Meanwhile, it must be pointed out that none of the UNSC resolutions prior to the success of resolution 1368 speak of a war. Nor does the NATO press release speak of a war<sup>434</sup>. This intellectual gymnastic is made on an assumption. Finally, some authors present the war against terrorism as an actual war that requires the extension of the notion of war to terrorist attacks to protect national security, to better legislate the rule of evidence and to obtain custody of alleged terrorists as well as the protection of jurors, witnesses and court personnel during prosecution.

(1106) Such arguments are unconvincing. National security certainly requires protection of sensitive information, but persons in custody will be missed by their co-conspirators. Their custody is no secret. Nor is the information they hold. By definition, the terrorists will take for granted that their enemy knows what the person captured knows. It is simple and expedient logic. The source of the information may well need to be protected, but the truth is that there are not 300 persons in on a secret at a time. And there are not 300 plots for 300 detainees. Therefore, it is reasonable to understand that there is no need to hold that many people *incommunicado* without access to a lawyer for fear of divulgence of information since it is what the government wants.

(1107) Historical precedents do not justify the arguments proposed. Israel has occupied Arab lands for more than 30 years and refuses to recognise a state of war with the Palestinian Authority as it is not a State. The same situation can be evoked for myriads of conflicts past and present, including the IRA in Northern Ireland. As well, the protection of national security rarely requires the use of martial law or emergency measures. In fact, indefinite or repeated states of alert create fatigue and laxism that result in human errors and fatal mistakes. The oft-cited comparison with Pearl Harbour is indeed quite applicable in this case as the repeated alerts created confusion and is in a large part to blame for the poor reaction of American forces that day. In the case of September 11, 2001, normal law enforcement agencies are very much presumed to have had enough information to act but decided not to, leading to the disastrous consequences of September 11, 2001. The report is due in May 2004 and there are words leaking already that there was evidence of sufficient quantity and quality to obtain a warrant and to hold alleged terrorists. This would have in fact prevented the attacks. But agents either chose to ignore the evidence, did not

<sup>431</sup> *Tadic*, *supra*, note 359 and *Tadic (Appeal)*, *supra*, note 363.

<sup>432</sup> Addicott, J. F., “Legal and Policy Implications for a New Era: ‘War on Terror’ ”, (2002) 4 *The Scholar: St. Mary's Law Review on Minority Issues* 209 at 212. The author cites Some examples of specific antiterrorist conventions include: *The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)*, T.I.A.S. No. 159 (1963); *Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)*, 22 U.S.T. 1641, T.I.A.S. No. 7192 (1971); *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)*, T.I.A.S. 7570 (1973); *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention)*, T.I.A.S. 8532 (1976-77); *International Convention Against the Taking of Hostages (Hostages Convention)*, 34 UN GAOR Supp. 39, UN. Doc. A/34/39 (1979) 23.

<sup>433</sup> Wedgwood, *supra*, note 420 at 329 citing S.C. Res. 1368 (Sept. 12, 2001), 40 ILM 1277 (2001).

<sup>434</sup> NATO, “Statement by the North Atlantic Council,” Press Release 124, (Sept. 12, 2001) in (2001) 40 ILM at 1267.

comprehend the full powers they already had, or were trying to set a trap for bigger terrorists. Whichever is the case, the fault lies not with the system prior to September 11, 2001 but with the use of that system by persons in law enforcement agencies. Their gamble did not pay.

(1108) As for the protection of court personnel, judges, jurors and witnesses, the current situation is nothing different than the trials of mafia members in Italy, or of Columbian or Mexican drug barons. These persons must be protected, by force of arms if necessary, but that does not mean that a state of war exists between the State or the cartels, despite the term “war on drugs” and the use of American and Colombian armed forces. Nor does the fact that a psychopathic murderer, even of the means and obvious intelligence of a Bin Laden, who claims the existence of a state of war against the United States creates such a legal state of war. He is not the representative of a State. He is not associated with a State, having in fact been rejected by many and exiled as a non-citizen, and certainly his word does not carry the weight of a nation. It carries the frustrations and fears of thousands, whether real or perceived, but it remains the word of a private person who is in fact inconsequential to international actors. It is not because a maniac somewhere declares war on a State that a state of war is created. Only a maniac representing a State and empowered to do so can create a war.

(1109) **TALIBAN STATUS - The Taliban as combatants.** The status of Taliban fighters captured during military operations in Afghanistan and now detained in Guantanamo results from Article 4 of the *Third Geneva Convention*<sup>435</sup>. But its interpretation in US policies does not meet the spirit or the letter of humanitarian law. The US adopted the view that it was engaged in an international armed conflict, in accordance with Article 2 common to the four *Geneva Conventions*<sup>436</sup>, but refutes that it confronted lawful combatants or that they should be granted prisoner of war status. Some of the Taliban personnel captured

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<sup>435</sup> *Third Geneva Convention, supra*, note 25 at Article 4: “Article 4 : A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war. 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (...)

B. The following shall likewise be treated as prisoners of war under the present Convention: 1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the Occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. 2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties (...).”

<sup>436</sup> *Geneva Conventions, supra*, note 25 at Article 2: “Art 2. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

in Afghanistan were transferred to Guantanamo Bay and denied prisoner of war status even though they were “treated” as combatants. The US government defended its decision with changing discourse but finally said that since the US did not recognise the Taliban regime as a legitimate government, Afghanistan was not a continued party to the *Third Geneva Convention*. As a result, none of Guantanamo Bay detainees, including the Taliban, can benefit from prisoner of war status.

(1110) Such reasoning demonstrates a very poor juridical understanding of international law. The theory of *tabula rasa* in cases of State succession has long been squashed<sup>437</sup>. It further leads to questions as Article 4(3) clearly states that the *Third Geneva Convention* applies to members of armed forces of government not recognised by the detaining Power<sup>438</sup>.

(1111) On February 7, 2002, President Bush declared that the *Third Geneva Convention* was applicable to Taliban forces and that there existed a state of war between two parties to the *Conventions*<sup>439</sup>. As a result the *Conventions* were applicable to Taliban detainees, but not to Al Qaeda detainees. Yet, Taliban fighters have not been granted prisoner of war status; the extension of some humane benefits of the *Conventions* has been granted to them, but not the protection befitting combatants on the grounds of collaborations with Al Qaeda.

(1112) The US Administration has declared Taliban fighters were unlawful combatants and therefore not granted the protections of prisoners of war. The degree of their unlawfulness depended upon the period when one asked the Administration, but the three main reasons evoked were: 1) that the Taliban was not an armed force in the sense of the Geneva Conventions, 2) that they could not fall within the category of militias because they did not wear distinctive signs and 3) that they did not respect the LOAC.

(1113) In a country in the midst of a civil war for 23 years, the Taliban regime won a clear military victory in 1996, overrunning its opponents and establishing effective control over the vast majority of the country. The Taliban had a rank structure, some military training and were empowered by a government exercising effective control over the territory and population of most of Afghanistan. Their main task was obviously to protect Afghanistan from enemies—as perceived by the Taliban regime—from within and without<sup>440</sup>.

(1114) The Taliban was not an armed force organised along modern army lines, but they were nonetheless submitted to a chain-of-command linked to the central government of the Taliban. The central command of such an entity may be argued and some may be tempted to differentiate between members of a standing army and active militias. To this end, the lack of uniform is pointed out. But this observation is a blatant technical justification that violates not only the spirit of humanitarian law, but that of common military sense. If a uniform was so definitely hard to differentiate, it then leads to the question of how Coalition forces could be so certain of the body count of killed Taliban fighters when communicating the results of operations to the press. How does one see the difference between a dead Taliban fighter and a dead civilian? The answer is clearly that there is a way to distinguish them. Reports from service personnel indicates that while a modern military uniform may not be the common attire of the Taliban, they nonetheless had a distinctive garb and that the black turban was seen as a primarily Taliban

<sup>437</sup> Dallier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002 at 417 and 538 to 543.

<sup>438</sup> *Third Geneva Convention*, *supra*, note 22 at Article 4(3).

<sup>439</sup> Murphy, S.D., “Contemporary Practice of the United States Relating to International Law,” (2002) 96 *AJIL* 461 at 476.

<sup>440</sup> Stein, “Artillery Lends Dignity to What Otherwise Would Be a Common Brawl: An Essay on Post-Modern Warfare and the Classification of Captured Adversaries,” (2002) 14 *Pace International Law Review* 133 at 148.

symbol<sup>441</sup>. This in itself satisfies clearly not only the spirit but the letter of Article 4 of the *Third Geneva Convention*.

(1115) Furthermore, the qualification of somebody as an illegal or unlawful combatant has nothing to do with whether he was wearing the right uniform or not. The status of combatant is the licence of persons to kill and wound and destroy property lawfully under the laws and customs of war. Wearing the wrong uniform or no uniform at all does not make a person an unlawful combatant: it makes him a combatant and, if captured, a prisoner of war who will retain his status of prisoner of war before, during and after his trial for violations of humanitarian law. Saying that they are unlawful combatants because they did not wear the right uniform is confusing cause and effects. And the same applies with respect to the laws of armed conflicts.

(1116) Concerning that respect, there are many legal issues linked to this. The two most important concerns are: 1) the fact that there is a procedure to punish violations of the international humanitarian law which has so far not been respected, with the effect of denying prisoner of war status to combatants obviously protected by the *Third Geneva Convention*, in itself a violation; and 2) an interpretation of collective guilt is not legal under international law and has not been used since the International Military Tribunals of Nuremberg and Tokyo.

(1117) The presumption of guilt on account of belonging to a State organisation judged as criminal has not been used since the enactment of Article 9 of the 1945 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*<sup>442</sup>. If some have revised history and seen this as victors' justice, it is nonetheless a fact that a law was created to severely punish the atrocities of the Second World War<sup>443</sup>. This has permitted a very clear precedent and a legal basis for prosecuting those accused. While the detention conditions of the high ranking members of the Party and military standing trial were certainly of a certain rude nature, defending parties had access to councils and were allowed more freedoms than the current detainees at Guantanamo Bay

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<sup>441</sup> Broomes, J.W., "Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba," (2002) 42 *Washburn Law Journal* 107 at 127.

<sup>442</sup> *London Agreement, supra*, note 22 at : "Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard..." See also *In re Ohlendorf and Others (Einsatzgruppen Trial)*, (1948) 15 *Annual Digest* 667.

<sup>443</sup> Other charges made about the legitimacy of the IMT concerned the absence of presumption of innocence or that of a possibility of acquittal; no definition of what a war of aggression consisted of existed; the laws of Germany were legal through their own system and the IMT provided for disobedience in the Armed Forces of Nations due to the refutation of the defense of superior orders (See *In re Goering and Others*, (1946) 13 *Annual Digest* at 221, *In re Altstötter and Others*, (1947) 14 *Annual Digest* at 286 and *In re Takashi Sakai*, (1946) 13 *Annual Digest* at 223). However, in the accusation of judgment made *ex post facto*, one must point out that the Allied had, since 1942, been very clear in their warning to Axis forces regarding atrocities. The declaration of President Roosevelt to punish atrocities on August 21, 1942 and repeated on October 7, 1942, and the *Moscow Declaration of October 1943*, available at <http://www.yale.edu/lawweb/avalon/wwii/moscow.htm>, (last opened 7 January, 2004), stating: "... three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare: (...) those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished (...) Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done," was limpid on the matter.



who, for all there alleged crimes, have committed nothing on the scale of Nazism and Imperialist Japan.

(1118) In fact, while the conditions may have been severe in some lights, defendants at Nuremburg were given many rights, including that of counsel or to defend themselves and the right of cross-examination. Meanwhile, Taliban fighters who are nothing more than common infantrymen have been refused even access to counsel and their respective individual offences have yet to be given to them in a clear bill of charges.

(1119) It is important to bring forth a precision at this point: Taliban fighters held at Guantanamo Bay are not held for acts of terrorism. They are held for the potential aiding and abetting of terrorists. Their detention is theoretically in order to "...protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks..."<sup>444</sup> as put forth in Section 2 of *Executive Order 13* since it defines the individuals subject to this order as either a member of Al Qaeda or persons engaged in, aiding or abetting, or conspiring to commit acts of international terrorism, or harbouring one of these persons. None of this order concerns combatants of armed forces<sup>445</sup>.

(1120) Furthermore, this order concerning terrorism, which is in itself a matter of criminal law, as been decreed by the President of the United States of America in his authority as Commander in Chief of the Armed Forces of the United States of America. Such an order should therefore concern military matters and not criminal law. Yet, the order continues to cite that persons detained under this order shall be tried by a military commission<sup>446</sup>.

(1121) Upon seeing the inclusion of trial by a military commission, one would be inclined to think that a proper procedure determining the status of the detainee is enacted and that the spirit and the letter of humanitarian law are applied. Nothing could be further from the truth. A military commission under American law is not the equivalent of a court martial. A military commission is a type of military tribunal but is governed by a specific—and *ad hoc*--set of rules and procedures. By doing so, the United States is actually taking away from the jurisdiction of the civilian legal system the right of appeal and the judiciary powers of the US Supreme Court, making the President the last authority for revision<sup>447</sup>, which is not a guarantee of fairness.

(1122) That is not to say that military commission cannot be functional and impartial. In the case of the *International Military Tribunal for Major War Criminals of the European Axis*, the tribunals set up through the *London Agreement* of August 8, 1945 handed verdicts one year later, resulting in the death sentences of 12 former high-ranking Nazis<sup>448</sup>. As for the Tokyo trials, 24 of the 25 defendants were convicted and had a sentence of death carried out. While a strong majority were declared guilty, there is still a marvel in the fact that non-guilty verdicts were actually given at all. Despite the accusation of victor's justice, facts and numbers compel observers to marvel at an attempt to fair and full trial. Moreover, military commissions conducted for lesser war criminals led to the prosecution of 1672 cases in

<sup>444</sup> *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011111327.html> [hereafter *Military Order 13*], at section 1(e).

<sup>445</sup> *Ibid.*, at Section 2(1).

<sup>446</sup> *Ibid.*, at Section 4.

<sup>447</sup> Maddox, H.A., "After the Dust Settles: Military Tribunal Justice for Terrorists After September 11, 2001," (2002) 28 *North Carolina Journal of International Law & Commercial Regulation* 421 at 422 and 423.

<sup>448</sup> In accordance with the *London Agreement*, *supra*, note 20.

Europe with 1416 convictions<sup>449</sup> and 996 trials in Japan with 856 convictions<sup>450</sup>. Therefore, one could argue that a military commission could be fair and just.

(1123) Still, the views of the United States on the matter and its treatment of detainees at Guantanamo do not support such impartiality. Presuming that all detainees are persons associated with the deeds deemed under the jurisdiction of a military commission as stipulated in *Military Order 13*, and that the extra-territoriality of American law does apply to them, there is a disturbing confusion between naming someone a combatant and then refusing prisoner of war status on the basis of the commission of war crimes.

(1124) This is because Article 5 of the *Third Geneva Convention* clearly states that in any case of doubts as to the category to which he belongs the presumption shall be that he is indeed a prisoner of war until a competent tribunal determines otherwise<sup>451</sup>. The unilateral declaration of Taliban fighters as unlawful combatants without even having this presented to any sort of tribunal is a violation of humanitarian law. It is a grave breach as defined in Article 130 of the *Third Geneva Convention*<sup>452</sup>, and leaves the US government open to litigation in international courts.

(1125) Furthermore, Article 85 of the *Third Geneva Convention* states that combatants that are prosecuted for acts committed before their capture shall retain, even if convicted, the benefits of the *Third Geneva Convention*<sup>453</sup>. Only the reservations to Article 85 made by the USSR (now Russia by way of State succession), Poland, Hungary and the Democratic People's Republic of Korea at the time of signature concerns the refutation of the applicability of the protections of prisoners of war to those convicted of war crimes or crimes against humanity. Until such a conviction is declared by a competent tribunal, these countries accept the application of prisoner of war protections. The United States can hardly claim that the situation has changed, especially because they have never made a reservation to Article 85 of the *Third Geneva Convention*.<sup>454</sup>

(1126) To avoid getting entangled this debate, the US government pleads that the Taliban fighters detained are not combatants in the first place and that therefore they are not protected under the terms of the *Third Geneva Convention*. While this is disproved above, let's consider this argument.

(1127) **Talibans as civilians/unlawful combatants.** Since the United States have ratified all four

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<sup>449</sup> In accordance with *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 3 *Official Gazette Control Council for Germany* 50-55 (1946).

<sup>450</sup> Janik, A.A., "Prosecuting Al Qaeda: America's Human Rights Policy Interests Are Best Served By Trying Terrorists Under International Tribunals," (2002) 30 *Denver Journal of International Law and Policy* 498 at 502.

<sup>451</sup> *Third Geneva Convention*, *supra*, note 25 at Article 5: "Article 5 - The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

<sup>452</sup> *Ibid.* at Article 130: "Article 130 - Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

<sup>453</sup> *Ibid.* at Article 85: "Article 85 - Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

<sup>454</sup> Sassoli, M. and Bouvier A.A., *How Does Law Protect in War?* Geneva, International Committee of the Red Cross, 1999 at 591-592.

*Geneva Conventions* and that we are under the hypothesis that combatant and prisoner of war status are refused to the detainees, they must therefore be of a specific legal category with rights and obligations attached. Indeed, there is such a category and that is the whole premise of the *Fourth Geneva Convention*, relating to the protection of civilians. If one refutes the argument that Taliban fighters were combatants and argues that they are unlawful combatants, this means they are civilians who have taken up arms unlawfully. Therefore, regardless of the acts committed prior to capture, they are protected by the terms of the *Fourth Geneva Convention*.

(1128) The *Geneva Conventions* are clear in the procedure and the effects of illegal combatants. While the term “unlawful” or “illegal” combatant does not exist officially in humanitarian law, it has been in use since at least the 19<sup>th</sup> century. And in conflicts before, such as the American War of Independence, militias were deemed illegal combatants by Regular officers and dealt with swiftly in many cases. Since then, and especially after the Second World War where partisan movements in Russia, Yugoslavia, Greece, France, Norway and Denmark proved very cumbersome for the occupying forces, the *Geneva Conventions* have brought new protections and the term “protected persons” to differentiate between the legal combatants and the persons not deemed combatants but to be nonetheless afforded protections under the *Conventions*. This is the case of all persons<sup>455</sup> in the hands of an Occupying Power<sup>455</sup>. One principle of humanitarian law is very simple: nobody should remain outside the law. A person detained must have a legal status<sup>456</sup>.

(1129) And it is clear at Article 5 of the *Fourth Geneva Convention* that civilians who have unlawfully participated in hostilities, whether they are saboteurs, spies or persons under definite suspicion of activities hostile to the Occupying Power, are entitled to the protections of this *Convention*<sup>457</sup>. And those protections include the core protections of Article 3 common to all *Geneva Conventions*<sup>458</sup> as well as the

<sup>455</sup> *Fourth Geneva Convention*, *supra* note 25 at Article 4(1): “Article 4 - Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13. Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.”

<sup>456</sup> Pictet, J., *Commentaries* at: <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument>: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.”

<sup>457</sup> *Fourth Geneva Convention*, *supra*, note 22 at Article 5: “Article 5 - Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.”

<sup>458</sup> *Ibid.*, *supra*, note 25 at Article 3 (common to all *Geneva Conventions*): “Article 3 - In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

full rights and privileges of the *Fourth Geneva Convention*<sup>459</sup>.

(1130) Article 3 is part of *jus cogens* and the protections of the *Fourth Geneva Convention* are *erga omnes*. However, even if *erga omnes*, a close reading of Article 5 of the *Fourth Geneva Convention* does present some exceptions of importance: 1) ‘definite’ suspicion of hostile activities is enough to hold a protected person *incommunicado* as it is being done at Guantanamo Bay and 2) it presents a distinction between the rights and privileges that must be afforded to the detainee.

(1131) Presuming purity of intent on the part of the detaining Power, the case of the detainees at Guantanamo may indeed justify their being held *incommunicado*. It was the intent of the Commission drafting the article that this be used as a security tool of the Occupying Power in order not to tip off the group with which the detainee may have been working to secure capture or elimination of the co-conspirators<sup>460</sup>. However, Article 136 of the *Fourth Geneva Convention* already provides for a delay of two weeks before communication may be made by the detainee or someone on his behalf. In all probability, somebody will have noticed the absence of a person after two weeks and presumed his capture or death within his irregular formation or underground network<sup>461</sup>.

(1132) As for the distinction between the rights and privileges, it is not worth getting into the debate of which constitutes a right and which constitutes a privilege as the obligation to treat humanely the detainee already encompasses the notions contained in Articles 37 and 38 such as medical attention and chaplain visits<sup>462</sup>. The fact is that despite the exceptions made and the provision for the security of the Occupying Power, there is nothing that curtails the rights of the detainees as to the basic human rights imbedded within the *Geneva Conventions* in Article 3. And these rights also contain the right to a fair and regular trial, as part of the full rights and privileges granted by the *Convention* and applicable at the earliest date consistent with the security of the Occupying Power.

(1133) Under this approach, it is also clear that the detainees at Guantanamo Bay have a right to the basic norms of judicial due process. Indeed, under Articles 71 and 72 of the *Fourth Geneva Convention*,

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1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

<sup>459</sup> *Fourth Geneva Convention, supra*, note 25, Article 5 *in fine*.

<sup>460</sup> Diplomatic Conference, *Remarks and Proposals*, Geneva, 1949 at 68, reproduced at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/12409217ce36c309c12563cd0042a5e0?OpenDocument>; “Diplomatic Conference several delegations explained that in their opinion provision would have to be made for certain exceptions in the case of spies and saboteurs. They pointed out that the effectiveness of the [p.53] measures taken to deal with enemy agents and saboteurs depended on the secrecy of the proceedings; it was inconceivable that a State which had arrested one or more enemy agents should be obliged to announce their capture and let the persons under arrest correspond with the outside world and receive visits; the situation was the same in the case of saboteurs and also, in occupied territories, in that of members of underground organizations.”

<sup>461</sup> *Fourth Geneva Convention, supra*, note 25 at Article 136.

<sup>462</sup> *Ibid.* at Articles 37 and 38.

they have not only the right to a fair trial but also a right to have the charges against them presented to them in writing in a language they understand and the Protecting Power shall be made aware of these charges with the particulars contained in Article 71 as well as a right to access legal council and have witnesses called for their defence. Moreover, the detainee convicted under such a trial as a right of appeal (Article 73) and the Protecting Power has to be notified of the grounds upon which a death penalty or a sentence of imprisonment of more than two years may be given to a detainee (Article 74)<sup>463</sup>. But even more important, detainees are to be detained in the occupied country, which is not the case at Guantanamo Bay<sup>464</sup>.

(1134) From this comparison, it is clear that the United States have a vested interest in declaring these persons combatants and prisoner of war rather than “unlawful combatants”, which they are not. If the United States government persists in breaching humanitarian law, cases must be taken by the Protecting Power to international instances. There is, however, one loophole that the American government may well desire to exploit to bring Taliban to justice, and that is the case of what it has dubbed “enemy combatants” and foreign nationals who have joined the Taliban as fighters.

(1135) **Taliban as “enemy combatants”**. First, it must be said that the concept of **enemy combatants** is not a notion of international law. **It is a purely interpretative legal term of the United States Supreme Court following cases presented to it since the American Civil War**. The notion of enemy combatant **applies only to American nationals who have fought against the Republic of the United States of America**. And this term has been applied only in the context of military commissions created by the Federal government. As for the Federal government’s record on military commissions, it is spotted to say the least.

(1136) Military commissions used since the Civil War have given grounds to important *stare decisis* from the US Supreme Court, but these decisions have been highly political and certainly very controversial. When the right of *habeas corpus* was suspended by the Lincoln administration and persons held *incommunicado*, Congress enacted a law to force the disclosure of the names of those persons<sup>465</sup>. This case upon which the United States government bases its right to hold its own citizens and try them in military commissions is tenuous.

(1137) The first case applicable to this discussion, *Ex Parte Milligan*<sup>466</sup>, concerns the authority of the President to order the creation of a military commission. The court decided that the President did indeed have that power but only if trying a civilian who is not a member of armed forces and the trial cannot be done in open civilian courts. Therefore, where civilian courts are open and functional, the commander of armed forces, and that includes the President as Commander-in-Chief of all American Forces, cannot

<sup>463</sup> *Ibid.*, at Article 71 to 74.

<sup>464</sup> *Ibid.* at Article 76: “Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtained in prisons in the occupied country. They shall receive the medical attention required by their state of health. They shall also have the right to receive any spiritual assistance which they may require. Women shall be confined in separate quarters and shall be under the direct supervision of women. Proper regard shall be paid to the special treatment due to minors. Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143. Such persons shall have the right to receive at least one relief parcel monthly.”

<sup>465</sup> Turley, J., “Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy,” (2003) 70 *George Washington Law Review* 649 at 732, citing the *Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases*, ch. 81, 2, 12 Stat. 755 (1863).

<sup>466</sup> *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1867)

order such trials. According to *Milligan*, even in war, it is only if it is impossible to administer criminal justice that a military commission may be ordered<sup>467</sup>.

(1138) From this case, the US Administration moves to support its authority for military commissions against US citizens on the basis of *Ex Parte Quirin*<sup>468</sup>. It argues that the obvious case of 8 German-American saboteurs and spies brought to the continental United States by submarines and caught on that night and the following two weeks applies to current American Taliban captured in the theatre of operation of Afghanistan since the US Supreme Court has clearly stated in this case that unlawful combatants are subject to trial and punishment by military tribunals for acts that renders their belligerency unlawful<sup>469</sup>.

(1139) Under American law, this seems indeed fair. But the current administration has interpreted this decision as meaning that American nationals may be held indefinitely *incommunicado*, without formal charges, may be denied access to counsel and that the protections of *habeas corpus* does not apply to them. That is a fraudulent interpretation. In the case of *Quirin*, even with all its sordid details and the highly political implications of President Roosevelt clearly documented<sup>470</sup>, the accused were charged formally within a month of their capture and were tried soon after their charges were given. They had a right to counsel and their petition for *habeas corpus* was revised by the Supreme Court. The Supreme Court never affirmed the right of the government to proceed on the simple affirmation that the accused were deemed enemy combatants<sup>471</sup>. It must also be pointed out that a determination of the status of the 8 accused was made by the Supreme Court<sup>472</sup>, while in the case of all detainees at Guantanamo Bay no determination has been made by any judicial authority. Therefore, while the authority of the military to try persons accused of violations of humanitarian law is established, this does not translate to supplanting civilian courts where they are open and functional. And if the authority of the military to convene commissions continues after the war has been recognised<sup>473</sup>, it does not translate to a necessity to trial under military commission. Indeed, the lessons from *Milligan* and *Quirin*, as reinforced by *Duncan v. Kahanamoku*<sup>474</sup>, state that civilian courts must be the preferred for Americans tried for breaches of humanitarian law.

(1140) Furthermore, it is interesting to see that a double standard exists in the process of the Guantanamo Bay detainees. Indeed, while the US is claiming the right to try enemy combatants under

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<sup>467</sup> Belknap, M., "A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective," (2002) 38 *California Western Law Review* 433 at 460-461.

<sup>468</sup> *Ex Parte Quirin*, 317 U.S. 31 at 38-40

<sup>469</sup> Which in this case was an arguable fact as the failure to distinguish oneself from non-combatants was not an established or codified custom of international law Baxter, R.R., "So-Called 'Unprivileged Belligerency' : Spies, Guerillas and Saboteurs," (1951) 28 *British Yearbook of International Law* 323 at 339-340, cited in Orenlichter, D.F. and Kogod Goldman, R., "The Military Tribunal Order : When Justice Goes to War: Prosecuting Terrorists Before Military Commissions," (2002) 25 *Harvard Journal of Law and Policy* 653 at 657.

<sup>470</sup> Belknap, *supra*, note 427 at 472-480: the fact is that the 'capture' for which the Coast Guard and the FBI took credit were more the matter of inefficiency and luck than one of actual competence.

<sup>471</sup> Rodriguez, A., "Is The War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla," (2003) 39 *California Western Law Review* 379 at 388-389.

<sup>472</sup> Maddox, *supra*, note 447 at 449.

<sup>473</sup> *Johnson v. Eisentrager* (1950), 339 U.S. 763 (1950), concerning German soldiers convicted of continuing hostilities after the military surrender of Germany on May 8, 1945 and *In Re Yamashita*, 327 U.S. 1 (1946) concerning the validity of the creation of a military commission after the end of hostilities.

<sup>474</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) whereby the Hawaiian Courts ruled that martial law, while authorising vigorous military actions for the defense of the Islands and the threat of invasion, was not intended to authorise the supplanting of civilian courts.

military commission, the sole American Taliban captured and tried, John Walker Lindh, has been tried in a Federal court and given a 20 years sentence for “supplying services to the Taliban” and “carrying explosives during the commission of a felony”<sup>475</sup>. This felony was high treason, for which he has obviously not been convicted nor sentenced in exchange for cooperating with the US government.

(1141) Opposite to this treatment is the case of Yaser Esam Hamdi, a 22 year old Louisiana-born American who moved to Saudi Arabia as a toddler and was captured while fighting for the Taliban. Hamdi has not been charged and on January 8, 2003, the US Court of Appeal for the Fourth Circuit of Richmond has ruled it improper for it to give a review of the detention of Hamdi, holding that deference must be given to the military and the Presidential decision<sup>476</sup>.

(1142) Meanwhile, a least one commentator argues that the government’s case for trying under military commissions is quite strong on the basis of Article 84 of the *Third Geneva Convention* as this article clearly states that a prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power specify otherwise<sup>477</sup>. Such an interpretation could be acceptable if the United States did recognize these detainees as prisoners of war. But since it does not, it is impossible to claim on the one hand the respect of humanitarian law to try these detainees under the *Geneva Conventions* while on the other hand refusing them the status allotted to them by those same conventions.

(1143) To this day, it remains unclear and certainly unstipulated why there is such a gap of treatment and interpretation. The fact is that if US citizens commit high treason, they should be judged for their actions. But as it is the case with spies, it should be done in courts of law that provide for a full and fair defence, thereby not only bringing justice but also being seen to bring justice without creating martyrs.

(1144) **Foreign nationals.** And as for martyrs, the last category of Taliban fighters under US detention are foreign nationals captured as Taliban fighters. This is sensitive as many a detainee of the US is a national of its allies, or at least conveniently neutral supporters, in its “war against terrorism,” including the United Kingdom and Australia, as well as Canada. Those captured under arms as Taliban fighters could have been tried as mercenaries had the United States ratified the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*<sup>478</sup> and its Article 47 concerning mercenaries or even if it had ratified the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989*. However, since it has not, they cannot be prosecuted under this guise.

(1145) Mercenaries are therefore not illegal to employ in a conflict against the United States. If they are incorporated within the rank and operational structure of the Taliban, they fought as members of a national armed force—much like United States volunteers did during the Sino-Japanese conflict prior to 1941 and flying in the Royal Air Force units as volunteers. As such, they are not terrorists nor are they illegal or unlawful combatants. They are quite simply combatants and prisoners of war once captured. If they stand accused of breaching the laws and customs of war, then have the charges drawn and the court appointed. Otherwise, these persons should enjoy the full protection of the *Third Geneva Convention*.

<sup>475</sup> Schaffer, A., “Life, Liberty and the Pursuit of Terrorists: An In-Depth Analysis of the Government’s Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission,” (2003) 30 *Fordham Urban Law Review* 1465 at 1474.

<sup>476</sup> *Ibid.*, at 1473.

<sup>477</sup> Wedgwood, *supra*, note 420 at 333.

<sup>478</sup> *Protocol I, supra*, note 82.

(1146) Still, the US government will most probably stick to its perception that these persons are unlawful combatants; they simply fall outside the scope of the *Third* and *Fourth Geneva Conventions*. Indeed, foreign nationals of parties to the conflict whose country retains normal diplomatic relations are excluded from the protections of the *Fourth Geneva Convention*, on the basis its Article 4(2). This creates a very problematic situation whereby most foreign fighters would fall under this category and as a result be protected by no measures of the *Conventions*, save for Article 3 providing for the minimal humanitarian and human rights. This would definitely be the sole exception where persons are not covered by a full *Convention* (with the exception of combatants, whether lawful or unlawful, convicted of war crimes in accordance with the reservations made to the *Conventions* and the notions of Article 5 of the *Fourth Geneva Convention*) and represent a major problem. In fact, it would seem at first hand to justify the United States' reasoning and treatment of these detainees.

(1147) But it does not. Indeed, very few of the United States allies or neutral States had normal diplomatic representation in Kabul at the outset of the conflict. Certainly the United Kingdom, Canada and Australia did not. Nor did Saudi Arabia. Even Iran and Iraq did not have such normal diplomatic representation. In fact, since we do not know the name and nationality of all detainees, it is impossible to assert that any detainees fall outside the scope of the *Fourth Geneva Convention* and until such time as it is proven, they must be given some judicial status under the *Conventions*. The only known country with nationals associated with the conflict that had normal diplomatic representation was Pakistan and there is no knowledge of Pakistanis being held as Taliban fighters. As a result, and until proven otherwise, the *Fourth Geneva Convention* applies and the United States is bound to apply the full protection contained within it.

(1148) Even if we did know the nationality of those captured, the first question that would be asked is: Captured by whom? The question is relevant because Article 4(2) does specify "...normal representation in the State in whose power they are."<sup>479</sup> This matters very much because if most neutral and co-belligerent States, with the notable and ironic exceptions of Iran and Iraq, had normal diplomatic relations with the United States, they did not with Afghanistan. As a result, Taliban captured by the Eastern and Northern Alliances, if refused combatant status, would automatically become protected persons under the *Fourth Geneva Conventions*. Their transfer to US forces should not affect the status they had at the moment of their capture.

(1149) Furthermore, transfer to US custody at Guantanamo Bay creates another problem for the United States: since the Administration argues that the protections of the American Constitution do not extend to the lent territory at Guantanamo Bay, as it is not US territory, the fact is that the neutral and co-belligerent countries concerned do not therefore have normal diplomatic representation with the country in whose territory they are—the problem being compounded by Cuban sovereignty and American lending of the territory.

(1150) But all this does not mean that foreign nationals who fought as Taliban are protected from prosecution from criminal and terrorist acts. Indeed, Article 70 of the *Fourth Geneva Convention* is clear that prosecution may be made for common law crimes done prior to capture and detention<sup>480</sup>. And if they

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<sup>479</sup> *Fourth Geneva Convention*, *supra*, note 25 at Article 4(2) *in fine*.

<sup>480</sup> *Ibid.* at Article 70: "Art. 70. Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war. Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace."



are accused of terrorism, then by all mean charge and try them under applicable criminal laws. But if none of these interpretations apply, these persons must be given the full extent of the protection of humanitarian and be repatriated as soon as permissible.

(1151) **AL QUAEDA.** The characterisation of fighters within the Taliban leads to differentiate also within the Al Qaeda structure, especially since it is not a formal and established structure but a loose association of numerous terrorist groups—“cells” claiming to be part of Al Qaeda.

(1152) **Al Qaeda in the Taliban trenches/caves.** One distinction that is difficult with the detainees claiming to belong to Al Qaeda are those that were captured alongside the Taliban during the Bora Tora operations and all other military operations within Afghanistan during the international armed conflict that took place and led to the fall of the Taliban regime with subsequent mopping up operations.

(1153) Some of the fighters captured during the fight did not claim to be Taliban, but Al Qaeda fighters that joined the fight. Some questions of fact will influence judicial treatment of those detainees. Commentators have suggested that due to evident targeting of civilians, Al Qaeda clearly does not respect the laws of war and therefore its members could never vie for the status of combatant and even less for that of prisoner of war<sup>481</sup>. This again revives the notion of group criminality as presented within the Nuremberg Trials. But even the Nuremberg Trials differentiated between the whole of the Axis armed forces and particular groups such as the *Einsatzgruppen* (extermination squads), the SS, the SD and other elements of the German military. Furthermore, even if a presumption of guilt was declared base upon this, there was a possibility for the defendant to clear himself (which was done at least 256 times within the military commissions brought to stand in Europe)<sup>482</sup>. This clearly established a precedent that even when an international standard acknowledges criminal characterisation of a group (which has only been done by *Military Order 13*, meaning after September 11, 2001), it stands that it is the application of individuality to the violations of the laws of war that must still be prominent. In the contemporary situation, this means that even if one was to claim an international standard declaring Al Qaeda a criminal group in which membership justifies a presumption of guilt to particular acts of violence, whether in criminal law or in violations of humanitarian law, an individual Al Qaeda member who has joined the Taliban and fought with them may very well be a combatant. If he as fought as part of the Taliban, been incorporated in some form of a unit and respected the laws of war, this person should and must be treated as a combatant under Article 4 of the *Third Geneva Convention*. He cannot be condemned for others having breached the laws of war; especially since the breaches alleged here were not committed in a time of war and the notion of war does not apply to terrorist attacks.

(1154) If he has breached humanitarian law during the combat operations in Afghanistan, he must retain the protections of prisoner of war and then be tried and sentenced for his breaches of humanitarian law.

(1155) But, there is also the question of nationality. If he is an Afghan national and a member of Al Qaeda who has joined a unit of the Taliban and was captured, he must be treated as a prisoner of war. If the United States government persists in refusing the application of the status of prisoner of war, they must then treat this person as a civilian, entitled to the protections of the *Fourth Geneva Convention* as explained above for Taliban. If he has breached humanitarian law prior to his capture and he is treated as a civilian, he must then be tried accordingly. Even if it is a foreign national, the United States must respect the status of combatant and prisoner of war since it does not acknowledge mercenaries.

<sup>481</sup> Broomes, *supra*, note 441 at 125.

<sup>482</sup> See *supra*, notes 442 and 443.

(1156) As for the argument that the *Third Geneva Convention* cannot apply to Al Qaeda members on the basis that it is not a State party to the Convention, it is again a very clever blurring of the spirit of the law. Nobody argues that terrorist organisations should be recognised as States. But even known terrorists, if they fight as combatants within the structure of regularly constituted (according to local standards) units and meet the requirements of the *Third Geneva Convention*, must be granted the status of prisoner of war. If they have breached humanitarian law, then they can be judged for it. If they have also committed other criminal actions, the countries where they have committed such actions can ask for extradition and try them for whichever crime they have committed.

(1157) However, if it persists in not acknowledging the status of combatants as legitimate fighters, the United States might have a recourse to try these people for breaches of humanitarian law under Article 4(2) of the *Fourth Geneva Convention* since nationals of neutral States having normal diplomatic relations with the Occupying Power are not to be considered Protected Persons under this convention<sup>483</sup>. If this interpretation is adopted, only the minimum protections of Article 3 (common) applies, as this applies to any person not taking active part in hostilities or having ceased to take such active part<sup>484</sup>. Still, just as in the case of any persons about whom the status is unclear, it must be a regularly constituted tribunal that makes this decision and so far, none of the detainees at Guantanamo Bay have enjoyed such judicial determination of their status. It is clear that there remains a doubt as to the application of the *Third Geneva Convention* and the discretionary declaration of the United States government that they are civilians when the detainees claim to be combatants is not a sufficient, nor just or fair, legal decision. It is maintained here that until such determination is made, Al Qaeda fighters, whether Afghan nationals or foreigners, must be brought to face a regularly constituted tribunal providing all judicial guarantees deemed necessary to all civilised people to determine their status. Only once this has been done may a determination about breaches of humanitarian law be made.

(1158) **Suicide pilots and bombers; murderers and executioners.** This category of terrorists includes international terrorists in the “classical” sense: airline hijackers as well as suicide bombers and murderers. In this category, one may easily include the 19 alleged hijackers of the September 11, 2001 attacks. As well, car bombers in Saudi Arabia, Turkey, Iraq and Afghanistan may certainly be described as part of this category.

(1159) Persons taking part willingly in those activities are indeed terrorists if their aim is to force a government to do or to stop doing something by the use of terror. However, they are really murderers, attempted murderers and all around criminals. The only differentiation of their actions is due to the political or social (including religious) aims of their actions<sup>485</sup>. But the *mens rea* and *actus reus* of homicide, at least involuntary as in the case of the killing of nationals of the country where bombings are made against barracks of foreign troops and are mostly premeditated as in the case of September 11, 2001, are both present. If the intention to commit and the actual gesture of committing the crimes are present, these persons are simply murderers.

(1160) In that case, the punishment is clearly within the realm of civilian criminal justice and should be judged according to the extent of the crime. To otherwise create a sort of “judicial” martyr by creating separate proceedings is actually lending credibility and “cause” to the persons associated with these ideas. Instead of treating such persons as special cases under the law, they should be treated like any other criminal and their crimes put in the light of acts against law and morality—not against ideas and ideology.

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<sup>483</sup> *Fourth Geneva Convention*, *supra*, note 25.

<sup>484</sup> Article 3 common to the *Geneva Conventions*, *supra*, note 25.

<sup>485</sup> See definitions at *supra*, note 426.

Crimes are crimes and should be treated as such. To inflate their ideological or spiritual meaning is simply playing into the hands of publicity seeking terrorists. Any person committing acts of terror in a country of which he is not a national remains punishable under this country's laws. And this must be the legal way to try these murderers.

(1161) Any persons committing acts of terror in a state of which he is a national may well be tried under criminal law or other type of applicable law. For instance, an Afghan national making an attempt on the life of the President of the interim Afghan government is obviously subject not only to punishment for homicide, but also for treason as he is attempting to kill the Head of State. Any American making an attempt on the life of President Bush would also be a traitor under American law, as would a Canadian attempting on the life of Canada's Head of State, Queen Elizabeth II<sup>486</sup>.

(1162) Special legislations exist to try terrorists. The United Kingdom has enacted its very comprehensive *Anti-Terrorism, Crime and Security Act*<sup>487</sup> in 2001, while the United States' Congress enacted the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act* on October 26, 2001<sup>488</sup>. The latter act provides definition for many of the previously undefined international terrorist actions, including that of domestic terrorism. A terrorist organisation is deemed one that is designated so by the Secretary of State under the current law, designated by the Secretary of State for immigration purposes or a group of two or more individuals that commit terrorist activities or plan to commit such activities<sup>489</sup>.

(1163) The problem with such laws is that they do not really solve the problem. Recent reports have indicated that many law agencies had enough evidence to proceed and stop the attacks of September 11, 2001 from being made. For any number of reasons, this was not done. The conclusion is that the law did provide the means to law enforcement officials to take steps and protect the American public. Legislations such as the *USA Patriot Act* serve not so much to fill a legal gap but more to show the public that something is being done.

(1164) The result of such calm-seeking legislation is, however, very important: it enlarges the government's power at the detriment of human rights. In fact, it is an obvious case of over-reaction. Following the enactment of this law—which was a wish-list of all law enforcement agencies of the Federal government and that was watered down somewhat by Congress—1,182 persons had been detained by the Federal authorities in November 2001. In the following months, the United States government refused to release the number of persons arrested<sup>490</sup>.

(1165) The *USA Patriot Act* has granted the Attorney-General of the United States the power to detain non-citizens for 7 days before requiring that the individual be formally charged with a crime or an immigration infraction. Nonetheless, many have been held for months without charges and one has been held for 119 days<sup>491</sup>; most of these charges are for immigration offences.

<sup>486</sup> The Queen is Head of State of the United Kingdom and also separately the Head of State of Canada.

<sup>487</sup> *Anti-Terrorism, Crime and Security Act*, ch.24, 2001 at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm>.

<sup>488</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*, 115 Stat., 272 (2001).

<sup>489</sup> Addicott, *supra*, note 432 at 215.

<sup>490</sup> Fain, N., "Between Empire and Community: The United States and Multilateralism 2001-2003 : A Mid-Term Assessment : Human Rights : Human Rights Within the United States : The Erosion of Confidence", (2003) 21 *Bekery Journal of International Law* 607 at 618.

<sup>491</sup> Murphy, *supra*, note 439 at 471.

(1166) This is not only illegal in the face of American law, but it also infringes upon all the standards agreed to by the United States, such as the *Helsinki Final Act* (tenth principle concerning the respect and good faith of international obligations)<sup>492</sup>, the *Copenhagen Document*<sup>493</sup>, the *Paris Charter*<sup>494</sup> and the *Moscow Declaration*<sup>495</sup> (all three with respect to minimal judicial obligations) as well as the *United Nations Declaration of Human Rights*<sup>496</sup> and the *International Covenant on Civil and Political Rights*<sup>497</sup>. Furthermore, it also infringes on United Nations resolutions that fully support the continuing and full application of human rights even in times of war, even with the recognised caveats of emergency situations<sup>498</sup>.

(1167) The case of the alleged dirty bomber, Jose Padilla, is a case in point of the new terrorism and new powers of the government. Padilla is an American citizen and alleged to be an Al Qaeda operative who tried to plant a radiological bomb in a major US city. Padilla has been declared an enemy combatant by the President on the basis of *Ex Parte Quirin*. But the question then arises how it is that a civilian, not falling under the laws of war since there is no conflict on US soil, can be deemed the equivalent of a person not respecting the laws of war. Padilla, if tried, may be found guilty of conspiracy to commit homicide and/or attempting to commit homicide. If American legislation allows it, he may also be guilty of treason against the State. And for all these, he may face the death penalty. But all these carry no reason whatsoever to deny the accused to meet with counsel and to be given the same minimum treatment as any other criminal. Padilla is not a member of armed forces and while he may well be a terrorist, the notion of enemy combatant—which remains a fictional notion existing only under American law—has nothing to do with him. He did not enter the United States disguised and was not wearing the uniform of his armed forces since he is a civilian. He did not wage war unlawfully as there is no state of war on the continental United States—nor in any other part of US territories for that matter.

(1168) In effect, Padilla is an alleged criminal accused of very serious charges and even more so if he is convicted of terrorist activities. But that is not war and the notion of enemy combatant has nothing to do with this. Padilla's case is another example of the very poor understanding of humanitarian law by American courts—and the use of this ignorance by the current Administration. Indeed, nothing better shows the clever use of legal confusion created and sustained by the administration than the difference in the treatment of Padilla and Timothy McVeigh—another person who tried, but in his case sadly succeeded, in creating mass death. McVeigh was tried and sentenced under federal legislations, even though he was claiming to be a member of American home-grown “rebel militias” and claimed to be waging war against the federal government. In fact, historically the USA has always viewed terrorists as common criminals to be tried in civilian courts<sup>499</sup>. For his mass crimes, McVeigh was put to death.

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<sup>492</sup> *Conference on Security and Co-Operation in Europe : Final Act*, 1 August 1975, reprinted in 14 I.L.M. 1292.

<sup>493</sup> *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990, reproduced in (1990) 29 I.L.M. 1305.

<sup>494</sup> *Conference on Security and Co-Operation in Europe : Charter of Paris for a New Europe and Supplementary Documents to Give Effect to Certain Provision of the Charter*, Paris, 21 November 1991, reproduced in 30 I.L.M. 190.

<sup>495</sup> *Conference on Security and Co-Operation in Europe : Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law and Procedures for Fact-Finding*, Moscow, 3 October 1991, 30 I.L.M. 1670 at p. 1677.

<sup>496</sup> *Universal Declaration*, *supra*, note 185 notably at Article 6 (recognition before the law), 7 (equality and non-discrimination before the law), 9 (arbitrary arrest), 10 (right to public and fair trial) and 11 (right to full defense).

<sup>497</sup> *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR supp. 16, U.N. Doc. A/6316 (1966) 52, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 at Article 9 (arbitrary arrest), 14(3) (right to know the charges against him), 16 (right of recognition before the law).

<sup>498</sup> *Basic principles for the protection of civilian populations in armed conflicts*, UN GAOR resolution 2675 (XXV), 25th sess. 1922nd plenary meeting, 9 December 1970 at 76.

<sup>499</sup> Janik, *supra*, note 450 at 512.

(1169) **Iraqi Fedayees and insurgents.** Another issue relating to the status of combatants is that of Iraqi Fedayees, paramilitaries of the Baath party, and other insurgents that continue to harass US and Coalition forces in Iraq. There have been 588 deaths of Coalition soldiers since January 13, 2003<sup>500</sup>. Current estimates of the number of the insurgents run at around 5000, with no precise numbers due to their flexible nature.

(1170) The high intensity war that ended on May 1, 2003 led to a low intensity conflict of a guerrilla nature. Since the United States are an Occupying Power, it is clear that the *Fourth Geneva Convention* applies to US and Coalition Forces toward the treatment of the civilian population of Iraq. As a result, the treatment of Fedayees and insurgents must be the same as any other civilian taking up arms against foreign forces: they must be given the full protection of the *Fourth Geneva Convention* and are subject to accusation of having unlawfully engaged in hostile activities. Therefore, they may be accused of murder in accordance with Iraqi laws, or with occupation laws, and sentenced accordingly. But, they must retain the applicable protections discussed above in the case of Taliban fighters protected as civilians. In this particular case, there is absolutely no other legal route available to the United States. Non-respect of the *Fourth Geneva Convention* would be a material breach of the laws and customs of war. The United States is an Occupying Power and must therefore respect the *Conventions*.

(1171) **Foreign nationals participating in the Iraqi insurgency.** However, reports abound that foreign national are joining forces with the Iraqi insurgents to harass American and Coalition forces. These persons are not combatants under the *Third Geneva Convention* as guerrilla warfare is not recognised against an Occupying Power<sup>501</sup>. And since they are civilians, they fall under the terms of Article 4 of the *Fourth Geneva Convention*. But its second paragraph clearly states that nationals of a country retaining normal diplomatic representation with the detaining power are not to be considered protected persons under the *Fourth Geneva Convention*. An exception for Iranians, since they did not have normal representation, would therefore exist, but for the majority of detainees only the protections of Article 3 common to the *Conventions* would apply. And they may then be prosecuted for unlawful belligerency and murder.

(1172) **In Fine - Saddam Hussein & Osama Bin Laden.** There remains a small hope that the Iraqi conflict will wane if there is a change in strategy and tactics in Iraq, but even if the capture of ex-president Saddam Hussein resulted in a sharp decrease of attacks and casualties inflicted on Coalition forces in the early days of 2005,<sup>502</sup> the facts are that it picked up from there and now seems more diffused and active than ever, even if it is not Coalition troops who suffered much casualties, but Iraqi civilians as the country descends into civil war. The effect of the judgement to be pronounced on Hussein's trial on November 5, 2006 – if not once more delayed – will indicate if there is a persistent effect of the punishment on the war.

<sup>500</sup> “Casualties,” *CNN*, (13 January 2004) at <http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/>, includes: “496 Americans, 56 Britons, five Bulgarians, one Dane, 17 Italians, two Poles, eight Spaniards, two Thai and one Ukrainian” since January 13, 2003 and of these all over 400 have been killed since President Bush declared the end of major combat operations on May 1, 2003. This augmented to 2591 as of August 7, 2006; see *CNN*, “World, Monday 7 August”, available at <http://www.cnn.com/2006/WORLD/europe/08/07/monday/index.html>.

<sup>501</sup> Some would argue that the United Nations’ General Assembly Resolution 2676 transformed this interpretation and that indeed they could be treated as prisoners of war, but this would be difficult to support. See *Respect for Human Rights in Armed Conflicts*, UN GAOR Res. 2676 (XXV), 25th sess., 1922nd plen. mtg, (9 December, 1970) 77: “Urges that combatants in all armed conflicts not covered by Article 4 of the Geneva Conventions of 1949 be accorded the same humane treatment defined by the principles of international law applied to prisoners of war...”

<sup>502</sup> “Attacks down 22% since Saddam’s capture: Offensives, Arrests lessen resistance”, *USA Today*, (12 January 2004) at 1. This is a month after his capture on December 14, 2003.

(1173) Regardless of its effect on the ground now, it is interesting to see that the United States has decided to consider ex-president Hussein as a prisoner of war<sup>503</sup>, based on his former authority as commander of the Iraqi forces. Of course, it is obvious that this is not an act of altruism: by doing so, the United States avoids the problem of the immunity of a Head of State and can proceed with a trial for war crimes and crimes against humanity.

(1174) But it again raises the question of how can such a person, accused of killing hundreds of thousands, be provided the protections accorded to a combatant—in case not a courageous one—while Taliban fighters not even individually accused of having breached any measures of humanitarian are not afforded this status. This is further ground to demand the full respect of the Conventions and their application to those to whom it should apply.

(1175) As for Osama Bin Laden, what status would he have? This would depend on the circumstances of his capture, but there would have to be a conflict somewhere to declare him a combatant. If American authorities capture him in a cave in Afghanistan, near the Pakistani border, Bin Laden will be a common criminal captured by forces under the mandate on the UN. Extradition to the US is fairly certain and his status will be that of an common criminal under charges of murder, attempted murder and a myriad other offences that would ultimately lead, with all probability, to a verdict of guilty and a sentence of death.

(1176) **Conclusions.** Since 2002, the Bush Administration has been locked in a legal dance with a plethora of cases arguing for the extension of the prisoner of war treatment status to the detainees of Guantanamo Bay until a juridical determination to another conclusion be found by a properly constituted court. This has been resisted to the outmost – and using all the delaying and dilative tricks possible – until the judgement of the U.S. Supreme Court in *Hamdan vs. Rumsfeld*<sup>504</sup>.

(1177) In this case, the U.S. Supreme Court rebuked the argument that unlawful combatants or even ‘enemy combatants’ could be held without applying the protections of the *Geneva Conventions*.<sup>505</sup> This is a very important development that will influence American – and most probably the world of International Humanitarian Law – for years to come.

(1178) Why it should be so is because the court went out of its way to clarify the reach of Article 3 common to the four *Geneva Conventions* and to edict on its interpretation.

(1179) First, the U.S. Supreme Court overturned the narrow interpretation of the Court of Appeals, following which that a conflict against Al-Quaeda does not qualify as a conflict “not of an international nature” (Art.3/GC 1949).

(1180) The court qualify this interpretation as erroneous because this sentence of the *Geneva Conventions* must in fact include such conflicts as that between a State and a non-State entity such as Al-Quaeda because the term “...“conflict not of an international character” is used here in contradistinction

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<sup>503</sup> “Hussein officially declared a POW,” *Globe and Mail*, (January 10, 2004) at 1.

<sup>504</sup> *Hamdan vs. Rumsfeld, Secretary of Defense and al.*, 548 U.S. (2006) available at [www.supremecourt.us/opinions/05pdf/05-184.pdf](http://www.supremecourt.us/opinions/05pdf/05-184.pdf)

<sup>505</sup> “Bush extends Geneva protections to Guantanamo prisoners”, *Globe and Mail*, 11 July 2006, available at <http://www.theglobeandmail.com/servlet/story/RTGAM.20060711.wgeneva0711/BNStory/International/home> : “In an abrupt reversal, prompted by a recent tongue-lashing from the Supreme Court, U.S. officials said Tuesday all detainees in the war on terror held at Guantanamo Bay and elsewhere will be protected under the Geneva Conventions. Until now, President George W. Bush has labelled terror suspects enemy combatants, refusing to legally recognize them as prisoners of war covered by the international accords, while maintaining the U.S. military is voluntarily complying.”

to a conflict between nations... [and] ... by contrast affords some minimal protections, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory ‘Power’ who are involved in a conflict “in the territory of a signatory”...<sup>506</sup>.

(1181) The court justifies this contradistinction and support it through the *Commentary to the Third Geneva Convention* (GC III Commentary), which makes it clear that “the scope of the Article must be as wide as possible” and this holds even truer as the words that would have rendered the article applicable “especially [to] cases of civil war, colonial conflicts or war of religion” were omitted from the final version of the article, as found in the GC III Commentary<sup>507</sup>. As a result, Article 3 applies to all situations, whether in the case of doubt for the application of the combatant status to a detainee or to civilians detained as unlawful combatants (GC IV Commentary on art.51/GC IV)<sup>508</sup>.

(1182) As a result, article 3 is as applicable to Taliban fighters – lawful, unlawful, illegal, enemy combatant or otherwise – as it is to Al Qaeda members. And if so, the four major provisions regarding its protections are to be granted. And these include the right to a trial by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” (art.3 (d)/GC 1949).

(1183) The U.S. Supreme Court interprets such a court as one that includes regular tribunals and ordinary military courts, but which “definitely exclud[e] all special tribunals”<sup>509</sup>. As a result, the current proposed military commissions institute by Secretary of Defence Rumsfeld with the strong support of President Bush, are deemed unconstitutional under American law and illicit under international law as applicable in the law of war (for our purpose, the law of armed conflicts).

(1184) It falls to reason then, that the status of combatant or civilian must always be applied and that no one should remain outside the protection of the LOAC.; Even if the very specific exceptions of Article 4(2) of the *Fourth Geneva Convention* prevents their application of the whole protection of the *Fourth Convention* to them, any person at any time, even when not covered by a specific convention, continue to retain the minimal protections of Article 3 common to all four *Geneva Conventions*.

(1185) Furthermore, it is not because a combatant is accused of breaching the laws and customs of war

<sup>506</sup> *Hamdan*, *supra* note 347 at 67.

<sup>507</sup> *Hamdan*, *supra* note 504 at 68, which refers in its footnote 63 in the following : “See also GCIII Commentary 35 (Common Article 3 “has the merit of being simple and clear. . . . Its observance does not depend upon pre-liminary discussions on the nature of the conflict”); GCIV Commentary 51 (“[N]obody in enemy hands can be outside the law”); U. S. Army Judge Advocate General’s Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 “serves as a ‘minimum yardstick of protection in all conflicts, not just internal armed conflicts’ ” (quoting *Nicaragua v. United States*, 1986 I. C. J. 14, ¶218, 25 I. L. M. 1023)); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶102 (ICTY App. Chamber, Oct. 2, 1995) (stating that “the character of the conflict is irrelevant” in deciding whether Common Article 3 applies”).

<sup>508</sup> *Id.*

<sup>509</sup> *Ibid.* at 69, where the court specifies that : “GCIV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as identical to “regularly constituted”);<sup>64</sup> see also Yamashita, 327 U. S., at 44 (Rutledge, J., dissenting) (describing military commission as a court “specially constituted for a particular trial”). And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.” Int’l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”); and further mentions at footnote 64 that : “The commentary’s assumption that the terms “properly constituted” and “regularly constituted” are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term “régulièrement constitués” in place of “properly constituted.””

that he loses his protection as prisoner of war; on the contrary, as demonstrated here, the protections remains until such a conviction has been legally given by a competent, fair and impartial tribunal in the cases of countries having made reservations to the *Third Geneva Convention* and remains even after such a conviction in the case of States not having made such a reservation, including the United States.

(1186) It is the conclusion of this essay that Taliban fighters are to be given combatant and prisoner of war status and that those held at Guantanamo Bay should be informed of the charges against them, given access to counsel and tried in the speediest manner. Any delays should not be a matter of months; it should only be a matter of days as the determination of their status should have been made months ago. It is also the contention of this essay that for those people who accompanied the Taliban or who have no proof of their prior belonging to Afghan armed forces but were captured in combat should be given the protection of the Fourth Geneva Convention and tried only if accused of breaching the laws and customs of war. As for foreign nationals having joined and fought with the Taliban, their incorporation into Afghan armed forces, including militias, should be enough to secure for them the right of prisoner of war. If the United States persists in denying this right, it should at the very least consider them as civilians and afford the protection of the *Fourth Geneva Convention*, thereby respecting the spirit and the letter of humanitarian law concerning the inclusion of all persons in a theatre of war under the protection of the *Geneva Conventions*.

(1187) It is the conclusion therefore that whatever the American decision of which set of protections applied, the simple fact is that either under art. 130/GC III or under art. 147/GC IV, the unwarranted privation of liberty by detention and indeed the use of torture or similar treatment are clear violations of the Laws of Armed Conflicts. For these violations, all participants in the chain of command may be indicted for war crimes. And this may well include political figures who may have authorised such measures.

(1188) It also concludes that similar treatment of Al Qaeda detainees must be afforded based upon the particularities of their capture. If their capture was made while fighting with the Taliban, they should be given the protections of prisoner of war. If not, they should be given the protection of civilians.

(1189) As for foreign national members of Al Qaeda captured in Afghanistan, they should be given at the protections of Article 3 common to the *Geneva Conventions* and tried under civilian criminal laws. Fedayees and Iraqi insurgents must be given the protections of the *Fourth Geneva Convention* as civilians and be judged for their breaches of the laws and customs of war if accused of such breaches. As for foreign nationals fighting with the insurgency, this article also recommends treating them according to those protections and judging them as Iraqi insurgents. Failing this, the protection of Article 3 common to the *Geneva Conventions* must be given and they must still be tried and sentenced under fair and impartial tribunals. So far, the United States has respected only one clause of the determination of combatant status by declaring Saddam Hussein a prisoner of war and this was made to facilitate his trial for war crimes.

(1190) Nobody can deny that the events of September 11, 2001 were of the most atrocious and disgusting kind. And many will support the right of the United States to counter this growing threat to its citizens with vigorous and indeed forceful measures, including the use of armed force. But that does not mean that the United States are above international norms or international law. It does not follow that they have a blank check to repudiate humanitarian law or to breach it and use it only for its own purpose.

(1191) The United States is and must remain a society toward which Nations may look for leadership and higher values. To continue to disrespect its own international engagement and to pervade the



international standards created to protect all victims of armed conflict does not help its final strategic goal. The United States may defend itself with force against force, but the only solution to any war has always been diplomatic. Twisting international law and repudiating international standards leads to force countered only by force and a cycle of violence. It provides arguments and martyrs for its enemies.

(1192) And it certainly provides arguments for future belligerents against the United States not to respect the laws of war with the evident effects most feared by Secretary of State Colin Powell that American service personnel will someday pay the price of those political and legal decisions when they are captured by their enemies.

## **B. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998)**

(1193) “Resolved to guarantee lasting respect for the enforcement of international justice”. This is how the International Court ends its preamble and it aptly describes its true aims: to impose respect for international humanitarian law and to prosecute those who do not respect it.

(1194) The Rome Statute is concerned with 4 types of crimes, enumerated at its Art. 5:

- a. Crime of genocide;
- b. Crimes against humanity;
- c. War crimes; and
- d. The crime of aggression.

(1195) The **crime of genocide** is very clear, as it is taken *verbatim* from Article 2 from the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>510</sup>.

(1196) **Crimes against humanity** are defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack<sup>511</sup>.

<sup>510</sup> *Rome Statute, supra*, note 133 at Article 6, referring to the *Convention on the Prevention and Punishment of the Crime of Genocide, supra*, note 23 at: “Article 2 - In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

<sup>511</sup> *Rome Statute, ibid.*, at Article 7: “(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” These are a merger of the crimes first mentioned in the Charter of the International Military Tribunal in *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 3 Official Gazette Control Council for Germany 50-55 (1946). As well as the provisions of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, the *Declaration on the Protection of All Persons from Enforced Disappearances*, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc.

(1197) **War crimes** are defined in Article 8 as:

- a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention<sup>512</sup>;
- b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law and enumerated in 26 points;
- c. In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause;
- d. 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;
- 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 enumerated in 12 points.

(1198) However, it must be noted that sub-paragraph (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 governmental authorities and organized armed groups or between such groups.

(1199) Interestingly, the crime of aggression is not defined in the *Rome Statute*. That is because the first notion of the crime of aggression came with the Versailles Treaty but was only established as a principle of international law within the confines of crimes against peace in the *Charter of the International Military Tribunal*. However, crimes against peace were never taken as an applicable instrument and therefore fell into disuse. Nonetheless, the notion of aggression as a crime has survived through the *Definition of Aggression* of the United Nations General Assembly Resolution 3314 (XXIX)<sup>513</sup>.

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A/47/49 (1992) and the *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, G.A. res. 3318 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 146, U.N. Doc. A/9631 (1974).

<sup>512</sup> *Rome Statute, ibid.*, at Article 8: “(i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.”

<sup>513</sup> *Definition of Aggression*, United Nations General Assembly Resolution 3314 (XXIX): “Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that

(1200) The establishment of the *International Criminal Court* has three major effects on the LOAC. First, it provides clear recognition of the principles of international humanitarian law as legitimate and applicable. Second, it provides for a permanent structure for the prosecution of violation of the LOAC, thereby not needing to wait for the establishment of an *ad hoc* tribunal by the Security Council of the United Nations, which usually takes years. Finally, it provides for the harmonization of the applicable LOAC in all conflicts, whether international or non-international. As a result, the International Criminal Court provides a much needed instrument to curb the excesses committed in armed conflicts.

### **C. THE CONVENTION ON THE PROTECTION OF UNITED NATIONS AND ASSOCIATED PERSONNEL**

(1201) Another much needed instrument is the *Convention on the Protection of United Nations and Associated Personnel*, as stated above. This convention provides a measure of leverage for peacekeepers and supporting personnel while engaged in missions.

(1202) Due to the increase in the number of peacekeeping missions, there has been an alarming rise in the number of casualties in U.N. missions. Thus far, this had been proven an easy task for belligerents as *Status of Agreements* for the presence of peacekeepers usually made them toothless compared to the belligerents. As such, peacekeepers have been the victims of many acts of violence against which there were not permitted to retaliate due to constraining mandates.

(1203) This convention further helps as leverage by saying that even if a person does not commit genocide, crimes against humanity, war crimes or a crime of aggression, he will be held accountable for attacks on U.N. and associated personnel. This permits an enlargement of the jurisdiction of international and national tribunals.

(1204) It surely will not curb the violence against peacekeepers by its existence, but it does provide for a mechanism to obtain justice. It does, however, have the limitation of not being applicable to Chapter VII operations where troops under U.N. mandate are deemed combatants. Nonetheless, it is a step forward in filling the gaps in the LOAC.

### **D. THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL**

(1205) The current travails of the American and Coalition forces in Afghanistan and Iraq have been much debated recently as to their legitimacy. In the same manner, the capture and detention of persons dubbed “enemy combatant”, a term applying only to American citizens as determined by the American Supreme Court<sup>514</sup>, has been decried for their illegality. As time takes us away from the trauma of September 11, 2001 and gives us time for pause, the questions relating to the causes and processes of two international conflict waged simultaneously by American and Coalition forces will be further explored and deemed for their worth in light of new elements. Whether good or bad, conclusions will be drawn and

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other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

<sup>514</sup> *Ex Parte Milligan*, *supra*, note 466 and *Ex Parte Quirin*, *supra*, note 468. The ‘illegal combatant’ status is an American juridical term designating a particular category of U.S. citizens. It dates from the American Civil War and was further taken again during the early days of the Second World War. Both reflect a highly politicized categorisation of what constitute an American national captured and indicted for treasonous activities. This should not apply to other nationals.

history will judge. Nonetheless, even through bad causes and bad processes some good may result. With regards to the Iraq war, and regardless of the current morass in which the occupation forces are bogged down, the capture of Saddam Hussein has had the effect of liberating a nation of peoples. As for the legal world, it has provided yet another case for an international tribunal.

(1206) The *Coalition Provisional Authority* has issued on December 10, 2003, its *Statute of the Iraqi Special Tribunal*. An analysis of its content is therefore necessary to insure that while punishment is hopefully afforded to the guilty, the preservation of the fundamental guarantees of human rights is preserved in their clearest and purest form. Such an analysis is necessary to insure that the basic judicial guarantees are granted to even such a man as Saddam Hussein, but also to determine the evolution of *ad hoc* tribunals, to denote whether the international community has yet learn from its past mistakes.

(1207) Therefore, this essay will analyze the Statute in the light of those of three preceding tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY), that of the Rwanda (ICTR), and the Special Court for Sierra Leone.

(1208) **LEGITIMACY OF THE AD HOC TRIBUNALS.** Before attempting to denote the progress or regression made by the *Statute of the Iraqi Special Tribunal*, one needs to address a very pointed question about the legitimacy of international and national *ad hoc* tribunals to preside over crimes against humanity, war crimes, the crime of genocide, the crime of aggression, as well as gross and severe human rights violations.

(1209) One of the charges brought against such tribunals is that they are illegitimate and ought not to be recognized. Charges of illegitimacy against such tribunals are not new. The *Peace Treaty of Versailles* established a special tribunal to indict Kaiser William II through its Article 227. Immediately, it was denounced by many international jurists as victor's justice. Yet, these charges are difficult to substantiate in view of Article 228 of the *Peace Treaty*, in which the German Government recognised the authority of such a tribunal and in view of Article 229 which statutes upon the legitimacy of a multinational tribunal for multinational crimes<sup>515</sup>. Of course, since the former Emperor was never extradited from the Netherlands, the question remained academic for lack of a trial. Nonetheless, recognition of the principles of international morality and the sanctity of treaties inferred a notion that such breaches of international peace and security could be prosecuted. And even the fact that Germany signed the *Versailles Treaty* somewhat under the gun does not take away the fact that recognition was willed by the victors and acquiesced to by the vanquished.

(1210) The same charges of a victors' justice were made against the *International Military Tribunal of Nuremberg* at the end of the Second World War. The legitimacy of the *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*<sup>516</sup>, was decried as *ex-post facto* law. Yet, warnings of such measures had been clearly, publicly and officially been

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<sup>515</sup> *Versailles Treaty, supra*, note 13 at Article 227: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence (...); at Article 228: "The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies"; and Article 229: "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel."

given to the German authorities in a minimum of four instances since 1942, when word of atrocities began to filter out of the European continent and into the British and American press.

(1211) The first of such instance was the *Resolution on German War Crimes by Representatives of Nine Occupied Countries*<sup>517</sup> signed on January 12, 1942 in London. In this resolution, reference to the accepted principles of international law contained in the 1907 *Hague Conventions* are stated as the legal basis of indictment being sought, judgement being passed and sentence being carried out.

(1212) President Roosevelt released a statement on August 21, 1942 in which he restated these notions that acts of violence against civilian populations are “at variance with the accepted ideas concerning acts of war and political offences as these are understood by civilised nations”<sup>518</sup>. This further restated the President’s own public declaration, pre-dating the United States’ entrance in the war on October 25, 1941 in which he warns of fearful retribution<sup>519</sup>. It is again once more taken publicly with the President’s declaration that it is “the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals”<sup>520</sup>. This is finally confirmed as a joint understanding of the major Allies in the *Statement on Atrocities* contained in the *Joint Four-Nation Declaration of the Moscow Conference* held in October 1943<sup>521</sup>.

<sup>516</sup> *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946), [hereafter *Control Council Law No. 10*] at <http://www1.umn.edu/humanrts/instate/ccno10.htm>, at Article II: “1. Each of the following acts is recognized as a crime: a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated (...)”

<sup>517</sup> *Resolution on German War Crimes by Representatives of Nine Occupied Countries*, London, January 12, 1942, at <http://www.ibiblio.org/pha/policy/1942/420112a.html>.

<sup>518</sup> *President Franklin D. Roosevelt’s Statement on Punishment of War Crimes*, Washington, White House News Releases, August 21, 1942, at <http://www.ibiblio.org/pha/policy/1942/420821a.html>

<sup>519</sup> *Franklin D. Roosevelt on the Execution of Hostages by the Nazis*, *Department of State Bulletin*, October 25, 1941, <http://www.ibiblio.org/pha/policy/1941/411025a.html>.

<sup>520</sup> *President Franklin D. Roosevelt’s Statement on Punishment of War Crimes*, Washington, White House News Release, October 7, 1942, at <http://www.ibiblio.org/pha/policy/1942/421007a.html>.

<sup>521</sup> *Statement on Atrocities of the Joint Four-Nation Declaration*, Moscow Conference, October 1943, at <http://www.ibiblio.org/pha/policy/1943/431000a.html>, which states: “speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy. Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.”

(1213) As such, the resulting *Charter of the International Military Tribunal* can hardly be said not to have been settled upon the firm foundation of treaty law, as understood in the concepts of the *Hague Conventions* of 1907, themselves resting upon the *St-Petersburg Declaration* of 1868. Nor could the intentions of prosecution of the crimes deemed to be unknown to the German government. The authority of the court being further recognized in the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* by the United Nations in whose name the four signatories act, there can little doubt of its legitimacy<sup>522</sup>.

(1214) In the same manner, the *Charter of the International Military Tribunal for the Far East* was a direct result of the *Cairo Declaration*<sup>523</sup> of December 1, 1943 and of the *Potsdam Proclamation* of July 26, 1943<sup>524</sup>. This was recognized fully by the Japanese acceptance of the *Potsdam Proclamation* in their surrender of August 10, 1945<sup>525</sup>. Again, the legitimacy of the Allies to establish tribunals and to pass judgment upon war criminals cannot be denied on account of a lack of recognition.

(1215) In the interval between the end of the Second World War and the 1990's, there have been no real examples of *ad hoc* tribunals being formed in this manner under international jurisdiction. While many trials of former war criminals have taken place, all were done under national jurisdiction, even if deemed in accordance with international law. Cynics might say that this is because it took Europe another 45 years to get on with yet another war in which mass persecutions and the new terminology of ethnic cleansing needed to be created. Neither the Asian situations in Vietnam and Cambodia nor the juntas of South America could create the kind of support for international tribunals that the Balkan conflicts of Slovenia, Croatia and Bosnia created. To prosecute persons indicted of war crimes, including grave breaches of the *Geneva Conventions of 1949* as well as violations of the laws and customs of war, crimes against humanity and genocide, the *International Criminal Tribunal for the Former Yugoslavia* (ICTY) was created by the Security Council through its *Resolution 827* adopted May 25, 1993<sup>526</sup>. Despite the claims of some nationalists and of some of the accused, such as the former President of the Serbian Republic and of the Yugoslav Federation, Slobodan Milosevic, the tribunal not only has recognition through the Security Council, but also has wide recognition amongst nations.

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<sup>522</sup> *London Agreement*], *supra*, note 22.

<sup>523</sup> *Cairo Conference*, Cairo, November 1943, available at The Avalon Project: <http://www.ibiblio.org/pha/policy/1943/431201a.html>.

<sup>524</sup> *The Potsdam Proclamation, A Statement of Terms of Unconditional Surrender of Japan*, July 26, 1945, at paragraph 10: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion and of thought as well as respect for the fundamental human rights shall be established."

<sup>525</sup> *Offer of Surrender of the Japanese Government*, (1945) XIII (320) *Department of State Bulletin*, August 12, 1945, at the Avalon Project: <http://www.ibiblio.org/pha/policy/1945/450729a.html#2>: "The Japanese Government is ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and later subscribed to by the Soviet Government, with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler." Furthermore, the principles of the IMTs have been recognized in *Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal*, Resolution 95 (I) of the United Nations General Assembly, 11 December 1946.

<sup>526</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993), as amended by S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th Meeting, U.N. Doc. S/RES/1166, 13 May 1998; S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th mtg. U.N. Doc. S/RES/1329 (2000) of 30 November 2000; S.C. Res. 1411, U.N. SCOR, 57th Sess., 4535th mtg., U.N. Doc. S/RES/1411 (2002), of 17 May 2002; S.C. Res. 1431, 57th Sess., 4601st mtg. U.N. Doc. S/RES/1431 of 14 August 2002; and S.C. Res. 1481, 58th Sess., 4759th mtg. U.N. Doc. S/RES/1481 of 19 May 2003. All these resolutions deal with the recognition of the tribunal as it stands and establishes criteria for the election of permanent judges and the composition of the Chamber as well as officers of the court.

(1216) Furthermore, it is based upon the two precedents of the *International Military Tribunals* of Nuremberg and Tokyo. Even if the relevance of the IMTs could still be opposed, the simple fact is that the international order created by the *Charter of the United Nations* recognizes only its Security Council has the body with the authority vested to determine any threat to international peace and security and to maintain and restore international peace and security. It has the sole authority of deciding what measures shall be taken to maintain or restore them<sup>527</sup>. As such, the application of today's international body of law is undeniable and therefore the establishment and prosecution through an international tribunal is perfectly legitimate. The same can be said of the *International Criminal Tribunal for Rwanda* (ICTR)<sup>528</sup> and of the *Special Court for Sierra Leone* (SCSL)<sup>529</sup>.

(1217) The interesting differences are that Yugoslavia's and Rwanda's tribunals have been created as the results of armed conflicts through the sole mechanism of the United Nations' Security Council while the Special Court for Sierra Leone was made through the means of the Security Council, but upon the instigations of Sierra Leone's government. This not only gives international legitimacy to the court, but it provides it with the national legitimacy it needs to face its own population and help the process of reconciliation.

(1218) This creates a precedent well supported by the international community, as requested in the *Lomé Peace Agreement* in its Articles XXXIII and XXXIV<sup>530</sup>. As a result the *Iraqi Special Tribunal* can be deemed as having solid grounds to claim its legitimacy since it is also rooted in both national and international law like the Sierra Leone Special Court. Indeed, the *Coalition Provisional Authority* established through the Security Council's Resolution 1511 (2003) clearly recognises the sovereignty of Iraq as belonging to the State of Iraq and this provisional authority is constituted of the *Governing Council of Iraq* as the legitimate interim administrators of Iraq and therefore responsible for the exercise of all responsibilities, authorities and obligations under applicable international law<sup>531</sup>. This was in line with the mandate the Security Council provided the United Nations with in resolution 1483<sup>532</sup>.

(1219) The *Coalition Provisional Authority*, or at the very least its *Governing Council*, did not waste

<sup>527</sup> *Charter of the United Nations*, *supra*, note 25.

<sup>528</sup> *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994*, [hereafter the *Statute of the International Tribunal for Rwanda*], adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

<sup>529</sup> *Special Court for Sierra Leone*, S.C. Res. 1315, U.N. SCOR, 55<sup>th</sup> Sess., 4186<sup>th</sup> mtg., U.N. Doc. S/RES/1315 of 14 August 2000 which rests upon the terms of the Truth and Reconciliation Commission in relation to human rights violations as contained in Article XXVI of the *Lomé Peace Agreement*, Lomé, U.N. Doc. S/1999/777 of 7 July 1999, as well as upon a statement of the Special Representative of the Secretary-General next to his signature of the treaty that amnesties given to former belligerents did not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian laws.

<sup>530</sup> *Lomé Peace Agreement*, *ibid.*, whereas Article XXXIII requests international involvement and Article XXXIV names the UN as the AOU (now the African Union), ECOWAS, the Commonwealth of Nations and the Government of the Togolese Republic as guarantors of the implementation of this agreement.

<sup>531</sup> *Coalition Provisional Authority*, S.C. Res. 1511, 57<sup>th</sup> Sess., 4844 mtg., U.N. Doc S/RES/1511 of 16 October 2003.

<sup>532</sup> S.C. Res. 1483, 57<sup>th</sup> Sess., 4761<sup>st</sup> mtg., U.N. Doc. S/RES/1483 of 22 May 2003, at par. 9 recognising the legitimacy of an interim administration until a representative government can be established. S.C. 1483 affirms in its preamble the need for accountability for crimes and atrocities committed by the previous Iraqi regime and request the denial of safe haven to those members of the previous regime who are alleged to be responsible for crimes and atrocities and requests support actions to bring them to justice. It also points to promoting human rights at par. 8(g), while encouraging legal reforms at par. 8(i). This is further recognised by S.C. Res. 1500, 57<sup>th</sup> Sess., 4808<sup>th</sup> mtg., U.N. Doc. S/RES/1500 of 14 August 2003 which grants recognition of the *Governing Council*.

time. On December 10, 2003, it issued the *Statute of the Iraqi Special Tribunal*<sup>533</sup>. It must be stated that the speed by which this document came about clearly indicates the insistence of the Iraqi members of the *Coalition Provisional Authority* to try former members of the Ba'ath regime in Iraq. Indeed, at the time prior to the capture of Saddam Hussein on December 13, 2003, there existed a definite question about who would have the privilege of trying former regime perpetrators and where such a trial would take place. While the United States have appeared non-committal, if somewhat bent upon doing this in America, the Iraqis have been very vocal in wanting to try those accused in Iraq. By producing a document permitting the trial to take place with the guarantees of justice, the *Governing Council* was in fact seizing the ground first to have the moral claim of trying under its terms. As the political manoeuvre of an occupied country's political body, this was brilliantly done. However, it does raise two questions as to its legitimacy: its roots in international law and the avoidance of the *International Criminal Court*<sup>534</sup>.

(1220) The *Iraqi Special Tribunal* has been created by the Iraqi's own *Governing Council*, through the approval of the Coalition Provisional Authority Administrator's *Order 48 – Delegation of Authority Regarding an Iraqi Special Tribunal*<sup>535</sup>. This order bases the legitimacy of its delegation upon Security Council Resolutions 1483 (2003), 1500 (2003) and 1511 (2003). As such, it therefore recognises its authority under the mandate of the United Nations and under Iraqi law. Indeed, Section 2(1) of Order 48 takes pains to hold the *Governing Council* accountable for describing the elements that will apply to the crimes listed in the *Statute* and does promulgate in Section 2(2) the need for the tribunal to meet at least the international standards of justice.

(1221) Nonetheless, final authority for the Statute firmly rests in the *Coalition Provisional Authority* as the Administrator reserves himself the right to alter the statute or any elements of crimes or rules of procedure developed for the tribunal in Section 1(6), while the prevalence of the promulgations of the *CPA* is affirmed in Section 2(3) over any conflict of promulgations by the *Governing Council* and the *CPA* or judgements by the Tribunal. It is clear that the Coalition desires to firmly keep the situation within the confines of its authority. Hence the political manoeuvre in producing a *Statute* so fast and with clear indications of where the *Governing Council* wants to hold trials. Regardless of this intra-Coalition tug for jurisdiction, the legitimacy of the Tribunal is not in doubt.

(1222) Still, some will wonder about the choice of venue for such a trial, since the *International Criminal Court* was created in 2002, and therefore is available to conduct such trials. Indeed, the jurisdiction of the court extends well into all the crimes aimed in the *Statute of the Iraqi Special Tribunal*. However, it has two problems against it being applied. The first is the geopolitical nature of the *International Criminal Court*, as the United States continues to refuse to see it as having jurisdiction over its nationals. Using the ICC while leading the *Coalition Provisional Authority* would be most impolitic. But, in legal terms it is Article 11 of the *Rome Statute* that bars it from being utilised. That is because Article 11 edicts a jurisdiction *rationae temporis* that limits it to crimes occurring solely after its coming into force. As the entry in force of the *Rome Statute* is July 1, 2002, and the crimes falling under the *Statute of the Iraqi Special Tribunal* have been giving a temporal jurisdiction applicable from July 17, 1968, there can be no question of using the *International Criminal Court*<sup>536</sup>.

<sup>533</sup> *Coalition Provisional Authority, The Statute of the Iraqi Special Tribunal*, December 10, 2003, at [http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm).

<sup>534</sup> *Rome Statute, supra*, note 133.

<sup>535</sup> *Coalition Provisional Authority Order Number 48 - Delegation of Authority Regarding an Iraqi Special Tribunal*, CPA/ORD/9 Dec 2003/48, [hereafter *Order 48*] at <http://www.cpa-iraq.org/regulations/#Orders>, signed by the Administrator appointed by the Coalition, L. Paul Bremmer III.

<sup>536</sup> *Rome Statute, supra*, note 133 at Article 11 as opposed to the *Statute of the Iraqi Special Tribunal, supra*, note 263, at Article 1(b), which limits the crimes to "Iraqi nationals or residents accused of the crimes listed in Articles 11 to 14 below, committed



(1223) A final limitation is of course that while the United States has signed, but not ratified, the *Rome Statute*, Iraq has done neither, rendering it inapplicable to its citizens and thereby forcing the creation of an *ad hoc* venue for the trials<sup>537</sup>.

(1224) All this speaks not only of the legitimacy of the *Iraqi Special Tribunal* as an *ad hoc* court of justice, but also of the reason why it has been enacted as it currently stands. While modifications may be foreseen, the *personae*, *temporis* and *loci rationae* are certain to remain. The determination that remains to be done is therefore the content of the *Statute of the Iraqi Special Tribunal*.

(1225) **JURISDICTION AND CRIMES.** Since 1991, the *Iraqi Special Tribunal* is the fourth to be created. And there seem indeed to be lessons that have been drawn from the experiences of the preceding ones. Indeed, the progression in clarity and reach of the Statute seems to improve, although not everything has progressed toward securing the full measure of justice due to the victims in accordance with International Humanitarian Law and the International Bill of Human Rights<sup>538</sup>.

(1226) The first attempt at creating such a court with the 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia* had fallen somewhat short of all the crimes that had been put to the feet of the accused. Indeed, this *Tribunal* was solely concerned with Serious Violations of International Humanitarian Law<sup>539</sup>. As such, it divided its competence over the notions of grave breaches of the *Geneva Conventions of 1949*<sup>540</sup>, violations of the laws or customs of war, genocide and crimes against humanity.

(1227) But even the formulation of these divisions seemed somewhat out of place. Instead of addressing the violations of humanitarian international law as a holistic legal regime, this *Statute* divided and compartmentalised what is inter-related. For example, its Article 2 joined as a cross-section the grave violations referred to in Articles 50 of the *First Geneva Convention*, 51 of the *Second Geneva Convention*, 130 of the *Third Geneva Convention* and 147 of the *Fourth Geneva Convention*. However, instead of speaking to the terms of the Geneva Conventions, it merged these documents to read “a prisoner of war or a civilian” when referring to grave breaches. As a result, it excluded some of the protected persons referred to in Article 4 of the *Fourth Geneva Convention*<sup>541</sup>. This oversight may seem benign, but it clearly excludes medical and religious personnel from the application of the *Statute* when Article 4(A) and (C) of

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since July 17, 1968 and up until and including May 1, 2003 in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s war against the Islamic Republic of Iran and the State of Kuwait.”

<sup>537</sup> This can be ascertained at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html>.

<sup>538</sup> Recognised as being the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976., *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991, United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

<sup>539</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra*, note 526, at Article 1.

<sup>540</sup> *Geneva Conventions*, *supra*, note 25.

<sup>541</sup> *Fourth Geneva Convention*, *ibid.*, Article 2: “Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.”

the *Third Geneva Convention* is interpreted in the light of its Article 33<sup>542</sup>, since it does not associate the status of prisoners of war to these persons. Nor are they considered civilians, although they are protected persons in the sense of the *Fourth Geneva Convention*. In wars like those of the Balkans, resting on cultural and religious differences, this oversight allows for many victims to fall out of the scope of obtaining justice. But this is even more telling when referring to irregulars.

(1228) Indeed, Article 4(2) of the *Third Geneva Convention* addresses the issue of militias and volunteer corps on the basis of the four conditions to be recognised for having combatant status. In ethnic conflicts such as those of the Balkan wars, a very high proportion of belligerents were in that category. But recognition as belonging to this category has always been very difficult and is left to the discretion of the Occupying Power. As a result, if they were not part of regularly constituted forces, many of the former belligerents who were victim of grave violations can not see justice done on their behalf since they did not acquire the status of prisoner of war, nor were they civilian since they were captured engaging in hostile actions, making them illegal combatants. They do remain protected persons in the sense of Article 4 of the *Fourth Geneva Convention*, but they are not civilians. As it has been noted by reputed authors, the problem is that under the *Geneva Conventions'* regime, International Humanitarian Law does not recognise a category for quasi-combatants. Nor does it recognise the right of civilians to participate in hostilities. But direct participation does make one lose his civilian status and therefore results in him being a combatant, albeit an illegal one, and lawfully a target during the length of its engagement in hostile actions<sup>543</sup>. However, he does not re-acquire his civilian status after taking part in such hostilities if captured. He becomes an illegal combatant, subject to the protections of the *Fourth Geneva Convention*, but not entitled to the privileges of a prisoner of war. As a result, Article 2 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* had and still possesses a deep flaw whereby only grave breaches against prisoners of war and civilians can be prosecuted.

(1229) Article 3 of the *International Criminal Tribunal for the Former Yugoslavia* further had a problem in separating the violations of the laws and customs of war into a unique article. As a result, it repeated the wanton destruction of property not justified by military necessity and limited itself to stating five principles of the laws and customs of war.

(1230) Article 4 goes on with the crime of genocide, which repeats *verbatim* the wording of the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>544</sup>.

(1231) The last crimes punishable under this *Statute* are crimes against humanity. These are listed as they first appeared when stipulated the first time in the *Control Council Law No. 10* for the promulgation of the *Charter of the International Military Tribunal of Nuremberg*<sup>545</sup>. The only difference concerns the fact that the persecutions on political, racial and religious grounds of the *International Military Tribunal* referred to persecution whether or not in violation of the domestic laws of the country where perpetrated, whilst no such statement is made in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

(1232) The *Statute of the International Tribunal for Rwanda* followed suit in many respects. Its Article 2 concerning the crimes of genocide takes also consideration the integral version of the *Convention on the*

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<sup>542</sup> *Third Geneva Convention*, *supra*, note 25 at Article 4(A) and (C) and at Article 33.

<sup>543</sup> Sassóli, Marco and Bouvier, Antoine A., *How does Law Protect in War?* Geneva, International Committee of the Red Cross, 1999 at 208.

<sup>544</sup> *Convention on Genocide*, *supra*, note 25.

<sup>545</sup> *Control Council Law No. 10*, *supra*, note 256 and *London Agreement*, *supra*, note 90.

*Prevention and Punishment of the Crime of Genocide*. So does its Article 3 in relation to the *Control Council Law No. 10*. Where it differs is in the violations of the laws and customs of war. This is because the Rwanda situation happened in the midst of a non-international armed conflict. But, not only did Article 3 common to the *Geneva Conventions*' regime apply to Rwanda, but also the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, which it had ratified on 19 November 1984<sup>546</sup>.

(1233) The drafters therefore choose to combine the fundamental guarantees of Article 3 of the *Geneva Conventions* with the notions of *Protocol II*. As a result, Article 4 of the *Statute of the International Criminal Tribunal for Rwanda* combined the four prohibitions of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, the taking of hostages, outrages upon personal dignity, in particular, humiliating and degrading treatment, and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples contained in Article 3 and common to the four *Geneva Conventions*<sup>547</sup>. With the additional prohibitions of collective punishments, acts of terrorism, enforced prostitution and any form of indecent assault, pillage, and the threats to commit any of the foregoing acts contained in Article 4(2) of *Protocol II*<sup>548</sup>. Interestingly, it did not concern itself with including slavery and the slave trade in all forms as violations, despite it being in Article 4(2) and the situation in some cases might be associated to this. Still, the wording of the Statutes allows for violations which "...shall include, but shall not be limited to..." these violations. Therefore, one can assume that such violations can also be prosecuted.

(1234) In both cases, the *International Criminal Tribunals* tried to create statutes tailored to the conditions of the conflicts for which they were created. The fact that they were created and that they did indeed prosecute and convict is an accomplishment worth celebrating. The lessons of the Yugoslav tribunal certainly did show in the drafting of the Rwanda statute, but as the legal regime applicable differs, it is difficult to see true progress<sup>549</sup>.

(1235) The *Statute of the Special Court for Sierra Leone*<sup>550</sup> brought a new perspective to *ad hoc* tribunals. As in the case of Rwanda, the Sierra Leone conflict was essentially non-international, despite obvious meddling by other nations. As such, it was again Article 3 common to the *Geneva Conventions* and *Protocol II* which applied. Its Article 2 takes once more the notion of the crimes against humanity in full, but adds to the crime of rape by declaring sexual slavery, enforced prostitution, forced pregnancy and

<sup>546</sup> *Protocol II*, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978. For ratification information, see <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.92&Count=30&Expand=53.1#53.1>

<sup>547</sup> *Geneva Conventions*, *supra*, note 22 at Article 3.

<sup>548</sup> *Protocol II*, *supra*, note 79 at Article 4(2).

<sup>549</sup> Nonetheless, the ICTY succeeded in In 2004, the ICTY published a list of five successes which it claimed it had accomplished: 1. "Spearheading the shift from impunity to accountability", pointing out that, until very recently, it was the only court judging crimes committed as part of the Yugoslav conflict, since prosecutors in the former Yugoslavia were, as a rule, reluctant to prosecute such crimes; 2. "Establishing the facts", highlighting the extensive evidence-gathering and lengthy findings of fact that Tribunal judgments produced; 3. "Bringing justice to thousands of victims and giving them a voice", pointing out the large number of witnesses that had been brought before the Tribunal; 4. "The accomplishments in international law", describing the fleshing out of several international criminal law concepts which had not been ruled on since the Nuremberg Trials; 5. "Strengthening the Rule of Law", referring to the Tribunal's role in promoting the use of international standards in war crimes prosecutions by former Yugoslav republics. As of March 16, 2006, the ICTY had indicted 161 persons. Only six of these remained "at large". The cases against 85 of the indicted had been concluded: 43 were found guilty, 8 acquitted, 25 had their indictments withdrawn, and six had died - 3 of these in custody, 3 while on parole. Four cases had been sent to national courts for trial. 15 of those convicted had completed their sentences and been released by March 2006.

<sup>550</sup> *Statute of the Special Court for Sierra Leone*, *supra*, note 259, at <http://www.sc-sl.org.scsll-statute.html>

any other form of sexual violence as such crimes. As such, it incorporates the enlargement made in Article 7(1)(g) of the *Rome Statute*, although omitting the last part of the sentence, where it stipulates "...of comparable gravity...."<sup>551</sup>

(1236) Further adapting to the times and moving toward simplicity, Article 3 of the *Statute* deals with the violations to the laws and customs of war applicable to non-international armed conflicts by simply restating verbatim the notions of Article 4(2) of *Protocol II*. However, the *Sierra Leone Special Court* does not limit itself. Article 4 includes other serious violations of international humanitarian law, namely: intentional attacks upon civilians, intentional attacks upon UN personnel, materiel, installations, units or vehicles involved in humanitarian assistance or peacekeeping missions as long as they are entitled to the protection given to civilians and civilian objects under international law, and the conscription or enlisting of children under the age of 15 or using them to participate in hostilities.

(1237) This article is truly interesting as while the principle of the respect of civilians has been part of the laws of armed conflicts since the *Declaration of St-Petersburg* of 1868, the notion of the crimes against the United Nations and its associated personnel have been set very shortly prior to the establishment of the Special Court in the *Convention on the Safety of United Nations and Associated Personnel*<sup>552</sup>. The fact that it is made a serious violation due to its grave nature, as expressed in its text, makes for an interesting and yet to be seen effective addition to the corpus of the laws of armed conflicts. The last notion of child combatants is a direct incorporation of Article 4(3)(c) of *Protocol II*, but was used for the first time while it was of definite interest in the Rwanda cases.

(1238) But where the *Special Court for Sierra Leone* truly innovates is in its joint approach from international to national legislation. While resting on all previous International Humanitarian Laws as well as on the *Convention on Genocide* for indictments and prosecution, it also incorporates within its statute two categories of crimes under national law. Its Article 5 thereby incorporates as crimes under Sierra Leonean laws offences against the abuses of girls and offences regarding wanton destruction of property. The most interesting aspect of this incorporation is that no one can ever accuse the current government of trying to prosecute under *ex-post facto* law as the first category of offences comes from the *Prevention of Cruelty to Children Act* of 1926 (Cap.31), while the second comes from the *Malicious Damage Act* of 1861<sup>553</sup>. These laws still being in force at the time of the commission of the offences, they fully apply to perpetrators. Furthermore, this incorporation of national laws within the structure of an essentially international law-based instrument demonstrate the juridical sense and the seriousness of the Government of Sierra Leone in trying and convicting those guilty of such crimes.

(1239) **INDONESIA'S SPECIAL PANEL ON SERIOUS CRIME (AD HOC HUMAN RIGHTS COURT)**. Parallel to the crisis in Sierra Leone, another type of violence took place in East Timor in 1999. From August 1999, the

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<sup>551</sup> *Rome Statute*, *supra*, note 133, at Article 7(1)(g).

<sup>552</sup> *Convention on the Safety of United Nations and Associated Personnel*, G.A. res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49, entered into force January 15, 1999, these are enumerated at Article 9: "Crimes against United Nations and associated personnel: 1. The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law. 2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature."

<sup>553</sup> *Statute for the Special Court for Sierra Leone*, *supra*, note 529 at Article 5.

UN Commission on Human Rights was seized with the on-going violence and informed of alleged systematic and gross abuses. Following the intervention of an Australian-led Coalition to re-establish a secure environment, steps were taken to make accountable Indonesian military and paramilitary perpetrators of crimes against humanity.

(1240) As such, Indonesia established a *Special Panel on Serious Crimes*<sup>554</sup> on the basis of national law number 26 of year 2000<sup>555</sup>. This law is supposed to permit the *Ad Hoc Human Rights Court* to try broad and systematic attacks against the civilian population as crimes against humanity<sup>556</sup>. Still its very form, including genocide within the concept of crimes against humanity and speaking of such deeds as “explosions and invasions” confuses the usual categorization of crimes. Indeed, explosion as such is not a crime under international law. Even explosions are not crimes *prima facie*; their obvious intent to attack systematically the civilian population must be demonstrated. But, even more damaging, is the inclusion of invasion within that concept of crimes against humanity. This confuses crimes against humanity with the notion of crimes of aggression, as understood in the *Rome Statute*.<sup>à</sup>

(1241) Therefore, this *Ad Hoc Human Rights Court* has been deemed an instrument for paying lip service to international pressures on Indonesia while assuring the perpetrators to be sent home free. But, this may not be the case as of yet. The UN Press Release of May 10, 2004 announced that the United Nations Mission in Timor-Leste (UNMITE) communicated that General Wiranto and seven other senior officers of the Indonesian military (TNI) and officials of the former government have been indicted by the Special Panel for Serious Crimes<sup>557</sup>. General Wiranto was charged with command responsibility for murder, deportation and persecution<sup>558</sup>. As the warrant is issued and prosecution demanded, the efficiency of the Indonesian tribunal will be offered as a test case. And its efficiency will be compared to that of the legislations given to the *Iraqi Special Tribunal*.

(1242) **THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL.** The cumulative lessons from the previous tribunals instituted to indict and prosecute the crime of genocide, crimes against humanity, war crimes and violation of national Iraqi law have not been lost on the drafters of the *Statute of the Iraqi Special Tribunal*. Indeed, the structure of its *Statute* once more demonstrates the juridical ability of its drafters and the search for clarity and expediency, while adapting to the new applicable models of international law.

(1243) First of all, the temporality of the statute addresses from the start the notion that the crimes aimed at are all those that are alleged to have taken place since the illegal *putsch* of the Ba’ath party against the ruling government of July 17, 1968 up to and including the official end of the latest Iraq War on May 1, 2003. As a result, there is a wide variety of conflicts and crimes that need to be addressed in particular geographic locations and at precise times. In order to avoid limiting the powers of the *Tribunal*, the Statute states clearly that its jurisdiction applies to any Iraqi national or resident accused of the crime listed whether it occurred in the territory of Iraq or elsewhere. As such, it does not limit the persons or the geographic area of its jurisdiction.

<sup>554</sup> Information on the court is sketchy, but its schedule can be seen at <http://www.jsmp.minihub.org/trials.htm>.

<sup>555</sup> Katjasungkana, Nug, “The Justice Process in Indonesia Regarding the Prosecution of the Serious Crimes Cases of Human Rights Violation in East Timor in 1999”, in *Justice and Accountability in East Timor: Internationals and Other Options*, Dili, 16 October 2001 at 9, at <http://www.etan.org/lh/misc/justconf3.html>.

<sup>556</sup> *Ibid.*, these adapted Article 7 of the *Rome Statute* to encompass: “a) genocide, b)

<sup>557</sup> *Daily Press Breifing by the Office of the Spokesman for the Secretary-General*, 10 May 2004 at <http://www.un.org/News/breifing/docs/2004/db051004.doc.htm>.

<sup>558</sup> *Special Panel for Serious Crimes, Motion to Request a Warrant Application Hearing Pursuant to Sections 27.2 and 19(A) of UNTAET Regulation 2000/30*, as Amended by Regulation 2001/25, District Court of Dili, 28 January 2004 at <http://www.etan.org/et2004/january/25-31/28deputy.htm>.

(1244) The drafters of this *Statute* have also decided to change its structure compared to the prior tribunals. Instead of plunging itself immediately into the crimes to be under its jurisdiction, it instead presents the composition and organisation of the tribunal. This seems obviously to be done in order to alleviate critics of a ‘kangaroo court’ by showing from the start and in plain view who and what the tribunal shall be composed of. This is of paramount importance as many of the persons representing the current *Governing Council* of Iraq are expatriates who returned to Iraq after the Coalition’s invasion. As such, they are deemed to have a strong bias against the former regime and therefore need to avoid any sort of accusation that would attack its legitimacy.

(1245) It is in this aim that Article 5(e) of the *Statute of the Iraqi Special Tribunal* incorporates not only the notion of national law for the selection of judges, but also the possibility for disqualifying a judge at Article 5(f)(1). This is also applicable to investigative judges under Article 7(m)(1).

(1246) There is also a Presidency of the Tribunal, established at Article 6, which further tries to increase the legitimacy by the appointment of non-Iraqi advisors to the Tribunals whose function will be to advise the Tribunal on international principles and to monitor the due process of law standards.

(1247) It is only after the credentials of the *Tribunal* are established that the *Statute* moves to the crimes submitted to its jurisdiction. And again, this is an exercise in simplicity and clarity. As such, Article 10 states them clearly: the crime of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws listed in Article 14.

(1248) It is interesting that this article does not keep in full with the *Statute of Rome*. Its Article 5(1) refers to four serious crimes, the first three being the same as in the *Iraqi Statute*, but the fourth is the crime of aggression.

(1249) Where Article 1 of the *Iraqi Statute* refers to the conflicts with the Islamic Republic of Iran and the State of Kuwait, one would expect in Article 10 that this is indeed a serious crime and that it should hold the Iraqi leadership accountable for this. Quite to the contrary, there is no mention of this being a crime at all. This is certainly the major failing of this statute, and one cannot discard the very real possibility that the avoidance of this inclusion is not unrelated to political consideration and historical facts. No mention of this crime means that no testimonies on the matter are to be accepted by the tribunal and therefore the avoidance of the subject of some countries’ support for Iraq’s wars.

(1250) Despite this failing, the adaptation of the statute to circumstances is interesting. One must take into consideration that the crimes mentioned have different time and space applicable to them. For example, crimes committed during the Iran-Iraq war of 1980-1988 fall under the international armed conflict regime of International Humanitarian Law. But crimes committed against Kurds during the interwar period do not. They either fall under non-international armed conflicts, if the existence of such a conflict is proven in court and which means that only Article 3 common to the *Geneva Conventions* applies with the applicable customs of the laws of war, or there is no international *juris corpus* applicable other than the crimes against humanity. As such, the Statute does an excellent of keeping with simplicity in order to obtain clarity.

(1251) On the crime of genocide, it takes in full by referring to it and mentioning Iraq’s ratification, the notions of Articles 2 and 3 of the *Convention on Genocide* and incorporating it *verbatim* within Article 11.

(1252) As for crimes against humanity, the *Iraqi Statute* does keep to the very wording of the *Rome*

*Statute* on the vast majority of its defined acts. However, it does differ with respect to imprisonment or other severe deprivation of liberty in violation of fundamental norms of international law, whereas the Rome Statute uses "...rules..." of international law. As it stands, this was a solid demonstration of the juridical thoughts of the drafters as norms are more likely to be applicable than rules, which should be defined by reference to specific treaties and not solely by custom as norms can be.

(1253) The crimes against humanity also do differ in the fact that they do not encompass enforced sterilization, as the *Rome Statute* does in reference to sexual crimes. This omission is particularly troubling as it is known that some branches of Islam do practice the ablation of the clitoris on women. It happens sometimes that the process is not successful or that it is not a precise surgical operation. As a result, death, serious debilitating injuries or sterilization occur. This is evidently a very delicate issue. Nonetheless, the whole rationale to justify the invasion of Iraq has been based upon the principles of democracy and humanity. The very deliberate omission of those two words does not augur well for the future of Iraq, nor of the region. As with the avoidance of the crime of aggression, the religious and political implications leave a very sour taste in the whole work of the establishment of the tribunal, despite its very commendable juridical approach.

(1254) To which approach one must applaud the inclusion of the crime of forced disappearance, in keeping with both the *Rome Statute* and the *Declaration on the Protection of All Persons from Enforced Disappearances*<sup>559</sup>. Further in keeping with the Article 7(2) of the *Rome Statute*, Article 12(b) of the *Iraqi Statute* states almost identically the definitions of these crimes, if only with the omission of the crime of apartheid, which is clearly irrelevant and the vulgarization of the term *inter alia*, where it concerns extermination. However, it does completely omit to define the crime of forced pregnancy. Again, one must see in this omission a clear statement of the keeping of religious and political gains by factions of the *Iraqi Governing Council* favouring some segment of the Iraqi society. This is regrettable as the definition provided for in the *Rome Statute* does not alter the meaning of national laws.

(1255) Another area of interest in the *Iraqi Statute* is where it concerns war crimes at Article 13. Indeed, as seen in the international tribunals before, there is a difference of applicability between international armed conflicts and non-international ones. But, in order to avoid having to divide and diminish the reach of war crimes dispositions, the *Iraqi Statute* follows the Article 8 of the *Rome Statute*, while rightly making unlawful confinement a separate offence from unlawful deportation or transfer.

(1256) But, more important than the enumeration of what constitutes war crimes, the *Iraqi Statute* takes the whole of the definitions contained at Article 8(2)(b) of the *Rome Statute* in its overall written form. However, there is one important omission in these which concerns international armed conflicts. This intentional omission is the employment of weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. This can be construed as a clear desire to leave out the very delicate issue of the employment of some weapons, such as bomblets, napalm, gas bombs and nuclear bombs, which many officials of the Coalition would certainly not want to have to speak about in a trial. And, of course, the question of sexual sterilization is again left out, as it is also when reference to sexual crimes is made in relation to serious violations of the laws and customs of war.

(1257) As for the rest, the whole of Article 3 common to the *Geneva Conventions*, as written in the *Rome Statute*, is brought forward in the *Iraqi Statute*, while the serious violations of the laws and customs of war are *verbatim*, save for the sexual crimes definition shown above.

<sup>559</sup> *Declaration on the Protection of All Persons from Enforced Disappearances*, *supra*, note 395.

(1258) **CONCLUSIONS REGARDING THE *IRAQI STATUTE*.** As a result of the evolution of the LOAC, it is evident that the experiences of the tribunals for Yugoslavia and for Rwanda affected the kind of conflict of the end of the 1990s and the more recent ones of the third millennium. The development of the *Rome Statute of the International Criminal Court* has also clearly influenced the development of national instruments, such as the *Statute of the Special Court for Sierra Leone* and that of the *Statute of the Iraqi Special Tribunal*. Therefore, a definitive progress has been made towards legitimizing the rule of international humanitarian law in both non-international and international armed conflicts, as well as the particular rules of that pertains to the *jus in bello*.

(1259) Nonetheless, and despite clear efforts of providing for transparency of procedures and meeting of the minimal humanitarian standards, there remains a very entrenched political influence that is pervasive throughout the redaction of such statutes. Not until the United States recognizes the *International Criminal Court* will we see a fully harmonized and applicable system of indictment and prosecution of crimes against humanity, war crimes, crimes of genocide and, as important, the crime of aggression. Until such time, there will be a selectivity applied to the prosecution of particular crimes while avoiding some of the more delicate issues, such as disappearance, sexual crimes and the crime of aggression.

(1260) Nonetheless, as silver lining does exist in the fact that all crimes committed after July 1, 2002 can be submitted to the jurisdiction of the court. Furthermore, the joint use of this tribunal with the *Convention of the Safety of United Nations and Associated Personnel* renders the U.N. peacekeepers less prone to attacks—or least able to obtain justice for any attacks.

(1261) As such, the *Iraqi Statute* demonstrates that the work done to draft the Rome Statute made good juridical sense, since it has taken most of its provisions for its own work. It now remains to be seen how far this will permit justice being truly served.

#### **E. FURTHER DEVELOPMENTS ANTICIPATED**

(1262) In light of the past developments and of the terrorist threat of the last two years, there is a fundamental question to answer when trying to anticipate future development in the LOAC. However, it does not take much to see that these future developments will surely take upon the re-definition of terrorism and comparing one segment of international law for international crimes in comparison with the LOAC as such. Therefore, the definition of what constitutes terrorism and what constitutes acts of armed conflicts will certainly be a subject re-addressed in the future.

(1263) In the same manner, pursuit of the development of better mechanism to ensure the respect of prisoners of war will certainly be a matter of priority for the International Committee of the Red Cross in the light of the recent scandals concerning the Abu Ghraib prison and other facilities under American control in Iraq. Questions about the detainees of Guantanamo Bay and about detainees in Afghanistan will surely surface as well.

(1264) These questions are important for the rule of law, but also for the countries that are asked to uphold it despite the pressures and difficulties they are under in armed conflicts. What perpetrators of infractions fail to realise is that **international humanitarian law is a strategic weapon**; when persons feel they will be humanely treated if they cease resistance, they tend to choose the easiest path. This affects the morale and the effectiveness of enemy troops, thereby serving to help win a conflict more



securely than would otherwise be the case. On the contrary, not respecting the LOAC hands over the best propaganda tool that a committed foe can wish for.

(1265) Another matter that may become a matter of interest is the use of remote weapons. While the rule concerning the development of new weapons are larger and encompassing of many aspects, there will be more and more development made in automation. The risk associated with these types of weapons will be the destruction power they have and the discrimination they can have in attacks. Indiscriminating weapons are certainly not the aim of the developers, but how much power of discrimination between civilian and combatants will be necessary remains to be an issue of much importance.

(1266) Overall, however, the next developments will come with the fall of regimes such as North Korea's, Iran's, Cuba's and other totalitarian governments. As the rulers become older, and eventually die, their hold on power will sway and the people will reclaim representative government. As this happens, there will be many accusations of crimes against humanity surfacing. This will bring to the forefront the question of the immunity of Heads of States and the jurisdiction of national tribunals on crimes committed elsewhere.

(1267) Since the International Criminal Court can only be seized of cases post-dating July 1, 2002, there will still be a need for national tribunals to be formed to prosecute crimes. When this happens, the very notions of the *Pinochet Case*, regarding immunity, will come to the fore and have to be settled once and for all. As for regimes tempted to go this way since 2002, they are now under the jurisdiction of the *International Criminal Court* and its Article 27 makes it clear that there is not an official capacity that grants immunity from prosecution.

#### CONCLUSION

(1268) The recent development in international humanitarian law demonstrates that there is still much to be done to have a fully coherent and harmonised system of laws to indict, prosecute and pass sentence over those guilty of violations.

(1269) Regardless, recent developments have shown promises and the current events are warranting future trends toward an improvement and consolidation of the legal system.



## CHAPTER 13

### FINAL CONCLUSIONS

#### INTRODUCTION

Up to this point, we have looked at the LOAC in terms of situations to which they are applicable. For the remainder of the course we discuss why the LOAC are so often violated in the most gross and blatant fashion. We will also look at means to remedy this situation.

#### Content

- a. why the LOAC are still violated;
- b. the instructional means that would render the LOAC more applicable; and
- c. final conclusions

#### A. WHY IS THE LOAC STILL VIOLATED

(1270) The use of violence during an armed conflict is not the clean concept that we may see in the movies. The act of killing, whether by bullets, steel, or hands, is condemned by all cultures.

(1271) The Christian Ten Commandments illustrate this with: “Thou shall not kill.” Why is it, then, that humans commit barbarous acts so shocking to our conscience, leading us to ask whether, in the same situation, we would have acted in the same manner? A good example demonstrating this paradox within the Christian religion is certainly that of Nazi Germany. A majority of Germans of the time were Christians, some Catholics, many Protestants. Their belt buckles proudly stated: “*Gott mit uns.*”(God is with us). Yet atrocities were carried out by these very same people who adhered strictly to the religious and societal principles of their culture.

(1272) Dr. Joseph Mengele, known as the ‘Angel of Death’ of Auschwitz-Birkenau, was also acknowledged to be a good and considerate father who loved life. Yet he was personally responsible for the death of at least one million people. How do we explain that fundamentally “good” persons can commit such fundamentally wrong actions in good conscience? And how is it that a man who kills another man in the streets is a criminal and one who kills twenty men in combat is a hero?

(1273) Many settle these questions by saying: “In an armed conflict, it is moral/legal to kill because it is necessary to do so to defend one’s country.” This appears self-evident. But if we push the reasoning further, the question is to know what really justifies killing, which is such a trial for the human psyche that it leaves physical and psychological scars that last a lifetime.

(1274) At the beginning of the book it was suggested you read Robert L. O’Connell’s *The Ride of the Second Horseman* – referring to the Bible’s Apocalypse, whereby the Second Horseman is War - on the reasons why humans will fight and even forfeit their right to life if necessary. To summarize O’Connell’s thesis, he proposes that humans fight for food - even today. The tribal conflicts of times immemorial were certainly in the beginning a question of controlling fertile lands and securing foodstuffs. Nomads carrying out pastoral tasks came into conflict with the needs of sedentary populations looking after field crops. In South America, it is alleged that Incas rituals included human sacrifice because this permitted the

population to supplement the protein deficiencies common at the time. Human meat was the only available source.

(1275) Of course, because of the abundance of food we enjoy, North Americans have difficulty accepting that human beings still fight for food. Yet all conflicts in the Middle East are linked to the control of fertile lands and sources of water; most non-international conflicts take place where 80 per cent of the land is controlled by 1 per cent of the population, as in Latin America; and one of the fundamental Chinese problems is the control and sustenance of its population, which makes up one-fifth of that of the entire earth.

(1276) Poverty is the inability to provide for one's need to eat, not the incapacity to pay for a second household vehicle. Isolated in our affluence, we find it hard to reason from a **perspective of survival**. Historically, what motivated our ancestors to fight was the control of food sources. It is unlikely that this need has fundamentally changed.

(1277) At the roots, the primary reason why a human fights is the **need to survive**, expressed in Maslow's pyramid under the label "physiological needs." But if this need has not changed, it certainly has evolved within a "national" perspective.

(1278) Humans have succeeded in establishing relatively strong bases, depending on the region and climates, to answer their needs. They have organized societies and permitted the sharing of excess food. Economies born out of trade have been transformed through systems of money that measured the worth of work. Hours of work were therefore given value by a monetary measure, permitting the subsequent acquisition of resources to satisfy physiological needs.

(1279) What is this monetary value if not food and other resources in another form? The diversification of economic activities has permitted some to leave the land and to produce other goods. Still, it is no coincidence that the rallying cries of the French (1789) and Russian (1917) revolutions were "We want bread!" Money is a medium to acquire what one wants.

(1280) In the last century, technological progress in the means of production has allowed us, in western societies at least, to surpass physiological needs at the national level. Monetary value aims not just at answering the first stage of Maslow's needs but higher ones as well. However, when another national unity threatens the sources of revenues linked to the control of a territory, the human psyche reverts to the **perspective of survival**. Then humans will do all that is necessary to defend themselves and survive the threat.

(1281) When these conflicts reach a high enough intensity, the use of armed force justifies the protection of the "State" and its "interests." As a result of long experience, humans have sought through the use of the instruments studied in this course to limit the damages resulting from these conflicts. But often many choose not to obey them. Why is this so?

(1282) As we have seen, humans are animals like other species, possessing an instinct for survival. While this instinct may justify some acts, it does not explain war crimes or crimes against humanity and international security. Many of these crimes are not committed on the front lines but are organized and carried out in relative safety away from the immediate zone of danger.

(1283) What factors can account for torture and for disrespect of civilians? Famous jurist Éric David list

many reasons in his book *Principes de droit des conflits armés*<sup>560</sup>. He separates them in two categories: **macro-sociological** and **micro-sociological**.

(1284) **Macro-sociological** reasons are first explained by the **context of violence**. According to this concept, it is the permissive character of armed conflicts that allows the violation of the laws that regulate them. Violence leads to violence. The longer a conflict lasts, the more those caught up in it become desensitized to the actions they commit. The more we see of violence, the less we are affected by it. After a certain point, we can no longer differentiate between limited legal violence and unlimited illegal violence. The conflict becomes a normal context of permissible violence.

(1285) In the same manner, this context of violence leads to the **loss of all reference points** to guide one's actions. The longer a conflict lasts, the more one wonders who is the enemy, the real enemy. Particularly in a NIAC, unfounded suspicions lead to venting frustration on anyone in the least suspected of supporting the enemy. From the mindset of the instinct of survival, all measures to eliminate a presumed threat, without any verification or proof, become justified.

(1286) This becomes even more a **permissible context** for persons with deviant personalities. Anyone with a psychological predisposition can profit from such situations to satisfy their urges. What's more, these urges do not have to be innate but can be learned. Persons with psychopathic tendencies can exercise their urges relatively freely. Others can be influenced to learn and develop these tendencies. Once again the **witness effect** comes into effect. For example, a person might be required to stand guard outside an interrogation room where torture is practiced. At first, this person would be revolted by the cries and the spectacle. But when we do not act to stop such actions, we begin to be part of the influence of the group. We start to accept these practices as "normal."

(1287) In social psychology terms, this is the principle of **submission**. The power of a legitimate authority to induce this submission in the individual has no equal. The Stanley Milgram experiments (1974) demonstrated the degree to which individuals can be made to submit when their intrinsic goodness is challenged by the compliance commanded of them. In his studies Milgram proved that between 60 and 93 per cent of the persons selected for experiments chose to obey when confronted with this choice<sup>561</sup>.

(1288) This submission is explained by the "**finger in the machine**" theory. According to Milgram, it is easier to bring people to do something that goes against their principles by bringing them closer small steps at a time. In the context of armed violence, if you were called to guard an interrogation room where torture was going on, you would first be called inside the room to hold the prisoner. Then you would be

<sup>560</sup> Éric David, *Principes du droit des conflits armés*, 2e éd., Bruylant, 1999.

<sup>561</sup> Stanley Milgram, *The Perils of Obedience*, 1974, based upon an experiment on human subjects found that in its first set of experiments that 67.5 percent (27 out of 40) of experimental participants administered the experiment's final 450-volt shock, though many were quite uncomfortable in doing so; everyone paused at some point and questioned the experiment, some even saying they would return the check for the money they were paid. No participant steadfastly refused to give further shocks before the 300-volt level. Variants of the experiment were later performed by Milgram himself and other psychologists around the world with similar results. Apart from confirming the original results the variations have tested variables in the experimental setup. Dr. Thomas Blass of the University of Maryland Baltimore County performed a meta-analysis on the results of repeated performances of the experiment. He found that the percentage of participants who are prepared to inflict fatal voltages remains remarkably constant, between 61% and 66%, regardless of time or location (a popular account of Blass' results was published in *Psychology Today*, March/April 2002). The full results were published in the *Journal of Applied Social Psychology* (Blass, 1999). There is a little-known *coda* to the experiment, reported by Philip Zimbardo. None of the participants who refused to administer the final shocks insisted that the experiment itself be terminated, nor left the room to check that the victim was well without asking for permission to leave, according to Milgram's notes and recollections when he was asked on this point by Zimbardo.

ask to hit him or her: not hard, just once. The next day it would be harder, but just slaps. Then it would be with a closed fist, then with boots, then with the butt of your rifle. Without really realizing what was happening or the shift in your attitude towards the prisoner -- no longer a human being in your eyes but the personification of "the enemy," weak and pitiful -- you would enter the machine. Your finger poked at its wheels and you got caught, and the rest of you, body and soul, was dragged in without your even realizing it. Now you are in the **chain of violence** to stay. Each day you are asked to do a bit more, and if you try to halt the process, peer pressure will be applied to make you continue. Your loyalty will be questioned, along with your motivation of why you hit the first time if you weren't willing to go the distance.

(1289) Little by little you have put your back to the wall, and each minute that passes makes it even more difficult to refuse the order. Eventually you crack and submit to the perceived legitimate authority. You become a war criminal without ever having thought it could happen to you. As Milgram said: "Ordinary people, doing their job without any particular hostilities, can become agents of a terrible process of destruction" -- both the enemy's and their own.

(1290) Keep in mind that you are not immune to this. You could commit such acts. Individuals habitually crumble before peer pressure. Knowing the psychological factors that explain the violations of the LOAC can help you overcome such situations.

(1291) As for micro-sociological reasons, as defined by Éric David, they are:

- a. general education;
- b. specific formation;
- c. ideological alibis; and
- d. strategic alibis.

(1292) **General education is a primary factor.** As we saw in Chapter 9, childhood is the period in which we learn individual and collective values that last all our lives. In an authoritarian or dictatorial regime, the cult of obedience is taught very young to instill loyalty in the individual. The Soviet Kosomols, the Hitler Youth, etc., are all examples of state organizations aimed directly at transmitting a spirit of submission to young people through general education.

(1293) **Specific formation** is linked to the "finger in the machine" theory. As with the military system, "special" (torture) units select candidates according to their psychological profiles and general education. Persons with low self-esteem and/or having had difficult childhood are prime candidates. This prevents loss of time and money in training someone who is fundamentally against these methods and facilitates being able to use him as soon as possible. Indeed, once the first acts are committed, the candidate's withdrawal becomes more and more improbable. By being pressed to commit an act as soon as possible, candidates form loyalties towards their unit, its culture, and its methods.

(1294) **Ideological alibis** are of a different order. As with general education, these imply the teaching of precise values, prejudices, and a rationale that justifies what would otherwise be unjustifiable. One then chooses the lesser of two evils. For example, an American torturing a Vietnamese PW would justify his act rationally by telling himself that this act is necessary to preserve the "American Way of Life," to stop

communism everywhere.

(1295) As with Christian crusaders of the Middle Ages breaking their own Ten Commandments against Muslims, contemporary ideologies permit individuals to deny their responsibilities in the name of God. In the case of Jihad, the “Holy Wars” of Muslim fundamentalists, the same reasoning is used to justify an attack on any tourist “infidel” to the Koran. Ideologies can be political, religious, racial, economic, etc. Independent of their nature, they aim at only one thing: imparting preconceived ideas to rationalize and justify actions that are fundamentally wrong.

(1296) During their 1943-1945 strategic bombing campaign, the Allies conscientiously targeted town and cities with no military defence systems. This was justified by the idea that democracy and liberty had to overcome the evil of Nazism. It is noteworthy that throughout history no societies have been more inclined to wage offensive war once attacked than western liberal democracies. The democratic conception of war is total war. This is quite paradoxical if one considers the ideas of tolerance preached by these regimes over the last 200 years.

(1297) In this conception of war, we depersonalize the enemy. They are no longer human beings, merely an ideology in animal form to be hunted down and killed. We are not responsible for crimes but instead are to be acclaimed for freeing the world from evil. Ideologies are used to sanctify actions that are by any account the most horrible barbarities. For the individual, this alibi is perfect, since we can say: “I did not do it. My country wanted this.” Wrapped in the cloak of justice, those who commit these acts tell themselves that they only did their duty, defending their nation. Through this justification, they and their society absolve themselves of their actions.

(1298) Finally, there is the **strategic alibi**. This one takes many shapes and forms. It serves to justify the use of nuclear weapons or strategic bombings in the name of saving lives in the long run. As the Supreme Court of Israel recognized in 1996 and disavowed in 1999, the acquisition of information to ensure the survival of the state and save lives justifies otherwise illegal acts. This alibi is based on a wobbly rationale whereby any means are justified to save lives. Just as in operations in two world wars the aim to “*bring the boys back home for Christmas*” justified successive catastrophes (Gallipoli [1915], the Somme [1916], Pachendale [1917], Arnhem [1944], etc.), the strategic alibi uses “economy of force” to defeat the enemy.

(1299) Some American generals, like Curtiss Lemay (1950), believed strongly in a first nuclear strike against the Soviet Union to prevent American losses once the USSR had caught up with American technological advances. General MacArthur, commander in chief of all the American Forces during the UN’s intervention in Korea, pleaded for a direct attack against China and the use of nuclear weapons if need be.

(1300) Life in a context of violence and the acceptance of this context as normal leads to a polarization and radicalization of ideas. For General MacArthur, twice decorated with the Medal of Honour, participating to two world wars and an ideological conflict was just such an example of the consequence of a martial spirit once the individual accepts it as the normal avenue of life. Victory then becomes the sole objective and all means justify its attainment. Then the “end justifies the means.”

(1301) This explains how the context of violence, human psychology, and human experience lead individuals to consider themselves absolved of responsibility for murder, torture, and other crimes such as war crimes, crimes against peace, and crimes against humanity.

(1302) We will now examine how it may be possible to minimize these factors and so render armed conflict somewhat more humanitarian.

**B. THE INSTRUCTIONAL MEANS THAT WOULD RENDER THE LOAC MORE APPLICABLE**

(1303) The reasons behind violations of the LOAC are juridical, sociological, and psychological. To remedy violations, these aspects must be addressed together as parts of a whole, not as distinct parts.

(1304) From the juridical point of view, the LOAC are part of the international law *lex corpus* (applicable law), although they are distinct from public international law. This type of law is reactive, not proactive. It can only readjust itself following experiences in its application. However, past belligerents, as a result of their experiences, often are little inclined to make further concessions, fearful of the flaring up of further hostilities.

(1305) To break this cycle, the LOAC must be transformed into a proactive and evolutionary *corpus*. Legal instruments must be created to prevent, not only to cure. In order to do this, international jurists involved in the development of the LOAC must:

- a. create minimal norms applicable at all times;
- b. explore new domains of technology and their impact;
- c. revise international instruments to an ever-higher standard; and
- d. create policing measures for these international instruments.

(1306) As for the **creation of minimal norms applicable at all times**, these are principally the measures of arts. 3/common GC 1949, 75/AP 1, and 4/AP 2. At present, however, these measures only apply in times of armed conflicts. They are placebos enacted to soften the blows, limited in application by their *rationae personae, materiae, conditionis* and *loci* obligations. Their applications are also confounded by their interpretation by the soldier on the ground. A soldier is not necessarily a jurist, and this is why there exist rules of engagement provided by the diverse legal branches of the world's armies. However, these differ from one country to another and must be harmonized during joint operations within an alliance or a coalition.

(1307) Thus the juridical gap between peacetime and times of armed conflict must be filled by a single instrument that would provide a clear and unique legal norm applicable at all times, regardless of the situation, the nature of the conflict, etc. Like the new *International Criminal Court* instituted by the *1998 Rome Treaty*, this instrument must be the result of a wide accord among the international community and be applicable to all, regardless of objections and national politics.

(1308) The arrest of General Augusto Pinochet indicates the tendency of the public opinion to favour such an instrument<sup>562</sup>. Armed conflict, the use of limited violence, and the respect of human rights must all

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<sup>562</sup> The former Chilean dictator has seen his immunity once more lifted by the Chilean Supreme Court on 26 August 2004 and has been declared fit to stand trial. Such a trial would take years of legal wrangling but should nonetheless proceed to a satisfactory conclusion. CNN, "Chile Court Strips Pinochet of Immunity", 26 August 2004, <http://www.cnn.com/2004/world/americas/08/26/pinochet.immunity.ap/index.html>. He was deemed unfit to stand trial and therefore



be as clearly and precisely regulated as fiscal laws and free-trade treaties. The limits of state sovereignty must be pushed back to prevent them from being used as the excuse for gross and flagrant violations.

(1309) Jurists of the LOAC must also be proactive and interest themselves in **new domains of technology**. Space is certainly a predictable battlefield in the future if human colonization becomes a reality. Colonization of space is no longer science-fiction but a real desire expressed by states. If the technology to achieve it does not exist today, this does not mean that it will not exist tomorrow or in a hundred years. Mars is the next target of human intervention. The *National Aeronautic and Space Agency* has already divulged its plans in the middle term for it. Like the Americas of the fifteenth century, space is *terra nullus*, unoccupied territory, and we all know the number of conflicts and massacres that have ruled the course of history here. These questions of division should be settled before we make the big leap.

(1310) Along the same lines, investment in space research brings with it the discovery of new forms of energy that can be converted into weapons. Strict norms must be developed to prevent the use of weapons that would contravene existing conventions but, even more important, such norms must be drawn to prevent the use of weapons that would evade already known categories that are restricted or prohibited if they contravene the spirit of the LOAC.

(1311) As for international instruments relative to the LOAC, they must be constantly revised to a **higher standard**. The worst juridical situation is one whereby the law makes itself the law of the land through state practice. Some dispositions can become obsolete by practice, or the absence of practice, of states. But in the existing instrument the standard is so low, principally due to the need of consensus of the Concert of Nations, that we would have trouble finding one section that is no longer needed.

(1312) To guarantee the maintenance of the LOAC legal regime and its relevance, jurists in the field must meet periodically to re-analyse, reinterpret and clarify the LOAC. In no circumstances should they be allowed to lower the standard already in place. The norm that has been acquired must be preserved and, when possible, revised to a higher standard. Such an exercise will not be easy. It must consider state susceptibilities and the operational needs of armed forces. But none of this is prohibitive. Despite the effort required, it would still be well worth meeting annually in order to make gains and to further consolidate the LOAC regime.

(1313) Finally, jurists must deal with the **creation of policing measures for the developed international instruments**. Applicable sentences for the violation of similar crimes presently vary to such an extent that they need to be rendered uniform, if not identical for all. But the issue is not simply sentences: it also deals with the reaction and intervention methods to stop violations.

(1314) The case of Rwanda (1994) clearly illustrated this situation. In a cartoon in the newspaper *Le Monde Diplomatique*, a politician declared: "But why worry? There are only 4 million of them and they are killing 500 000 a week. In 8 weeks, it will be over." The cartoon's intention was to denounce the

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acquitted. But once more he was indicted by Chili in 2005 and in late November 2005 was deemed fit to stand trial. He remains under house arrest while the procedures are under way. Much as with Milosevic, who died in custody at The Hague, and now with Saddam Hussein's trial, there is a very slow but nonetheless appreciable movement toward depriving heads of states guilty of gross, severe and continued violation of human rights as well as those guilty of war crimes or crimes against humanity of their immunity. The indictment of the former president of Chad, Hissen Habré, by a Belgium court which has been given universal jurisdiction over breaches of humanitarian law and of human rights through the national system of Belgium will further tip the balance towards this, as will the indictment of Joseph Kony, the Lord's Resistance Army's rebel of Uganda, as a future example of the reach of the International Criminal Court since he is its first accused. The future will tell where this movement will lead, but one can hope that it will take away the irresponsible concept of immunity to bring about accountability at all levels.

inaction of western governments that refused to engage their troops to halt the massacres. Canada almost intervened three years later by trying unilaterally to send troops into Zaire. However, due to the lack of means, Canada had to withdraw its plan. By contrast, France after a long hesitation, deployed numbers of its *legionnaires* and put some order back into the chaos.

(1315) Clearly such interventions are very risky and only possible when an intervening state has more means than the target state. Nonetheless, the experience of 1990 proves that coalitions, alliances, and multilateral organizations have these means. NATO has demonstrated on the European continent both its domination and its will to dominate. A UN Rapid Reaction Force remains the most legitimate idea, since it is already permitted by art. 42 of the *UN Charter*. Indeed, it permits the creation of a permanent military force, composed of a national contingent, available on call to rapidly deploy and face sudden outbreaks and to stop LOAC and human rights violations.

(1316) **Sociologically** speaking, it is becoming both more difficult and easier to resolve problems of violations of the LOAC. Easier, because the solutions are not unknown -- the principles of the *Universal Declaration of Human Rights* certainly provide a good example to follow. All humans should have the same opportunities regardless of race, sex, religion, political opinions, etc. All should have enough food and an education supporting these fundamental principles. Only by growing up with them can we acquire the conviction to defend them.

(1317) Therefore, the teaching of GC 1949 and AP 1977 should be included in all national education programs, along with other fundamental international instruments protecting human rights and the rights of victims in time of peace as well as in times of armed conflicts.

(1318) Also, the idea of democracy should supplant that of authoritarian and dictatorial regimes that pollute the world. Only democracy, although itself imperfect, permits the greatest numbers to reach the best level of quality of life. States should work also to take care of those minorities that are still cut off from these opportunities. Internal contentment brings external contentment in international relations. This arduous work is the responsibility of the governments of the world and of individuals as well. Despite economic restrictions, inclusion of marginalized people needs to be part of any state's priorities. All efforts should be made to ameliorate the quality of life for all, not just for the few. The instinct of survival leads humans to commit acts they would not otherwise. Reducing adverse conditions is a required first step.

(1319) It is hard to conceive of the realization of these solutions due to the sacrosanct notion of state sovereignty. This notion does stop intervention in the internal affairs of states, as explained by Oscar Schachter. However, only with the reinterpretation of this concept will it be possible to impose a respect for human rights both in times of peace and of armed conflict.

(1320) Finally, there is the **psychological** question. On this point, little progress is feasible. We can discover the sources of human violence and attempt to resolve them but most will agree that humans are human, with an instinct for survival and a desire to live. Just as there will always be crimes of passions and gratuitous acts of violence, there probably will always be in humans a propensity towards violence in times of crisis. This return to the beast is often hidden behind grand scientific terms, but it still persists as the animal in us with its instinct to survive.

**C. FINAL CONCLUSIONS**

(1321) We have seen throughout this book a list of some of the obligations you must fulfil. As a member of Armed Forces, you will have the mandate to protect the sovereignty of your country, but also the mandate to apply the international instruments for the protection of the victims of armed conflicts and human rights.

(1322) Not only do you have these mandates, which are rarely contradictory, but you also have the duty to prevent and repress all violation of these instruments. This is not a choice. It is your moral and legal personal obligation.

(1323) The LOAC are not an abstract concept to be taken lightly. They are the foundation of what we are and have been for centuries. They are means of overcoming our animal nature and breaches of humanitarian principles, of preventing the annihilation of the human race. Their importance cannot be overstated since, even if they are no miracle remedy for human nature, they represent a giant step towards defining the human being as a social organism living in a constantly evolving universe. There is much to indicate that humans will not be confined to terrestrial borders for long. Today's changes are those that will guide the future actions of humans.

(1324) According to art. 83/AP 1, it is your duty to disseminate all information possible on the LOAC as contained in GC 1949 and AP 1977.

(1325) Include the teaching of these instruments in your training plans at unit and sub-unit levels. Contact the International Committee of the Red Cross to have delegates sent to you for teaching. Order the GC 1949 and AP 1977 to make them mandatory readings for your subordinates. Means abound. You only have to ask.

(1326) Teach your personnel to freely consult their consciences without disrupting military authority. But, above all, always remind them that the LOAC are the **rules applicable in the conduct of hostilities to reduce unnecessary suffering and limit damages and to produce conditions favouring a return to a viable and lasting peace.**

(1327) Stopping the use of armed force to resolve international and intra-national dispute might be too tall an order. But acting in line with our conscience and respecting the Laws of Armed Conflicts in already a step toward protecting its victims and saving lives. And that, in itself, is an order that is both possible and worthy of our efforts.



LIST OF NAMES

**Arone, Shidane.** (b. 1977? - 17 March 1993). Somali teenager beaten to death by Canadian soldiers from the Canadian Airborne Regiment. Caught on March 16 attempting to steal supplies from the Canadian base he was bound Arone and tortured by Corporal Clayton Matchee and Private Kyle Brown over several hours. He died of injuries. While the military initially claimed Matchee and Brown had acted alone, it was later revealed that sixteen others had visited the tent while Arone was captive, including superior officers. Also, Arone's screams were revealed to have been sufficiently loud as to be audible throughout the camp.

**bin Lādin ,Usāmah bin Muhammad bin 'Awad bin Lādin.** (in Arabic: أسامة بن محمد بن عوض بن لادن) (b. March 10, 1957 - ). Known as Osama bin Laden or Usama bin Laden (أسامة بن لادن), he is a militant Islamist founder of the al-Qaeda organization. He allegedly directed a number of violent attacks, including the September 11, 2001 ones, which killed at least 2,986 people.

**Bonaparte, Napoleon.** (b. 15 August 1769 – 5 May 1821) Emperor of the French, King of Italy was a general of the French Revolution, ruler of France as First Consul of the French Republic from 11 November 1799 to 18 May 1804; Emperor of the French and King of Italy under the name Napoleon I from 18 May 1804 to 6 April 1814; briefly restored as Emperor from 20 March to 22 June 1815. Surrendered to the British and was exile to the island of Saint Helena, where he died six years later.

**Boyle ,Joseph Édouard Jean.** C.M.M., C.D. (b 1947 - ). Canadian fighter pilot, retired General, and businessman. He resigned in disgrace in October of 1996 due to his involvement with the cover up of the altering of documents related to the Somalia Affair

**Bremer III ,Lewis Paul.** (b. September 30, 1941 - ). Director of Reconstruction and Humanitarian Assistance for post-war Iraq following the Iraq War of 2003.

**Bush, George Herbert Walker.** (b. June 12, 1924). 41st President of the United States of America (1989–1993). He presided over the dismantling of the ‘Socialist Block’, leading him to characterize his time as that of a ‘New World Order’.

**Bush, George Walker.** (b. July 6, 1946 - ). 43rd President of the United States

**Chrétien, Joseph Jacques Jean.** (known as Jean Chrétien) (b. January 11, 1934 - ). 20<sup>th</sup> Prime Minister of Canada, (November 4, 1993 - December 12, 2003), 9<sup>th</sup> leader of the Liberal Party of Canada from 1990 to 2003.

**Collenette, David Michael.** (b. June 24, 1946 - ). Canadian politician representing the Liberal Party of Canada from 1974 to 2004. Minister of National Defence, he was at the center of the controversy over the Somalia Affair, and was especially challenged on the government's decision to curtail the inquiry into the affair. Because of this, and another incident where he intervened with a judge on behalf of a constituent, he resigned from Cabinet.

**Dönitz, Karl Admiral.** (b. September 16, 1891 – December 24, 1980). German naval officer, famous for his command of the Kriegsmarine during World War II and for his twenty-day term as President of Germany after Adolf Hitler's suicide.

**Douhet, General Giulio** (b. 30 May 1869 - 15 February 1930). Italian air power theorist. He was a key proponent of strategic bombing in aerial warfare.

**Dunant, Jean Henri.** (May 8, 1828 Switzerland - October 30, 1910 Germany). Swiss businessman and social activist. Witness to the aftermath of the Battle of Solferino (1859). He recorded his memories and experiences in the book "A Memory of Solferino" which became the inspiration for the creation of the International Committee of the

Red Cross (ICRC). The 1864 Geneva Convention was based on Dunant's ideas and in 1901 he received the first Nobel Peace Prize together with Frédéric Passy.

**Eichmann Otto Adolf.** (known as Adolf Eichmann; March 19, 1906 – May 31, 1962). High-ranking Nazi and SS-Obersturmbannführer (Lt. Colonel). Due to his organizational talents and ideological reliability, he was tasked by Obergruppenführer Reinhard Heydrich to facilitate and manage the logistics of mass deportation to ghettos and extermination camps in Nazi-occupied Eastern Europe. Captured by Israeli Mossad agents in Argentina, indicted by Israeli court on 15 criminal charges, including charges of crimes against humanity and war crimes, he was convicted and executed by hanging.

**Genovese, Catherine.** (known as Kitty Genovese) (b. 1935 – March 13, 1964). New York City woman stabbed to death near her home in the Kew Gardens section of Queens, New York. The circumstances of her murder and the apparent reaction (or lack thereof) of her neighbors were sensationalized by a newspaper article published two weeks later and prompted investigation into the psychological phenomenon that became known as the bystander effect, or "Genovese syndrome".

**Grotius, Hugo** (Huig de Groot, or Hugo de Groot;) (b. 10 April 1583 – 28 August 1645). Jurist of the United Provinces (Netherlands), he laid the foundations for international law, based on natural law. He was also a philosopher, Christian apologist, playwright, and poet.

**Habré, Hissène.** (b. 1942). Leader of Chad from 1982 until deposed in 1990. Indicted for crimes against humanity, torture, war crimes and other human rights violations by Belgium which, between 1993 and 2003, had universal jurisdiction legislation allowing the most serious violations of human rights to be tried in national as well as international courts, without any direct connection to the country of the alleged perpetrator, victims or where the crimes took place. Despite the repeal of the legislation, investigations against Habré went ahead and in September 2005 he was. Senegal has Habré under virtual house arrest in Dakar. On March 17, 2006 the European Parliament demanded that Senegal turn over Habré to Belgium to be tried. Senegal is not expected to comply.

**Hitler, Adolf.** (b. April 20, 1889 – April 30, 1945). Chancellor of Germany from 1933, and Führer (Leader) of Germany from 1934, until his death. Leader of the National Socialist German Workers Party (Nationalsozialistische Deutsche Arbeiterpartei or NSDAP), better known as the Nazi Party. He pursued an aggressive foreign policy with the intention of expanding German Lebensraum ("living space") which triggered World War II in Europe by ordering the invasion of Poland. His racial policies had culminated in the genocide of 11 million people, including about six million Jews, in what is now known as the Holocaust. He committed suicide by shooting himself in the head in his underground bunker in Berlin with his newlywed wife, Eva Braun.

**Homer** (in Greek Ὅμηρος Hómēros) (8<sup>th</sup> century BC ?). Legendary early Greek poet and rhapsode traditionally credited with the composition of the *Iliad* and the *Odyssey*.

**Hussein, Saddam (Saddam Hussein Abd al-Majid al-Tikriti)** (in Arabic: صدام حسين عبد المجيد التكريتي) (ṣaddām ḥusayn abdu-l-maǧīd al-tikrītī). (b. April 28, 1937). President of Iraq from 1979 until April 9, 2003, when he was deposed in the United States-led invasion of Iraq. On June 30, 2004, Saddam Hussein was handed to the interim Iraqi government to stand trial for war crimes, crimes against humanity, and genocide. On July 18, 2005, Saddam was charged by the Special Tribunal with the first of an expected series of charges, relating to the mass killings of the inhabitants of the village of Dujail in 1982 after a failed assassination attempt against him. On January 23, 2006, Rauf Rashid Abd al-Rahman was nominated interim chief judge of the tribunal. [37] He replaced former chief judge Rizgar Amin, also a Kurd, who resigned after complaining of government interference. On July 26, 2006, Saddam made his final court appearance, during which he said "I ask you, being an Iraqi person, that if you reach a verdict of death, execution, remember that I am a military man and should be killed by firing squad and not by hanging as a common criminal."

**Kony, Joseph.** (b. 1962 - ). Head of the Lord's Resistance Army (LRA), a guerrilla group that engaged in a violent campaign to establish a theocratic government in Uganda based on the Ten Commandments. The LRA, has abducted an estimated 20,000 children since its rebellion began in 1987. On October 13, 2006, ICC Chief Prosecutor Luis Moreno Ocampo released details on Kony's indictment. These include 33 charges of which 12 are counts of crimes against humanity, include murder, enslavement, sexual enslavement and rape, and another 21 counts are of war crimes including murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlisting of children into the rebel ranks.

**LeMay, Curtis Emerson** (b. November 15, 1906 – October 1, 1990). General of the United States Air Force and the vice presidential running mate of independent candidate George C. Wallace in 1968. Credited with designing and implementing an effective systematic strategic bombing campaign in the Pacific Theatre of Strategic Air Command. and then reorganized the Strategic Air Command into an effective means of conducting nuclear war. Critics have characterized him as a belligerent warmonger (even nicknaming him "Bombs Away LeMay") whose aggressiveness threatened to inflame tense Cold War situations (such as the Cuban Missile Crisis) into open war between the United States and the Soviet Union.

**Lieber, Dr. Francis.** (b. Franz Lieber March 18, 1798 Germany – October 2, 1872, USA). German-American jurist and political philosopher. Most widely known as the author of the Lieber Code during the American Civil War, also known as Code for the Government of Armies in the Field (1863), which laid the foundation for conventions governing the conduct of troops during wartime.

**Lindh, John Phillip Walker.** (known as Hamza Walker Lindh, "The American Taliban") (b. February 9, 1981 - ). American citizen captured during the 2001 invasion of Afghanistan while fighting there for the Taliban.

**MacArthur, Douglas.** (January 26, 1880 – April 5, 1964). American general and Medal of Honor recipient, who was Supreme Commander of Allied forces in the Southwest Pacific Area during World War II. MacArthur fought in three major wars (World War I, World War II, Korean War) and rose to the rank of General of the Army. MacArthur remains one of the most controversial figures in American history. While greatly admired by many for his strategic and tactical brilliance, MacArthur was also criticized by many for his actions in command, and especially his challenge to Truman in 1951.

**Mengeles, Joseph.** (Josef Mengele) (March 16, 1911 – February 7, 1979). Nazi German SS officer and a physician in the concentration camp Auschwitz. Notorious for being one of the SS physicians who supervised the selection of arriving prisoners, determining who was to be killed or a forced laborer, and performing brutal experiments of dubious scientific value on camp inmates. After the war, he first hid out in Germany under an assumed name, escaped, lived in various countries in South America and died an accidental death by drowning in Brazil (confirmed by DNA).

**Meron, Theodor** (b. 28 April 1930) was the president of the International Criminal Tribunal for the former Yugoslavia (ICTY) until 2005. He now serves as a judge on the ICTY

**Milošević, Slobodan** (in Serbian Cyrillic: Слободан Милошевић) (b. 20 August 1941 – 11 March 2006 while in custody of the ICTY and during the final phase of his trial, of a massive heart attack). President of Serbia from 1989 to 1997 and of Yugoslavia from 1997 to 2000, when he was overthrown by popular protests. The original charges of war crimes in Kosovo were upgraded to genocide in Bosnia and war crimes in Croatia. His trial began at The Hague on 12 February 2002. Milošević was found dead in his cell on March 11, 2006 in the UN war crimes tribunal's detention center, located in the Scheveningen section of The Hague. Autopsies soon established that Milošević had died of a heart attack. In June 2006 the Supreme Court of Serbia decided that Milošević had ordered the murders of political opponents Ivan Stambolić and Vuk Drašković. The Supreme Court accepted the previous ruling of the Special Court for Organized Crime in Belgrade which targeted Milošević as the main abettor of politically motivated murders in the 1990s.

**Mitchell, William (Billy) General** (b. December 28, 1879 – February 19, 1936) was an American general who is regarded as one of the most famous and most controversial figures in American air power history.

**Mohandas Karamchand Gandhi**. (known as Mahatma Gandhi) (b. October 2, 1869 – January 30, 1948). Major political and spiritual leader of India and the Indian Independence Movement, and considered the father of India. He was the pioneer and perfecter of Satyagraha — resistance through mass civil disobedience strongly founded upon ahimsa (total non-violence) came to be one of the strongest driving philosophies of the Indian Independence Movement, and has inspired movements for civil rights and freedom across the world.

**Padilla, José**. (known as Abdullah al-Muhajir) (b. October 18, 1970 - ). American citizen of Puerto Rican accused of terrorism in the United States. Arrested in Chicago on May 8, 2002, he remains in detention in a military prison. He is charged with "conspiracy to murder, kidnap, and maim people overseas." The U.S. has referred to him as an illegal enemy combatant, stating that he was thereby not entitled to the normal protection of US law or the Geneva Conventions.

**Pétain , Henri Philippe Benoni Omer Joseph Maréchal de France (destituted of his title)**. (b. 24 April 1856 – 23 July 1951). French general, later Head of State of Vichy France, from 1940 to 1944. Due to his military leadership in World War I, he was viewed as a hero in France, but his actions during World War II resulted in him being convicted and sentenced to death for treason, which was commuted to life imprisonment by Charles de Gaulle. In modern France, he is generally considered a traitor, and pétainisme is a derogatory term for certain reactionary policies.

**Pinochet, General Augusto José Ramón Pinochet Ugarte**.(b November 25, 1915 - ). Head of the military dictatorship that ruled Chile from 1973 to 1990 after violent coup which deposed democratic socialist President Salvador Allende. He has been accused of human rights violations, both at home and abroad. He has been indicted by the Spanish government, arrested and released by the British government and, finally, arrested and prosecuted by the Chilean government itself. His poor health has led the latter two governments to dismiss the idea of prosecution. On August 8, 2000, the Supreme Court of Justice voted 14 to 6 to strip Pinochet of his parliamentary immunity, and he was prosecuted. However, the cases were dismissed by the same Court, for medical reasons (vascular dementia), in July 2002. Shortly after the verdict, Pinochet resigned from the Senate and lived quietly. He rarely made public appearances and was notably absent from the events marking the 30th anniversary of the coup on September 11, 2003. Almost two years after his resignation, on May 28, 2004, the Court of Appeals voted 14 to 9 to revoke Pinochet's dementia status and, consequently, his immunity from prosecution. On August 26, 2004, in a 9 to 8 vote, the Supreme Court confirmed the decision that Pinochet should lose his senatorial immunity from prosecution. On December 2, 2004, the Santiago Appeals Court stripped Pinochet of immunity from prosecution over the 1974 assassination of General Carlos Prats, his predecessor as Army Commander-in-Chief, who was killed by a car bomb during exile in Argentina. On December 13, 2004, Judge Juan Guzmán placed Pinochet under house arrest and indicted him over the disappearance of nine opposition activists and the killing of one of them during his regime. On March 24, 2005, the Supreme Court reversed the Santiago Appeals Court ruling in the Carlos Prats case, and affirmed Pinochet's immunity in that particular case. In another case involving the killing of 119 dissidents, the Supreme Court decided to strip Pinochet of his immunity in a ruling issued on September 14, 2005. The following day he was acquitted of the human rights case due to his ill health. Late in November of 2005, he was deemed fit to stand trial by the Chilean Supreme Court and was indicted on human rights, for the disappearance of six dissidents arrested by Chile's security services in late 1974, and again placed under house arrest, on the eve of his 90th birthday.

**Ribic, Nicholas** (Nikola). (b. 1974). Canadian charged as a terrorist and sometimes described as a traitor. Ribic, a former resident of Edmonton, Alberta, was arrested on February 20, 1999 in Mainz, Germany and then charged as part of the Bosnian-Serb army that captured United Nations peacekeepers and used them as human shields against NATO air strikes in 1995. Ribic, of Serbian ancestry, left his home in Canada to travel to Bosnia-Herzegovina where he joined the Bosnian-Serb army at the height of the war. Ribic was charged under a section of Canada's Criminal Code on jurisdiction that had never been used before that allows Canada to claim jurisdiction over kidnapping and hostage-taking offenses of or by a Canadian committed outside the country. This law was enacted



specifically to deal with terrorists. Ribic's hostage was a fellow Canadian, Capt. Patrick Rechner, working in Bosnia as an unarmed U.N. military observer. The May 1995 worldwide television and newspapers coverage showed the shocking photo of a distraught Capt. Rechner chained to a lightning rod at an ammunition bunker in the Bosnian city of Pale. Ribic was in the uniform of a Bosnian Serb soldier, wielding an AK47 rifle, in the company of other Serb soldiers. Held for 24 days, the photo of Capt. Rechner became a symbol of the United Nations incapacity to deal with Serb military aggression. Ribic's trial began in Ottawa, Ontario on October 8, 2002. An audio recording was entered into evidence that revealed Nicholas Ribic on the phone to UN headquarters in Sarajevo, warning that if any more bombs fell on Serb positions, the observers would be the first to die. In his testimony, Capt. Rechner stated that Nicholas Ribic was part of almost every crucial stage of his captivity, including making him a human shield by chaining him to the lightning rod.

**Skorzeny ,Otto Obersturmbannführer (Colonel of the Waffen-SS).** (b. Vienna, June 12, 1908 - Madrid, July 5, 1975) . Best-known as the commando leader who rescued Benito Mussolini from imprisonment after his overthrow. He was assigned in May 25, 1944 to Operation Rösselsprung, the paratroop commando operation aimed at capturing Yugoslav Partisan leader Tito at his headquarters near Drvar and crushing the communist resistance in the Balkans. He fought the numerically superior force of partisan defenders but failed their mission. Tito escaped to safety just a few minutes before Skorzeny's men reached the cave in which Tito's headquarters were located. In October 1944, he was sent to Hungary to capture Regent Admiral Miklós Horthy, who was suspected of secretly negotiating his country's surrender with the Red Army. Skorzeny, in another daring "snatch" codenamed Operation Panzerfaust, kidnapped Horthy's son Nicolas and forced his father to abdicate as Regent. A pro-German government was installed in Hungary which fought alongside Germany until German troops were driven out of Hungary by the Red Army in April 1945. On October 21, Hitler, inspired by an American subterfuge which had put three captured German tanks flying German colours to devastating use at Aachen, summoned Skorzeny to Berlin and assigned him to lead a panzer brigade. As planned by Skorzeny in Operation Greif, about two dozen German soldiers, most of them in captured American army Jeeps and disguised as American soldiers, penetrated American lines in the early hours of the Battle of the Bulge and sowed disorder and confusion behind the Allied lines. A handful of his men were captured by the Americans and spread a rumour that Skorzeny was leading a raid on Paris to kill or capture General Eisenhower. Although this was untrue, Eisenhower was confined to his headquarters for weeks and Skorzeny was labelled "the most dangerous man in Europe". Skorzeny spent January and February 1945 commanding regular troops in the defence of the German provinces of Prussia and Pomerania as an acting major general. For his actions there, primarily in the defence of Frankfurt (Oder), Hitler awarded him one of Germany's highest military honours, the Oak Leaves to the Knight's Cross. Skorzeny surrendered to the Allies in May 1945 and was held as a prisoner of war for more than two years before being tried as a war criminal at the Dachau Military Tribunal for his actions in the Battle of the Bulge. However, he was acquitted when Wing Commander Yeo-Thomas G.C. of the SOE testified in his defence that Allied forces had also fought in enemy uniform. But he was held until he escaped from a prison camp on July 27, 1948. He settled in Spain with a passport granted by its leader, Francisco Franco, and resumed his prewar occupation as an engineer. In 1952, he was declared "entnazifiziert" (= denazified) in absentia by a German government arbitration board, which let him travel abroad. Later, he worked as a consultant to the Egyptian President Gamel Abdel Nasser and the Argentine President Juan Peron, in 1963 while he stayed in Egypt he was recruited by the Mossad to deliver information about the German scientists that worked in the Egyptian missile program, and is rumoured to have assisted several of his friends in the secret SS escape network "Odessa" in the years after the war.

**Stalin, Joseph Vissarionovich.** (in Russian: Иосиф Виссарионович Сталин) (Born Io sif V issarionovich Dzugashvili (Georgian: იოსებ ჯუღაშვილი; Russian: Иосиф Виссарионович Джугашвили [Iosif Vissarionovič Džugashvili]) (b.December 18 [O.S. December 6] 1878– March 5, 1953). Leader of the Soviet Union from the mid-1920s to his death in 1953 and General Secretary of the Central Committee of the Communist Party of the Soviet Union (1922-1953), a position which had later become that of party leader. Regarded as one of the greatest mass murderers of all time, having directly ordered (or instituted inhumane programs directly responsible for) the deaths of at least 4,000,000 and up to 20,000,000 people.

**Trenchard, Hugh Montague, Marshal of the Royal Air Force 1st Viscount Trenchard.** GCB OM GCVO DSO (February 3, 1873 - February 10, 1956). British Chief of the Air Staff during World War I. He was instrumental in establishing the Royal Air Force (RAF) and the Trenchard Aircraft Apprentice scheme (The Trenchard Brats). He is recognised today as one of the first advocates of military strategic bombing.

**von Martens, Georg Friedrich** (b. February 22, 1756 - February 21, 1821). German jurist and diplomat. Became professor of jurisprudence at Göttingen in 1783 and was ennobled in 1789. Made a counsellor of state by the elector of Hanover in 1808, and in 1810 was president of the financial section of the council of state of the kingdom of Westphalia. In 1814 he was appointed privy cabinet-councilor (Geheimer Kabinetsrat) by the king of Hanover, and in 1816 went as representative of the king to the diet of the new German Confederation at Frankfort. Of his works the most important is the great collection of treaties *Recueil des traites*, from 1761 onwards. Of Martens' other works the most important are the *Precis du droit des gens modernes de l'Europe* (1789; 3rd ed., Göttingen, 1821; new ed., G.S. Pinheiro-Ferreira, 2 vols., 1858, 1864);

**Wellesley, Arthur, Field Marshal, 1st Duke of Wellington, KG, GCB, GCH, PC, FRS** (c. 1 May 1769 – 14 September 1852) was an Irish-born British soldier and statesman, widely considered one of the leading military and political figures of the 19th century. He commanded the Allied forces during the Peninsular War, pushing the French Army out of Portugal and Spain and reaching southern France. Victorious and hailed as a hero in England, he was obliged to return to continental Europe to command the Anglo-Allied forces at Waterloo, after which Napoleon was permanently exiled at St. Helena. Wellington was victorious over Napoleon and the French at each of six major battles, confirming his place as one of history's greatest generals and strategists. He served as a Tory Prime Minister of the United Kingdom on two separate occasions, and was one of the leading figures in the House of Lords until his retirement in 1846.

**William Laws Calley, Jr.** (born June 8, 1943) was the U.S. Army officer who led the March 16, 1968 My Lai Massacre. Drifter from many manual jobs, trained primarily as a clerk in the U.S. Army, he asked for Officer Candidate School, where he barely succeeded, was sent to Vietnam where he was profoundly disliked by his troops and judged ineffectual by his men. Despite a condemnation for war crimes, he was pardoned by President Nixon and served only 3 and a half year of his extensive sentence.

**Wiranto.** (b. April 4, 1947) is a retired Indonesian army General. Commander of the military of Indonesia from February 1998 to October 1999, and ran unsuccessfully for president of Indonesia in 2004. Accused by the United Nations of having a role in human rights violations by the Indonesian army and Jakarta-backed militias during Indonesia's withdrawal from the occupied territory of East Timor in 1999.

**Wright brothers, Orville Wright (b. August 19, 1871 - January 30, 1948) and Wilbur Wright (b. April 16, 1867 - May 30, 1912).** Credited with making the first controlled, powered, heavier-than-air flight on December 17, 1903. In the two years afterward, they developed their flying machine into the world's first practical fixed-wing aircraft, along with many other aviation milestones.

**Zhukov ,Georgy Konstantinovich Marshall.** GCB (in Russian: Георгий Константинович Жуков) (b. December 1 [O.S. November 19] 1896–June 18, 1974). Soviet military commander who, prior to World War Two fought the Japanese army to a stunning defeat in 1938 in Mongolia at the Battle of Khalkhin Gol (sometimes spelled Halhin Gol or Khalkin Gol) and in the course of World War II led the Red Army to liberate the Soviet Union from the Nazi occupation, to overrun much of Eastern Europe, and to capture Hitler's capital, Berlin.

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