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The Law of War

Third Edition

Ingrid Detter

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The Law of War

Third Edition

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Preface to the First Edition

> The cosmic dust ... changes the colours of the sky ... colours the sunlight with a bloody line ... penetrates our dwellings and our lungs ... (and) acts injuriously upon living organisms.

This is not a description of any nuclear holocaust. The words are those of an author, writing 85 years ago, about the nature of the 'wish for war' which pervades the mind of statesmen like 'penetrating cosmic dust'.[1]

The known horrors of war do not have to be described; but one should remember that they are the implementation of an at least oblique wish for war, or, since many wars are generated spontaneously and may appear 'unavoidable', a wish to *allow* war. Others hold that wars have ceased to exist, now that they are theoretically outlawed. Whatever disturbances that now occur must, they say, therefore be given another name, such as armed conflicts.

But conflicts that are factually very similar to traditional war still occur in the international society. It is important to regulate the behaviour of parties to any such conflict. Efforts have been made to this effect in various fields. Numerous treaties and conventions have been concluded and certain general and specific rules can be discerned.

There is no modern treatise on these rules. Older works cannot be used by simple updating as the very nature of war has changed, especially in view of the increased number of internal conflicts. The present work attempts to fill that gap. However, the work covers an immense area of problems and must necessarily balance the importance of different subjects by stringent selection.

The title of this work, the 'Law of War', using a singular rather than the more common term 'laws of war', is intended to indicate there is now a homogeneous body of rules applicable to the modern state of war. The term 'laws of war', as applied to the subject as a whole, tends to convey an image of fragmentary regulation of matters of diverging nature and importance. The 'Law of War' comprises such

1 Bloch, I.S., *Modern Weapons and Modern War*, London, 1900, p. lxiii.

different matters and provides the framework inside which problems and rules can be systematically ordered.

However, the expression 'laws of war' will also be used in this work, but then to refer to the various components of the law, for example the various legal instruments, declarations and treaties, which form part of the legal system devised for war.

The contents and the ambit of the Law of War have changed drastically in modern times, particularly in the last few decades. Matters which were once at the centre of attention in warfare are now of less pertinence. For example, blockade was always assumed to be of paramount importance to naval warfare but, in recent naval conflicts, few close or long-distance blockades have been imposed and the strategy of blockades have fallen into disuse. Furthermore, the law of prize represents another area of declining importance in modern warfare, and can perhaps now, along with angary, be more conveniently viewed as a derogation from the protection that property otherwise might enjoy in hostilities, rather than a practice specially pertinent to naval warfare.

Because of this change, this work has devoted proportionally less space to relevant rules in fields as these than earlier textbooks and sought to deal more with problems of modern importance. Some such topical problems concern the extension of the application of the Law of War to internal disputes which will be discussed in detail in various contexts throughout the book. For the reader to be aware of the place of such modern problems in a coherent system of law, this book will, albeit briefly, set out the conceptual framework of the law of prohibition of force in general in international society in Part I. Rules on belligerence and humanitarian rules will be analysed in Part II and Part III is devoted to the effects of war and various methods of securing, or avoiding, the application of the Law of War. The present book attempts, in its conclusions, to evaluate the contemporary Law of War in legal and political terms.

St. Antony's College, Oxford, 1987

Preface to the Second Edition

When this book was first published, at the end of 1987, the world was still governed by bipolarity. There was little to indicate – whatever scholars now claim to have foreseen – that communism would fall and that the political pattern would change. In a way, the divided world was accepted and perhaps even supported, by western political leaders, as a stable system, albeit suffering from tension.

At the time of publication, the theme was highly original among titles on international law and international relations: no book had been published on the Law of War since 1952. War was, according to many of my colleagues at the time, thought to be a non-subject since war was technically outlawed; the war in Vietnam was finished and the war in the Falklands was seen as a minor affair; war was of little topical interest. What was more studied at this stage by international relations scholars was deterrence and various aspects of the arms race, the Strategic Defence Initiative, and its implications. And international lawyers were devoting most of their time to the Law of the Sea and, possibly, to problems of investment in the Third World.

The ink in my book was barely dry when the Gulf War broke out. Six months later Croatia and Slovenia had to fight a war of independence and another year after that, Bosnia became the war theatre of major battles. The transition from communism was not without bloodshed; what was shocking was the indifference of the world to war in a region less than two hours' flight from London. Then war flared up again, this time in Cambodia. In Africa there were numerous conflicts: in Somalia, Mozambique, Rwanda, Angola and the Congo; in 1999, twenty of the forty-five sub-Saharan States were involved in war. New armed conflicts followed in Ethiopia, Eritrea, Kosovo and East Timor. War suddenly became of major political importance.

However, it is not only that wars have become more frequent since the first edition of this book. There have been other drastic changes. Ten years ago most wars were 'liberation wars' of nations seeking independence from more or less oppressive 'colonial' regimes. There were also a number of 'vicarious' conflicts between the then superpowers, where the United States and the former Soviet

Union supported different sides in local wars in Africa, Asia and Central America. Since the demise of the bipolar system, wars tend more to concern secession from larger federations, like the war in Chechnya in Russia, and in the constituent States of former Yugoslavia. Other new types of war appear to be fuelled by uncontrolled ethnic tension, often in the aftermath of the fall of communism which left a number of countries economically destitute.

This second edition of this book is highly topical in the light of the military action of NATO against Yugoslavia (Serbia and Montenegro), a sovereign State which had not invited such action, in an unprecedented attempt to stifle humanitarian cruelties. This is a dramatic change from the State-centred paradigm of earlier decades with ensuring reduction of the 'reserved domain', that is to say the internal area over which a State has exclusive rights. This development forms a part of the Law of War: action by military force can only be effectively studied and analysed in the context of rules for the waging of war and of rules concerning legitimate defence.

The Law of War and its branches of laws on weaponry and on humanitarian law are of major importance to mankind. It is clearly vital to produce this second edition to cover the additions to the Law of War that can now be made in view of developments during the last decade. There are also some new problems, for example the status of international forces and the responsibility of organisations. Major international organisations, like the United Nations, the European Union and the Red Cross, have been subjected to biting criticism for bureaucratic and operational mistakes in certain wars and appear to be in need of adaptation.

In the last few years there has been a flood of books on war, both on legal and political aspects. However, it is still correct to claim that there is no other treatise that deals with the major legal aspects in a systematic manner.

At the turn of the Millennium, we note that, unfortunately, wars and armed conflicts still occur. Unless international law sets firm limits and clarifies rules that apply in such situations, warring factions may resort to formless and lawless behaviour, including excesses and atrocities. Conversely, if clear rules are crystallised in a homogeneous and systematic analysis, setting out also sanctions which may follow deviations from such rules, States and groups may consider other options than armed force to voice their differences. It is the aspiration of this work precisely to contribute to such clarification of relevant rules of the Law of War.

St. Antony's College, Oxford, 2000

Preface to the Third Edition

The first edition of this book was published in 1987 when the world looked different: half of Europe and many countries elsewhere were suffering under communism. The Iron Curtain seemed be certain to remain for decades or even forever. In what can only be described as a political miracle, however, all changed in 1990. Communism fell, within a very short space of time, perhaps within six months, and the world, and international law and international relations, changed.

The second edition of this work sought to describe the entirely different post-communist scenario. But then there were further profound changes: after the attack on the Twin Towers, the 9/11 tragedy, it became apparent that the main belligerents are no longer States but individual terrorist groups. On one side we still have States involved in war and armed conflict; but on the other side, more often than not, it is a terrorist organization that is 'the enemy'. The proliferation of terrorist groups means that we now live in a very dangerous era as we no longer know where the enemy is or where and when the enemy will strike next.

This is a work that will seek to map this important transformation of international society. Without knowledge of relevant rules, statesmen cannot take appropriate decisions; leaders of the armed forces cannot give correct and lawful orders; and scholars of international law and international relations cannot advance in their analysis of the contemporary order.

There are, at present, other works which claim to deal with rules of armed conflict but the vast majority of these deal with 'humanitarian rules' which form but a part of the Law of War. They often leave out what is treated in this work: the rules concerning which weapons may be used and which targets may be attacked, justification for the use of force, rules on ethics and sanctions for breaches.

Although some scholars now claim to have predicted this transformation of international society, it must be admitted that few could have foreseen, or did foresee, that a communist system that had dominated many countries in Eastern Europe for some 45 years suddenly disappeared. The Soviet Union that had been communist for over 70 years also succumbed, with apparent joy, to the new order and renamed itself Russia. Leningrad became again St Petersburg, statues of Lenin

were removed and most streets and squares named after communist heroes were given new names, often reverting to what they had been called pre-1917.

Apart from superficial changes of names, Russia adopted far-reaching measures to ensure true democracy and adopted an economic system that was no longer controlled by the State but guided by the market economy. Most State enterprises were privatised. Churches were repaired and opened. The whole of Eastern Europe and all the former satellite countries of the USSR in Eastern Europe followed suit and, with greater or lesser success, also adopted the Western economic system.

When the second edition of this work was prepared, long sections on communist views of armed conflict were removed from this book as irrelevant or obsolete and other new chapters were revised to take account of the far going changes in international society. More attention was given to emerging rules on secession, much guided by the experience of the dismantling of the Soviet empire and by the independence of the new States in Central and in South-East Europe. Other sections were considerably enlarged, for example chapters on terrorism and relevance of acts of non-State actors. There were also tentative efforts to deal with cyber crimes and militarisation of space. Because of these drastic changes, the second edition of this work was effectively a totally different book and not merely an updating of the first edition.

No one could foresee, in 2000, a further dramatic change of international society caused by the atrocious attack on the Twin Towers in New York, rapidly referred to just as '9/11'. This was an attack of unparalleled dimension on 9 September 2001 by Muslim terrorists flying aeroplanes into the Twin Towers in New York, killing some 4,000 people. Another plane attacked the Pentagon in a similar fashion. These attacks caused President George W. Bush to declare a 'War on Terror'.

Few could have foreseen, or did foresee, that the State-centric system that had dominated the entire international society since the rise of the nation-States in the sixteenth century, would virtually disappear. Terrorist groups became belligerents, to some extent replacing States, in real 'wars'. There was now a 'War of Terror'.

Many academics then said that this is not a 'real war' but only a euphemism for new troubles in the world. But as time went on it became apparent that the Al-Qaeda terrorists are indeed the new belligerents, waging what is very similar to what in history has been called 'war'. But the situation is different: we no longer know when and where a further attack may be expected and, worse, we do not even know exactly where to find the enemy.

The declaration of the War on Terror by the United States, in turn, changed much of the contents of the Law of War. Now there had been an attack of such magnitude that it warranted unprecedented acts of military intervention in countries assumed to bear at least a part of the responsibility for 9/11. Some countries were likely to harbour the Muslim fundamentalists who had been behind the attack. The group called Al-Qaeda, then led by the extremist Osama bin Laden, was widely believed to have planned and executed the attack.

With some considerable stretch of legal arguments for justification, Iraq was invaded in 2003 and Saddam Hussein deposed and then tried and executed. One reason said to legitimise this action was that Saddam was thought to have

weapons of mass destruction (WMDs) although inspectors later did not find any. Yet, inspections and searches were largely limited to a search of traditional weapons of mass destruction, such as nuclear missiles. It would have been almost impossible to establish whether Iraq actually held any depots of biological or chemical weapons: these can be disguised and stored in a very small area indeed.

In any event – as a dramatic change of the international legal system – it was now widely held that it had become legitimate to depose a dictator and an 'undemocratic' regime.

In spite of other more or less spurious grounds of justification for the war, such as connections with Al-Qaeda, it was never made quite clear what links Iraq might have had with this organisation or, indeed, with any other terrorists.

But military force led to military force. As the third edition of this work is being prepared there is one major war still going on, in Afghanistan, and troops are still stationed in Iraq where fighting is continuing. Osama bin Laden was captured and killed but Al-Qaeda survives as an organisation, with numerous regional sub-sets. Al-Qaeda appears to still be encouraging Muslims to attack Western – especially American – targets through suicide attacks, sacrificing themselves for the fundamentalist cause. There were further atrocious attacks on innocent civilians, after 9/11, such as the attacks in London ('7/7'), in Madrid, and in numerous other places.

Further calls for democratisation came from northern African in 2011. This was the so-called 'Arab Spring' which caused one dictator after another to be deposed, starting with President Mubarak in Egypt and continuing with the capture and shooting of Colonel Gaddafi in Libya.

War used to involve a clear 'enemy'. But when terrorists – now a major problem in the world – are involved, it is no longer clear where the 'enemy' is or, indeed, who is the 'enemy'. In the earlier editions of this work it was suggested that terrorists, with their largely unexpected attacks, could be compared to pirates and that, as such, terrorists should also be considered to be *hostes gentium*, enemies of all people, and therefore outlaws.

But one could not foresee that real pirates would also re-emerge, taking innocent people on yachts and ships hostage and demand ransom for their release and in many cases taking the vessel and killing its owners. The practice became a new profitable way of warlike practices off the coast of Somalia, endangering private yachts and commercial vessels. So now the world is facing double threats and dangers by both terrorists and by pirates.

Another new development shows that the Law of War does not only concern armed conflict between States but also between other entities. Not only is a kind of war waged by terrorists, on the one hand, but also, rather than by States, by military companies, on the other. The emergence of such entities is a new and serious development in international society. These companies, often run by very experienced soldiers, engage in war-like actions similar to what in previous times was carried out by mercenaries on behalf of States or by private armies. Yet, some of these companies are often authorised by States to carry out certain military

operations. In many cases they no longer appear to be carrying out illegitimate tasks and, in such cases, they no longer appear to deserve to be outlawed.

In the transformation of international society since the publication of the first edition of this work 25 years ago, there are two trends that have become increasingly obvious, especially in the context of the Law of War. First, there appear to be some 'inherent' rules that the State has no power to displace. These rules are very few but without respecting them no society can survive. The State, that is every State, must respect that individuals have the right to be spared genocide, torture, slavery and, at least nowadays, apartheid. Again, at least nowadays, individuals appear to be ensured also some basic democratic rights. Furthermore, other intrinsic rules that operate in war and in armed conflict also bind States to such a degree that States no longer have any power to change them. These rules are not necessarily identical to those that belong to *jus cogens* but probably represent a narrower but clearer field, that is to say rules without which international society cannot survive.[1]

Some such 'intrinsic' rules concern the duty of any combatant to clearly show insignia, or a uniform, to indicate that he is a member of armed forces. If he fails do that he will be an 'illegal combatant'. Thus a civilian who takes up arms and goes into battle loses all privileges to be treated as a civilian under the Law of War. Other such 'intrinsic' rules concern the minimum standard afforded to all, whether captured dictators or suspected detainees.

All these rules are derived immediately from international law, and operate as overriding 'intrinsic' rules, whatever national legislation may prescribe. Such an ideology on 'intrinsic' rights that the State cannot alter was clearly abhorrent to the communist system: one of the core rules in that order is precisely that the State is omnipotent. Such views were also reflected in what academics could, or would, write about in certain countries. There are remnants of this attitude even in some post-communist States and even in other academic circles, influenced by previous ideologies in Eastern Europe.

The second trend – perhaps a consequence of the above – is the move away from the exclusive State paradigm as ordinary individuals, terrorist groups and mercenary companies become more visible in armed conflict. Above all, the individual is becoming more and more prominent as an actor in international society. To some extent this development may vindicate the proposition in the 1987 edition of this work (and even earlier in my other works) that, at least in a number of situations, the individual is an immediate subject of the international legal order. But many academics were unprepared for the rapid transition and changes in international practice and now find difficulties in explaining what now is called 'non-State actors'. Yet, in the system presented in the present work, such actors, above all individuals, emerge as clear subjects, immediate bearers of rights and duties, under international law.

As a subject of international law in certain situations, the individual, be it a soldier or a civilian or even a terrorist, enjoys rights under international law but

1 See Detter, I., *The Concept of International Law*, 2nd edn (Stockholm, 1994), Ch. One, and Detter, I., *The International Legal Order*, 2nd edn (London, 1993), Ch. III, on 'the hypothetical goal' of international society.

he is, above all, also subject of strict duties under that legal system (as shown in the war crimes cases). Because of duties imposed by international law on the individual, the terrorist, or the soldier who exceeds what he is entitled to do, or the statesman who kills his own people, cannot escape responsibility for his actions.

Only by accepting that the individual is at the centre of international law can we make sense of what is actually happening in State practice: terrorists are tried by military commissions or by other courts; soldiers – or politicians – who commit excesses are tried by war crimes tribunals; and dictators, who do not respect basic rules of democracy, are deposed, by their own people or even by outside intervention, or they too are tried by international criminal courts. In the modern world, the individual (the soldier, the civilian, the dictator, the terrorist or the pirate) can no longer behave as he wishes and will have to face the consequences if he violates the rules of international law.

St. Antony's College, Oxford, 2013
Ingrid Detter Doimi de Lupis Frankopan

To my son Nicholas

Abbreviations

ABA	American Bar Association
ABM	Anti-ballistic missile
AC	Appeal Cases
AD	*Annual Digest*
AFDI	*Annuaire français de droit international*
AF L Rev	*Air Force Law Review*
AJIL	*American Journal of International Law*
Annals Am Acad Pol & Soc Sci	*Annals of the American Academy of Political and Social Science*
APM	anti-personnel landmine
APPF	Afghan Public Protection Force
AQMI	*Al-Qaeda au Maghreb islamique*
AR	*United Nations Repertory of Arbitration Awards*
ASATs	Anti-satellite weapons
ASDI	*Annuaire suisse de droit international*
ASIL	American Society of International Law
ASJG	*Acta Scandinavia Juris Gentium*
AT	Advanced Tactics
AVR	*Archiv des Völkerrecht*
Berk J Intl L	*Berkeley Journal of International Law*
BFSP	*British and Foreign State Papers*
BGH	*Bundesgerichtshof*
BIICL	British Institute for International and Comparative Law
BTWC	Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction
BU Intl L J	*Boston University International Law Journal*
BWs	Biological weapons

BYIL	*British Year Book of International Law*
C	*Clunet*
Cal W Intl L J	*California West International Law Journal*
CNA	computer network attacks
CANWFZ	Central Asian Nuclear Free Zone
Can YB Intl L	*Canadian Yearbook of International Law*
Cardozo J Intl & Comp Law	*Cardozo Journal of International & Comparative Law*
Case W Res J Intl L	*Case West Reserve Journal of International Law*
CBMs	Confidence building measures
CBWs	Chemical and biological weapons
CCD	Committee of the Conference of Disarmament
CD	United Nations Conference on Disarmament
CDDH	Steering Committee of Human Rights of the Council of Europe
CECA	*Communauté européenne du charbon et de l'acier*
CEE	*Communauté économique européenne*
CEEA	*Communauté européenne de l'énergie atomique*
CERN	*Organisation européenne pour la recherche nucléaire*
Chic J Intl L	*Chicago Journal of International Law*
CICR	*Comité International de la Croix Rouge*
CIS	Commonwealth of Independent States
Civpol UN	United Nations Civilian Police
CL	*Current Law*
CLJ	*Cambridge Law Journal*
CLP	*Current Law Problems*
CML Rev	*Common Market Law Review*
Colum L Rev	*Columbia Law Review*
CSCE	Conference on Security and Cooperation in Europe
CWC	Chemical Weapons Convention
CWs	Chemical weapons
D	*Dalloz*
DGVR	*Deutsche Gesellschaft für Völkerrecht*
Denv J Intl L & Poly	*Denver Journal of International Law and Policy*
Dodson	*Reports of Cases argued and determined in the High Court of Admiralty*
DÖV	*Die öffentliche Verwaltung*
Duke J Comp & Intl L	*Duke Journal of Comparative and International Law*
EAPC	Euro-Atlantic Partnership Council
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECCC	The Extraordinary Chambers in the Courts of Cambodia

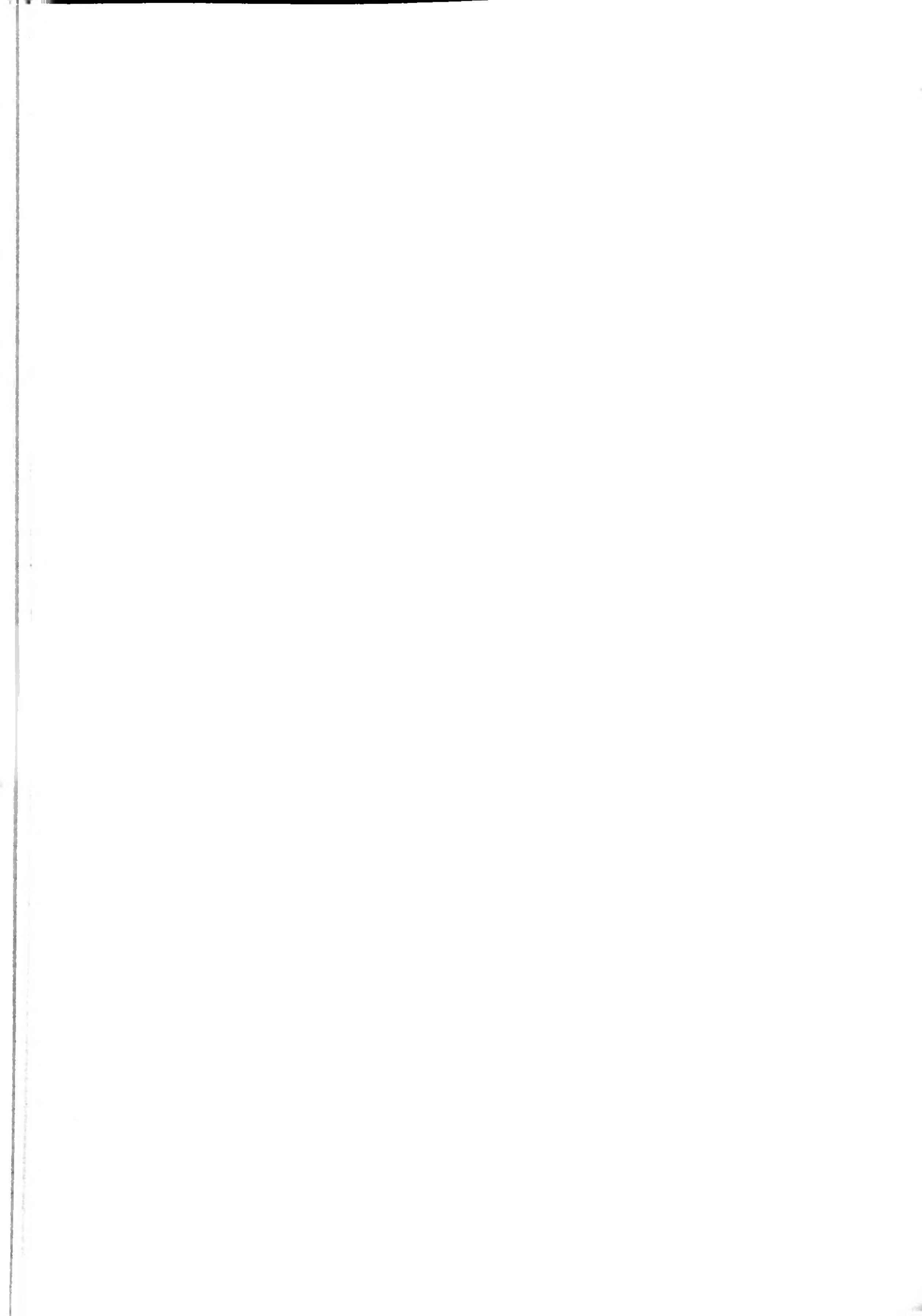
ECOSOC	Economic and Social Council
ECOWAS	West Africa of the Economic Community of West African States
ECSC	European Coal and Steel Community
ECTS	*United Kingdom European Community Treaty Series*
EEC	European Economic Community
EFTA	European Free Trade Association
EHRR	*European Human Rights Reports*
EJIL	*European Journal of International Law*
ENCD	Eighteen Nations Committee on Disarmament
ESA	European Space Agency
Euratom	European Community for Nuclear Energy
FAO	Food and Agriculture Organisation of the United Nations
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
Ga J Intl & Comp L	*Georgia Journal of International and Comparative Law*
German YB Intl L	*German Yearbook of International Law*
GRIP	*Groupe de recherche et d'information sur la paix et la sécurité*
GWU	*Geschichte in Wissenschaft und Unterricht*
Hackworth	Hackworth, G. H., *Digest of International Law*, (Washington, D.C.: Government Printing Office, 1940-44), 8 volumes
Harv Intl L J	*Harvard International Law Journal*
IBRD	International Bank for Reconstruction and Development
IBS	*International Boundary Series*
IC	*International Conciliation*
ICAO	International Civil Aviation Organisation
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICFY	International Conference for Former Yugoslavia
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IFOR	Implementation Force
IHT	*International Herald Tribune*
IHEI	*Institut des Hautes Etudes Internationales*
IIHL	International Institute of Humanitarian Law

IISL	International Institute for Space Law
IISS	International Institute for Strategic Studies
IL	International Law
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organisation
ILR	International Law Reports
ILM	*International Legal Materials*
IMF	International Monetary Fund
IMO	International Maritime Organisation
IJIL	*Indian Journal of International Law*
INMARSAT	International Maritime Satellite Organisation
Institut	Institut de droit international
IRRC	*International Review of the Red Cross*
IS	*International Studies*
ITU	International Telecommunications Union
Ital YB Intl L	*Italian Yearbook of International Law*
IW	Information warfare
IHHR	*Israeli Handbook of Human Rights*
JCE	Joint Criminal Enterprise
JCP	*Jurisclasseurs Périodiques*
JCSL	*Journal of Conflict and Security Law*
JDI	*Journal du droit international*
JICJ	*Journal of International Criminal Justice*
JIR	*Jahrbuch für internationales Recht*
JNA	*Jugoslovenska Narodna Armija* (Yugoslav People's Army)
JO	*Journal Official de l'Union Européenne*
JPR	*Journal of Peace Research*
JZ	*Juristenzeitung*
KFOR	International Force in Kosovo (NATO Command)
KK	*Kunglig kungörelse*
LGDJ	*Librairie générale du droit et de jurisprudence*
LJ	*Law Journal*
LNTS	*League of Nations Treaty Series*
LONJ	*League of Nations Journal*
Loy LA Intl & Comp L J	Loyola of Los Angeles International and Comparative Law Journal
LQ	*Law Quarterly*
LQR	*Law Quarterly Review*
MBFR	Mutual and Balanced Forced Reductions
Melb J Intl L	*Melbourne Journal of International Law*
Mich J Intl L	*Michigan Journal of International Law*
Mil L Rev	*Military Law Review*
MINUGUAUN	Verification Mission in Guatemala

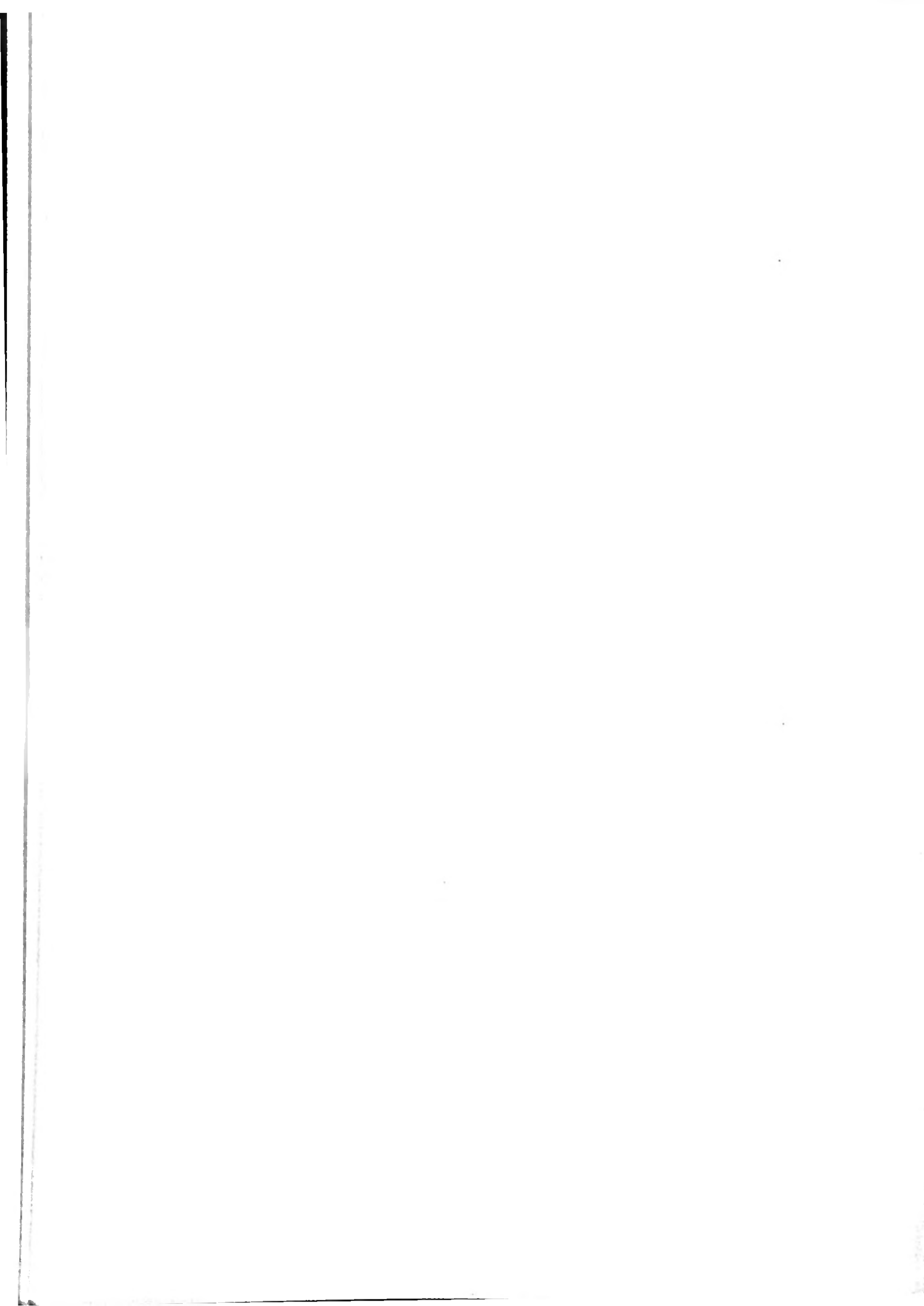
MINURSOUN	Mission for the Referendum in Western Sahara
MINUSALUN	Mission in El Salvador
MINUSTAHUN	Stabilization Mission in Haiti
MLR	*Modern Law Review*
MNF	multi-national force
MNLA	*Mouvement de libération de l'Azawad*
MONUSCOUN	Organisation Stabilisation Mission in the Democratic Republic of Congo (formerly MONUC)
Moore	Moore, J. B., *A Digest of International Law As Embodied In Diplomatic Discussions, Treaties and Other International Agreements, International Awards, The Decisions Of Municipal Courts, And The Writings of Jurists*, (Washington, D.C.: Government Printing Office, 1906) 8 volumes
MUJAO	*Movement pour l'unicité et le djihad en Afrique de l'ouest*
MUJWA	Movement of Unity and Jihad in Western Africa
NATO	North Atlantic Treaty Organisation
Naval L Rev	*Naval Law Review*
Ned TIR	*Nederlandse Tijdschrift voor Internationaal Recht*
NGO	non-governmental organisation
NILR	*Netherlands International Law Review*
NJ	*Nederlandse Jurisprudentie*
NJW	*Neue Juristische Wochenschrift*
Nord TIR	*Nordisk Tidskrift for International Ret*
NRGT	*Nouveau receuil général des traités*
NYU J Intl L & Pol	*New York University Journal of International Law and Politics*
NYU L Rev	*New York University Law Review*
NZWR	*Neue Zeitschrift für Wirtschaftsrecht*
OAS	Organisation of American States
OAU	Organisation of African States
Ocean Dev & Intl L	*Ocean Development and International Law*
OECD	Organisation for Economic Cooperation and Development
OJ	*Official Journal of the European Communities*
ÖJZ	*Österreichische Juristenzeitung*
ONUCUN	Operation in the Congo
ONUMOZUN	Operation in Mozambique
ONUSALUN	Observer Mission in El Salvador
ONUVEHUN	Observer Group for the Verification of the Elections in Haiti
ONUVENUN	Observer Group for the Verification of the Elections in Nicaragua
OPEC	Organisation of Petroleum Exporting Countries

OPEX	Provision of Operational, Executive and Administrative Personnel
ÖZöR	*Österreichische Zeitschrift für öffentliches Recht*
Pas belge	*Pasicrisie belge*
PCIJ	Permanent Court of International Justice
PfP	Partnership for Peace
PLO	Palestine Liberation Organisation
PMCs	Private military companies
PM&E	Participatory, monitoring and evaluation schemes.
PCASED	Program for Coordination and Assistance for Security and Development
PSCs	Private securities companies
RAND	The Research and Development Corporation
RBDI	*Revue belge de droit international*
RCADI	*Recueil des cours de l'Académie de droit international*
RDG	*Revue de droit général*
RDI	*Revue de droit international*
RDILC	*Revue de droit international et du droit comparé*
RDIPrivé	*Revue critique de droit international privé*
RDP	*Revue de droit public*
RDISP	*Revue de droit international et de science politique*
RDPC	*Revue de droit pénal militaire et de droit de la guerre*
REDI	*Revista espagnol de derecho internacional*
RGDIP	*Revue générale de droit international public*
RGSt	*Reichsgericht in Strafsachen*
RGZ	*Reichsgericht in Zivilsachen*
RHDI	*Revue héllenique de droit international*
RIAAUN	*Reports of International Arbitral Awards*
RICR	*Revue international de la Croix Rouge*
RIIA	Royal Institute of International Affairs
RILC	*Revue international de législation comparé*
Riv dir int	*Rivista di diritto internazionale*
RPAs	remotely piloted aircrafts
RRF	Rapid Reaction Force
SAYIL	*South Africa Year Book of International Law*
SC	Security Council
SCSL	The Special Court for Sierra Leone
SEANWFZ	South East Asia Nuclear Weapons Free Zone
SFOR	Stabilisation Force
SPSC	Special Panels for Serious Crimes
STL	The Special Tribunal for Lebanon
Stan L Rev	*Stanford Law Review*
Tex Intl L J	*Texas International Law Journal*
TIASUS	Treaties and Other International Acts
UAS	unmanned aircraft systems

UAVs	unmanned aerial vehicles
UKTS	*United Kingdom Treaty Series*
UNCEDUN	Conference on Environment and Development
UNCLOSUN	Conference on the Law of the Sea
UNCTADUN	Conference on Trade and Development
UNESCOUN	Educational Scientific and Cultural Organisation
UNIDIRUN	Institute for Disarmament Research
UNFICYPUN	Peacekeeping Force in Cyprus
UNIFILUN	Interim Force in Lebanon
UNMAS	UN Mine Action Service
UNOCHA	UN Office for the Coordination of Humanitarian Assistance to Afghanistan
UNPROFOR	UN Protection Force
UNTAET	United Nations Transitional Administration in East Timor
UNTS	*UN Treaty Series*
UNYB	*United Nations Year Book*
UPU	Universal Postal Union
USTS	*US Treaties and Other International Agreements*
Va J Intl L	*Virginia Journal of International Law*
WHO	World Health Organisation
WMO	World Meteorological Organisation
Yale J Intl L	*Yale Journal of International Law*
ZaöffR	*Zeitschrift für ausländisches* öffentliches *Recht und Völkerrecht*
ZLW	*Zeitschrift für Luft und Weltraumrecht*
ZOPFAN	Zone of Peace, Freedom and Neutrality
Ö	see above under O



PART I: GENERAL PRINCIPLES



Chapter 1
The Concept of War

A THE NATURE OF WAR

Is war a dispute between men rather than between States? The question has often been asked with regard to traditional wars between States, as wars are *fought* by individuals. There is no other area where greater duties are imposed on individuals and no other activity in which they are exposed to more personal suffering. Many traditional inter-State wars may have been fought by men filled with patriotic ardour; in others, individuals have not had such firm belief in any cause; other wars, again, have been fought by professional mercenaries whose allegiance could be bought.

One may detect a specific pattern of commitment in civil wars, internal conflicts and other disputes where one party is not a State: members of the non-State party almost by definition fight for a cause, whereas members of the other party sometimes lack this motivation. Contrary to what Ulpian claimed when he said there are no real enemies in civil wars,[1] internal wars and similar disputes have often been more fiercely fought than inter-State wars, even in the case where citizens have taken up arms against fellow citizens. In such wars individuals may thus be more directly confronted.

But things have changed: the '*War on Terror*',[2] that started after the attack on the Twin Towers on 9 September 2001 in New York, is being conducted against terrorists, highly motivated by contempt of Christianity, and of any other non-Muslim faith, of Western traditions and especially of the values of the United States. On the other hand, even many of those who fight on the side of States in this global conflict have now regained considerable motivation, all caused by the outrageous nature of the attacks by Islamist militants.

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1 Dig.L, XLIX, t.xv, I, xxi: '*In civilibus dissentionibus, quamvis saepe per eas respublica laedatur, non est tamen in exitium discedat, vice hostium non sunt eorum inter quos jura captivatum aut post liminorum fuerint.*'

2 See below, in this Chapter under B i, for a definition of this term.

In inter-State wars individuals have traditionally been held as mere 'incidental' enemies. During the time of the consolidation of national sovereignty one could expect writers to underline that war, by definition, is a relationship between States, especially in the light of Bodin's theory of internal and external sovereignty.[3] With the entrenchment of the idea of external sovereignty such attitudes were perpetuated. Rousseau considered that war is not a matter of a relation 'man to man' but only between 'State and State', as individuals are only enemies by accident, not as men, not even as citizens but as soldiers; not as members of the fatherland but as its defenders.[4]

But Vattel claimed[5] that when the Head of State, the sovereign, declares war against another sovereign, it is the whole nation which declares war on another nation, for the sovereign acts on behalf of the whole society. This view seems to indicate that it is really the individuals who are at war. This passage has often been cited in English cases[6] and courts in other countries have taken similar views.[7] In one case the Supreme Court of the United States underlines that 'war between nations is war between their citizens'.[8] But, when courts affirm the view of Vattel, it is not because they disagree with Rousseau's idealistic view of men being forced to be enemies, but because they are concerned precisely with the relationship in law between individuals, the effects of war on their contracts, property or other rights. Inter-State wars and non-State wars are, as will be demonstrated,[9] indistinguishable in this respect: both affect legal relationships of individuals elsewhere and both are, in the final analysis, fought by individuals.[10]

Why should then, as many suggest, different rules apply in the two types of conflict, in wars between States and in wars involving other non-State actors? Is it the exaggerated sovereignty view that explains that some claim that a State has the right to any 'police action' in its own territory?[11] It will be investigated later to what extent various rules of the Law of War are applicable inside the internal sphere of States. But at this stage it may be remarked that already Vattel suggested that similar rules *ought* to apply in the two types of conflict.[12] This applies, in the

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3 *Six livres de la republique*, 1577, for comments on the double and sub-aspects of sovereignty, see my *International Law and the Independent State* (London: Gower, 1973), 2nd edn, 1987, 3ff.

4 *Du contrat social*, i, c.4: '*La guerre est donc point une relation d'homme à l'homme, main une relation d'état à l'état, dans laquelle les particuliers ne sont des ennemies qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs.*'

5 Vattel, E., *Droit des gens* (Paris, 1758), iii c.5.s.70.

6 *E.g. Janson v Direfontein Consolidated Mines* (1901) AC 493.

7 For United States courts, see *e.g.*, *The Benito Estenger*, 176 US 568.

8 *Sutherland, Alien Property Custodian v Mayer* (1926), 271 US 372.

9 See below, Chapter 10 on Effects of the State of War, under section C iii.

10 Even in the case of attacks by robots or drones, individuals will programme these devices and indicate the relevant targets, see below, Chapter 7, B viii.

11 See below, Chapter 6 on Spatial Application of the Law of War, section B ii.

12 Vattel, *Droit des gens*, iii 3 c. 5, s.70: '*Mais toutes les fois qu'un parti nombreux se croit en droit de résister au souverain, et se voit en état de venir aux armes, la guerre doit se faire entre eux de la même manière qu'entre deux nations différentes*'.

first place, to all rules of warfare including humanitarian law. For the rules of the Law of War exist for the benefit of the individuals. Secondly, for the sake of equality in unequal conflicts, similar rules of warfare ought to apply.

This does not preclude that it is the State that has the normal war waging machinery.[13] Nor will the application of rules of the Law of War to individuals lessen or erode the State's sovereignty. There are numerous clauses in many relevant documents to the effect that provisions granting rights to individuals or to 'peoples' will not affect the sovereignty of States.[14] And Protocol II of 1977 to the Geneva Conventions of 1949[15] adds that its provisions do not affect the sovereignty of States, nor its 'legitimate means to maintain or reestablish law and order in the State or to defend national unity or territorial integration of the State'.[16] Furthermore, general rules on the treatment of fighting personnel pervade the relationship of both States and non-State units, to ensure certain minimum standards for individuals.[17]

War is thus essentially a relationship by armed force between individuals, subjected in varying degree[18] to the Law of War. It must now be investigated what other characteristics contemporary war present in order to arrive at a tentative definition.

B THE DEFINITION OF WAR

So what is war? In a sense, we know it is the opposite of 'peace'. And peace is *tranquillitas ordinis*,[19] tranquillity of the international legal order. We may assume, *e contrario*, that war is the turmoil, *chaos* or, as in Nordic mythology the *Ginnungagap*, the Yawning Void, of utter emptiness. What makes these references particularly relevant is that, in a world where attacks by terrorists are becoming more and more frequent, the chaotic features are becoming more apparent.

In old-fashioned wars, some two hundred years ago, regiments lined up in most wars, for the daily campaign, went to their tents to dine and sleep at night, to resume their fighting at the light of day. This is no longer so. Now, war is waged by unpredictable surreptitious attacks, often by persons who camouflage themselves as civilians to attack other unsuspecting targeted groups of persons.

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13 See below, Chapter 4, on the War Waging Machinery.

14 See documents on self-determination, Chapter 1, section C i. But for the decline of the State paradigm in international law, see my *Concept of International Law*, (Uppsala: Norstedt, 1987), 2nd edn, 1992, 18ff.

15 See further below, Chapter 6, section B ii g.

16 Article 3(1).

17 See Chapter 9 B iv c on the Treatment of Illegal Combatants.

18 See below, Chapter 4 C on the notion of 'combatant'.

19 On '*tranquillitas ordinis*' see St. Augustine, *De Civitate Dei contra Paganos*, Early 5th Century, Translation by Dyson, R.W., *The City of God against the Pagans* (New York: CUP, 1998), Book 19; St Thomas Aquinas, *Summa Theologica*, 1265–1274 (The Latin Library, s.l, s.d.); The Encyclical *Pacem in Terris*, of John XXIII (The Vatican: Vatican Press, 1963), *cf.*, Weigel, G., *Tranquillitas Ordinis: The Present Failure and Future Promise of American Catholic Thought on War and Peace* (Oxford: OUP, 1987).

To prevent war one must analyse the war phenomenon.[20] Furthermore, as war entails certain legal consequences it is important to ascertain when a state of war has become effective.

i Views on the Existence of a State of War

Clausewitz's statement that war is an act of force to compel our enemy to do our will[21] concerns the *motive* of war, answering the question *why* a war is waged, assuming that there is a 'will' with which another State does not comply voluntarily. The 'definition' does not provide criteria for when war actually exists. Equally, his statement that war is an instrument of policy in the 'continuation of political intercourse with the addition of other means'[22] concerns the *function* of war, addressing the question of *how* war is waged, assuming that a foreign policy cannot be implemented in any ordinary way but has to be supplemented by special forceful means.

Some call war 'the state of force between States with suspension of peaceful relations'.[23] Sometimes it has been held that *all* peaceful relations must have been severed for there to exist a war: it has been claimed that the distinction between war and peace is that only peaceful situations, or at least situations of nonwar, including situations of acute international tension and perhaps even armed conflict, are 'legal'. The distinction, in turn, between war and peace is that in war all peaceful relations are disrupted.[24] That is to say, States can engage in hostilities of warlike dimensions but as long as they preserve or display the intention of preserving some rudimentary peaceful relations. By this reasoning Arbitrator Lalive held that there was no war between India and Pakistan during the hostilities in 1965.[25]

Others require the suspension of the law of peace, rather than of peaceful relations, for a state of war to exist,[26] thus importing, as a condition for the existence

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20 Bouthoul, G., *La guerre; Eléments de polémologie*, 6th edn (Paris: Payot, 1978).

21 Clausewitz, C.v., *Vom Kriege*, 1834, 19th edn (Bonn: Werner Hahlweg, 1980), BkI, ch. I, 75; English edition *On War*, ed. Howard, M. and Paret, P. (Princeton: Princeton University Press, 1976). For other definitions see, for example, Rettich, H., *Zur Theorie und Geschichte des Rechts zum Kriege* (Stuttgart: W. Kohlhammer, 1888), 14.

22 Clausewitz, *op. cit.*, 605; *cf.*, 88.

23 Verdross, *Völkerrecht*, 5th edn (Vienna: Springer Verlag, 1964), 432: '*Zwischenstaatlichen Gewaltstand unter Abbruch der friedlichen Beziehungen*'. For Grotius' view, see *De jure belli ac pacis*, 1625 (ed. London 1923), I, ch. I 2; at apparent variance with earlier commentators, Grotius held that war was a condition rather than an activity. Grob, O., *The Relativity of War and Peace* (New Haven: Yale University Press, 1949), 81 considers Grotius's definition to be a 'mistake'. *Cf.*, McNair, A.D., 'The legal meaning of war and the right to reprisals', 11 *TransGrotSoc*, 1926, 29; see Eagleton, C., 'The attempt to define war', *IC*, 1933, 235.

24 *Dalmia Cement Ltd. v National Bank of Pakistan, ICC Arbitral Award* (1976) by Professor Pierre Lalive, 67 ILR 751.

25 *Ibid.*

26 Berber, F., 2 *Lehrbuch des Völkerrechts, Kriegsrecht* (Munich and Berlin: Beck'sche Verlagsbuchhandlung, 1969), 3.

of war, one of its potential legal effects. Similarly, rupture of diplomatic relations is also a consequence rather than a criterion for any state of war.[27]

Some call war 'a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases'.[28] But the last few words alone may indicate that such a definition must be obsolete: a victor is no longer entitled to impose whatever conditions he wishes. Furthermore, statesmen may have learnt that harsh conditions imposed on a State which has lost a war, may lead to another war – as did the crippling conditions imposed on Germany at Versailles in 1919 probably enhanced the possibility that there would follow a Second World War. And besides, the concept of war can obviously not depend on its own consequences. Contrary to what some have suggested, war is normally designed to correct a suffered wrong.[29]

War has also been called 'a legal condition of things in which rights are or may be prosecuted by force'.[30] But if this definition is accepted, there can be wars without hostilities, for example if the option of prosecution is not exercised – or would there exist a 'potential war'? Some wars have, in the past, been declared and not fought, for example by the Latin American States during the Second World War.[31] Some States have sought to take part in a war, by declaring war and attempting to join hostilities, but have still not qualified as belligerents because they did not fully participate or their hostilities did not imply sufficient force. And in other situations it has been held that since not all peaceful relations were suspended, there was no war.[32] Others stress the importance of the intention of the parties and other subjective elements.[33] According to many, a State had a certain liberty in deciding whether war existed: if a State was attacked by armed force it could either treat the attack as war or respond with force outside the ambit of war.[34] Some suggested a State could 'elect' to treat acts as having introduced a state of war, almost by analogy to attitude to breach in the English law of contract.[35] In other cases there have been considerable hostilities without there being a war, at least according to the parties.[36] A declaration of war may also be relevant to assess whether war exists according to subjective ideas of one of the parties.[37]

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27 *Cf.*, Rousseau, Ch., *Le droit des conflits armés* (Paris: Pédone, 1983), 35.

28 Oppenheim, 2 *International Law, War and Neutrality*, 7th edn, ed. H. Lauterpacht (London: Longmans Green, 1952), 202.

29 *Cf.*, Vattel, 3 *Droit des gens* I (Paris, 1758).

30 7 *Moore* 1907, 153.

31 See Briggs, H.W., *The Law of Nations*, 2nd edn (London: Stevens & Sons, 1953), 972 n.16.

32 See above, on the *Dalmia Cement Case*, n. 24.

33 See, on expeditionary forces sent by Brazil during the Second World War, Cancado Trindade, A.A., *Repertorio pratica brasileira do direito internacional* (Brasilia: Fundação Gusmão, 1984), 329.

34 McNair, A.D., 'The legal meaning of war and the right to reprisals', 11 *TransGrotSoc.*, 1926, 29, 38.

35 Brierly, J., 'International law and resort to armed force', 4 *Cambridge LJ*, 1932, 308, 311.

36 On the Sino-Japanese War in 1937 see 3 Hyde 1687; on the Vietnam War, see Carlisle, 'International and United States naval operations' and O'Connell, *Influence of Law on Sea-Power* (Manchester: Manchester University Press, 1975), 93ff.

37 See below in this Chapter under v.

Instruments after 1949 bearing on rights of individuals deviate more emphatically from subjective opinions of States or 'other' parties to a conflict. The Draft Code of Offences Against the Peace and Security of Mankind[38] thus refers, for its ambit of application, to situations of armed conflict even if it is not recognised by 'one or more' of the parties, a wording which has also been adopted by the 1954 Hague Convention for the Protection of Cultural Property.[39]

Virtually all the attempted definitions of 'war' set out above, refer to 'war' as being a state of affairs between two or several States. But as we may observe today, the belligerents are no longer necessarily States: at least on one side it is now more common to see terrorist groups as belligerents. Any definition of 'war' must be adapted to accommodate this development in international society.

There are, of course, cases where 'war' is used as a figure of speech. The 'wars of assassination'[40] merely denote a unilateral method to dispose of political enemies. Colonialism has been called a 'frozen war' to denote hostile policies and unilateral resentment (but few would employ such an expression in a normal conversation). Some call low intensity conflicts, funded by international crime and carried out with guerrilla tactics, 'new wars',[41] which could perhaps, because of its generality, be a little misleading. The 'Mexican drug war' is a war between criminal gangs or 'cartels'.[42] Finally, the 'Cold War' implied, of course, only a war of minds, without physical hostilities.[43]

Although some contend that, to define war, one would have to resort to organic, psychological, material and teleological material,[44] there is probably greater merit in allowing for a common sense meaning. Such a method could be used to decide the effect on contracts of private parties by examining what the parties understood by the reference to war,[45] and it could be extended to other situations when certain objective elements are present.[46] Few would, for example, deny that there is a 'war' in Afghanistan although this is clearly not a war between several States.

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38 ILC, 1 Yearbook 1951, 73, 224; 2 *ibid.*, 136.

39 249 *UNTS* 240.

40 Murphy, J.F., *The United Nations and Control of International Violence* (Manchester: Manchester University Press, 1983), 175.

41 Kaldor, M., *New and Old Wars: Organized Violence in a Global Era* (Stanford: Stanford University Press, 1999).

42 See, for example, Grillo, I., *El Narco: Inside Mexico's Criminal Insurgency* (London: Bloomsbury Press, 2011). There have been at least 40,000 victims of killings during the conflicts between the 'cartels' since 2006. Towards 2008–10 the network of the Mexican criminal gangs had spread to Guatemala and even to West Africa.

43 On 'frozen war', see Masrui, A.A., 'The contemporary case for violence and the international system', 81 *Adelphi Papers*, 1971, 18; Some claim there was in the 1980s, a 'second' Cold War, see Halliday, F., *The Making of the Second Cold War*, 2nd edn (London: Verso, 1986).

44 xxx, 'La notion juridique de la guerre, Le criterion de la guerre', 57 *RGDIP*, 1953, 177. *Cf.*, Kotsch, L., *The Concept of War in Contemporary History and International Law* (London: Macmillan, 1956).

45 *Cf.*, *Kawusaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co.* (1939), 2 KB 544.

46 *Cf.*, *Re Alfin Corporation Patent* (1970) Ch. 160 on the United Kingdom being 'at war' with North Korea, a 'non-recognised' entity.

ii Relevance of a 'State of War'

The importance of knowing whether there is a state of war is that certain rules are brought into operation when a conflict has developed into 'war'.

When there is situation of actual war, certain highly detailed rules enter into operation: for example rules concerning the behaviour of belligerents such as rules on permissible weapons, targets and means of warfare. Furthermore, if, for example, a legal state of war existed between the United States and North Vietnam, a blockade of Hai Phong would be a belligerent right; but if there was no war a blockade would be of 'doubtful legality'.[47] In this way, the state of war determines the legitimacy of counter-measures.[48]

A state of war is also relevant to the question whether treaties have been abrogated or suspended. It will also be important to establish whether contracts of individuals have been affected by frustration or impossibility and whether insurance policies or export finance policies are effective.

War also activates the application of certain important humanitarian rules. Other rules which apply in traditional state of war situations come into operation. On the other hand, certain human rights which operate in peace-time are no longer effective in war: rules concerning the right of life are suspended for the soldier once war has started.[49]

It is important for courts to know as disputes will be handled differently, for example rules on trading with the enemy comes into force. It is important for insurance companies to know as rules of payable premium and on war risk may change.

iii Elastic Application of the Notion 'State of War'

There is no reason why one should not condone a variety of definitions of war or armed conflict to enable such definitions to be used for different purposes,[50] for example to allow rules of war protecting individuals the widest possible

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47 Carlisle, G.E., 'The interrelationship of international and United States naval operations in South East Asia', 22 *JAG Journal of US Navy*, 1967, 11, stating that there was no state of war. On change of attitude in 1972 when a blockade was imposed see, O'Connell, *Influence of Law on Sea-Power, op. cit.*, 94 and below, Chapter 8 on Prohibited methods of warfare, under section B iii.

48 It may be different in the case of counter-measures of the United Nations: amidst protestations that the NATO intervention with regard to Kosovo did not constitute a 'war' but merely an intervention (see below, Chapter 2, B viii), the UN authorised a blockade against Yugoslavia in 1999, the legality of which was not questioned (see below, Chapter 12, C i b).

49 But see below Chapter 5 C iii (2) on the possible duty of a State to protect the life of a soldier in combat.

50 Thus Grob, F., *The Relativity of War and Peace: A Study in Law, History and Politics* (New Haven: Yale University Press, 1949), 177. *Cf.*, Gialdino, A.C., *Gli effetti della guerra sui trattati* (Milan: Giuffré, 1959), 251, and below, Chapter 10 section C on the effect of war on treaties and contracts.

application. The Geneva Convention III on Prisoners of War[51] specifies[52] that there is no need for there to be 'fighting' for the Convention to apply: it is sufficient for persons to be captured.[53]

Sometimes the term 'war' has been construed to have a narrow meaning, depending, still, on a formal declaration of war which, in the event, enabled an administratrix of a deceased employee of the United States Navy to recover a fine.[54] In other cases bearing on insurance[55] it was held that 'time of war' is an expression which must be held 'against' the insurance company and thus be construed to give maximum benefit to the insured. Consequently, the Court held that there was no 'war' in Vietnam and double indemnity payment was due.[56] Even with regard to the war in Iraq, the English Courts held that there was no such war as the result might have been that a claimant was then an 'enemy alien' and, as such, deprived of the legal standing to sue in England. Furthermore, the question of whether there is a war is one of international law and, in the case of doubt, the Executive has the right to pronounce on this and, in the event, the government of the United Kingdom had stated that there was no state of 'war' between the United Kingdom and the Republic of Iraq.[57] Other cases too, have construed 'war' in a wide sense for the purpose of payment of insurance monies.[58] Other examples may show that a State may 'declare' that there is a state of war which activates the operation of the Law of War: a state of war was thus declared by the government of the Federal Republic of Yugoslavia on 24 March 1999 when NATO commenced its military operations against that State: *Prosecutor v Đordevič*.[59]

But in cases turning on military discipline the attitude of Courts has been different. Here, Courts have normally construed 'war' to cover precisely what a soldier might have understood himself to be involved in for the purpose of discipline, for example with regard to desertion.[60] Courts have then underlined that 'war' for the purpose of 'military law' must include also *de facto* war where there has been no declaration of war by the competent body.[61]

It may be suggested that Courts, including military courts, to some extent have been guided by what the effect of a specific definition of 'war' would have on the rights and duties of the parties in the particular litigation. For example, if a claimant

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51 See below, Chapter 9 on Humanitarian rules under section B iii f concerning prisoners of war.

52 Article 4.

53 *Cf.*, David, E., *Mercenaires et volontaires internationaux en droit des gens* (Brussels: Eds. de l'Université de Bruxelles, 1977), 370.

54 *Robb v United States* (1972) 456 F 2nd 768.

55 *Hammond v National Life and Accident Insurance Co.* (1971) La. App. 243, SO. 2nd 902.

56 The Court might have been influenced also by the fact that there had been no accident in action: the deceased had been killed by a fire on his ship started by carelessness by his own crew.

57 *Amin v Brown* [2005] EWHC 1670 (Ch).

58 *E.g., Western Reserve Life Insurance Co. v Meadown* (1953), 20 ILR 578.

59 Case IT-05-87/1-T, 23 February 2011, ICTY, at 1580.

60 *Broussard v Patton* (1972) 566 F 2nd 816. *Cf., United States v Bancroft* (1953) 20 ILR 586.

61 See *Broussars v Patton*, above, where there had been no declaration of war by Congress in the Vietnam War.

would be precluded from taking action in a state of war as the claimant would be an 'enemy alien', the Court might rule that no 'war' existed and thus enable a litigant to continue an action in the courts.[62] In particular there appears to be another sharp distinction between the potential impact on rights of civilians and on the duties of members of the armed forces; in the latter case it is not unlikely that the question of example of military discipline and general preventive aspects influenced the Courts.

iv New Developments

a War with Non-States

International lawyers have been reluctant to accept non-State entities as subjects of international law[63] (that is to say, bearers of rights and duties under the international legal system). These attitudes have contributed to the conceptual confusion that many commentators claim that war can only exist between States but not between States and a non-State international terrorist organisation.

Yet, it is abundantly clear in practice that parties which engage in war do not have to be recognised as States by their enemy. A country, nation or group can be a belligerent in spite of nonrecognition.[64] Conversely, the application of the treaties of the Law of War, for example, the Geneva Conventions, does not imply any 'recognition'[65] of a party to a dispute as a 'State'. This is often made also clear by forceful pronouncements of States, for example by General Gowon when he agreed to apply the Geneva Conventions in the war with Biafra: such action certainly did not imply any recognition of Biafra.[66]

Few would dispute that the hostilities between the United States and its Allies against Al-Qaeda and the Taliban in Afghanistan amounts to a 'war'. But, of course, the consequences of that state of affairs could hardly be used as an argument that the Taliban or Al-Qaeda would be a 'State'.[67] Yet, the Law of War is applicable and, in the event, the Law of War imposes obligations on these belligerents.[68]

Decisions in the United Nations on, for example, Palestine, indicate that 'war-like' conflicts often involve a newly organised territorial unit which is attempting to become a 'State' and, for that reason, certain elements of the Law of War would be relevant in the opinion of the UN. Other armed conflicts have been described as being fought between two distinct territorial units and, if these could be expected to be 'relatively permanent', are 'to be treated as conflicts between established

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62 See *Amin v Brown* [2005] EWHC 1670 (Ch) and above.

63 But see Detter, I., *Concept of International Law*, 2nd edn (Stockholm: Norstedt, 1997), *passim*, and Detter, I., *The International Legal Order* (London: Gower, 1995), *passim*.

64 *The Fjeld*, Prize Court of Alexandria, 17 ILR 1950 345. *Diah v Attorney General*, Supreme Court of Israel, 19 ILR 1952 550.

65 See further below Chapter 6 section B i e, Recognition of Statehood.

66 ICRC, 1967, 37 and below, in this Chapter under section D i b, Civil Wars.

67 See below in the next section on the War on Terror.

68 See further below, Chapter 4 C.

States'.[69] Similar attitudes were apparent in the case of Vietnam.[70] Thus, for some time statesmen and academics, have sought to use analogies to explain why certain rules of the Law of War would operate in conflicts involving non-States.

To analyse present conflicts in the world of today, it is however obvious that by far the most numerous armed conflicts are no longer inter-State wars. On the contrary, most armed conflicts are waged either between non-States and States or between various factions of non-State groups, like terrorists or various militia units. The traditional inter-State war is increasingly rare in contemporary in international society.

b The 'War on Terror'

A candidate for a new type of 'war' is clearly the '*War on Terror*', following the 9/11 attack on the Twin Towers and the parallel attack on the Pentagon the same day. Initially, the term was dismissed by some international relations scholars as a 'figure of speech' but gradually, as armed forces were commanded into action, the term actually began to represent a new form of war.

What might have changed in the present situation is that this new type of war is not only fought between States but also fought between lawful 'combatants', on one side, but, on the side of the Al- Qaeda, the participants are illegal 'combatants' as they do not wear uniforms and do not distinguish themselves from the civilian population. And thus they do not fulfil the criteria of being lawful combatants.[71]

The war in Afghanistan, initially named *Operation Enduring Freedom*, started on 7 October 2001 as an immediate response to the 9/11 attack on the United States and had as its main objective to pursue and attack the sites and strongholds of Osama bin Laden and of the Al-Qaeda organisation. This operation was followed by a number of other strategies to combat what appeared to be a world-wide network of Al-Qaeda and their affiliated sympathisers in Iraq, Somalia and Yemen.[72]

It may be appropriate to refer to the '*War on Terror*' as a new form of war or a war *sui generis*. Matters may have been blurred by the insistence of the Obama administration to adopt a new term for what is essentially the *War on Terror*: it is now to be known as the *Overseas Contingency Operation*, a term which has not really caught on and which may disguise the elements which involve at least war-like elements. Yet, in his inaugural address, President Obama conceded that 'Our nation is at war, against a far-reaching network of violence and hatred'.[73]

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69 McDougal, M.S. and Feliciano, L., *Minimum World Public Order* (Princeton: Princeton University Press, 1961), 221.

70 Moore, J.N., 'The lawfulness of military association to the Republic of Vietnam', 61 *AJIL*, 1967, 1ff.

71 See Detter, I., 'The Law of War and illegal combatants', 75 *The George Washington Law Review*, 2007, 1050ff. and below Chapter 4 B and C on combatant status.

72 See *Statement by President George W. Bush*, The White House, 14 February 2003 on *National Strategy to Combat Terrorism*.

73 See *Full Transcript of President Obama's Inaugural Address*, at abcnews.go.com, 20 January 2009.

Thus, a 'war' can no longer be said to be only a conflict between States as we have seen above that also the *War on Terror* is an actual war, albeit perhaps a war *sui generis*, between a State (or States) and terrorists.[74] The parties to a 'war' are thus no longer merely States. This may sound dramatic to some traditionalist international lawyers and statesmen: but, in a sense, we may be reverting to what was the situation of armed conflict before the emergence of the sovereign States in the sixteenth century when wars sometimes, or even often, were waged between private armies.[75]

v Relevance of a Declaration of War

a Declarations of States

In spite of the diverging attitudes illustrated above, it is often assumed that there is little uncertainty as to whether or not a state of war exists. The question arises whether a declaration of war, as some claim, is relevant to the existence of a state of war. In traditional terms, such a declaration by a State would presumably indicate that in the subjective opinion of that State a war would exist, or ensue, after the statement.

Grotius claimed that such a declaration was a necessary condition that must be fulfilled before war could be held to exist. Grotius' rule was intended to preclude treacherous attacks by one State on another in cases where there had been no preceding conflict of any proportion and where the attacked State had no means of preparing itself; it was above all necessary to ensure that war was waged by the clear decision of both parties.[76]

It was well accepted in the doctrine[77] that war might well start, and often did, without any formal declaration. Sometimes a declaration of war was useful as a final threat which itself was helpful to prevent actual outbreak of hostilities.[78] But, in the opinion of international lawyers, there was no general obligation to make such a declaration.[79] And in practice there were many occasions without a declaration of war, especially if there had already been demands for amends.[80]

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74 The Red Cross has disputed that the 'War on Terror' would, in any sense, be a 'war', perhaps ignoring the military aspects which are clearly present. See Rona, G., *Official Statement on Behalf of the ICRC* (Geneva: ICRC, 16 March 2004), available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/5XCMNJ: 'There is no more logic to automatic application of the laws of armed conflict to the "war on terror" than there is to the "war on drugs", "war on poverty" or "war on cancer".'

75 See also further below Chapter 4 C ii a (5) on Military Companies.

76 *De jure belli ac pacis*, Bk. III ch. iii. V and XI. Grotius divided wars into declared wars (that were legal) and undeclared wars (that were not necessarily illegal). The law of nations would neither support nor oppose the latter category.

77 *E.g.* Bynkershoek, C., *Quaestiones juris Publici* (Leiden, 1767), i, c.2.

78 Vattel, E., *Droit des gens* (Paris, 1768), iii, 3.

79 Martens, G.F., *Précis du droit des gens moderne de l'Europe* (Göttingen, 1789), 274.

80 For example, Gustavus II Adolphus' note to Emperor Ferdinand II; Zouche, R., *Juris et juridicii foeciales sine jure inter gentes et questionum et eodem explicatio* (Oxford, 1650), 171.

However, since an attack with modern weapons could be executed with greater speed than before, there was, around the turn of the last century,[81] a body of opinion to make declarations of war obligatory, as swift attacks were almost synonymous with treacherous attacks.[82]

Therefore, a conclusive declaration of war was often held to be needed by one of the parties, and war would exist as soon as such a declaration had been issued. Hague Convention III of 1907 included an obligation to make such declarations of war. This Convention prescribed that hostilities must not commence without 'previous and explicit warning' in the form of a declaration of war or of an ultimatum.[83] The inclusion of this rule was mainly due to the widespread disapproval of the use of torpedo boats by Japan to attack Russian warships without a declaration of war in 1904, although there had been some earlier trends to require declarations of war.[84] As declarations of war became required by law there were even specific rules on their form.[85] There were also settled rules on the function and form of an ultimatum.[86]

The subjective will of parties to a conflict is often easier to assess if there is a declaration as to whether that party considers there to be a state of war. War may not exist *merely* because of the subjective will of the one of the parties to the conflict. Yet, the subjective view is still occasionally put forward. It is occasionally claimed that war subsists only if there is an armed conflict between two or more States *and* at least one of them considers itself at war.[87]

In the *Dalmia Cement Case*[88] it was held that it is necessary that at least one party has an *animus belligerandi* but the Arbitrator relaxed other criteria. Certain other statements also indicate that declarations of war have become irrelevant.[89] On the other hand, a declaration of war may clarify that war exists if there are accompanying actual hostilities to warrant this assessment. Arbitrator Lalive examined all circumstances together with a declaration of war in the form of a broadcast by Ayub Khan.[90] The Arbitrator found that the 'declaration' was not a

81 But still in *Janson v Driefontein Consolidated Mines* (1902) AC 484, 497, it was held that as long as a State 'abstains from declaring or making war, there is peace'. But the statement gave an alternative: declare or make war.

82 *Cf.*, *Institut de droit international*, 21 *Annuaire* 1906, 283.

83 Hague Convention III Relative to the Opening of Hostilities, 1907, 3 NRGT, 3 serie, 437, article I.

84 On earlier practice FeraudGiraud, L.J., 'Des hostilités sans déclaration de guerre', *RILC*, 1885, 19; de la Pradelle, A., 'Des hostilités sans déclaration de guerre', *RDP*, 1904, 846; de Sainte Croix, L., *La déclaration de guerre et ses effets immédiats* (Paris: A. Rousseau, 1892).

85 Steinlein, A., *Die Form der Kriegserklärung* (Munich, Berlin and Leipzig: J. Schweitzer, 1917); Eagleton, C., 'The form and function of the declaration of war', 32 *AJIL*, 1938, 19.

86 Johann, H., *Begriff und Bedeutung des Ultimatums im Völkerrecht* (Berlin: Duncker & Humblot, 1967).

87 Sweden, *Krigets Lagar*, SOU:1984, 48; *cf.*, Spiropoulos, J., 'Sur l'existence de l'état de guerre entre la Grèce et l'Albanie', 1 *RHDI*, 1948, 375.

88 (1967) 67 *ILR* 751 and above under section i.

89 See, for example, Resolution XI of 21st ICRC Conference, Istanbul, 1969, which referred to 'parties to a conflict' without mentioning declarations of war as relevant, nor indicating that parties have to be 'recognised' units.

90 On this see above, under section i.

communication by one State to another. Nor were there other circumstances to corroborate the existence of war.[91]

There is an apparent subjective view in the Geneva Conventions of 1949[92] where article 2 provides that the Conventions 'apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'. This wording could lead to a conclusion that the Conventions would not apply if both (or all) parties deny the existence of war. But most admit there was a drafting error,[93] and there must be an objective test.

Historically, a declaration of war, even a unilateral one, was usually sufficient evidence that a state of war existed. Such a declaration was held to be a instrument with definite legal consequences and no 'mere challenge' which could be 'accepted or refused at pleasure'.[94] But in the world of unequal States[95] such declarations were sometimes ignored by a more powerful State even if there were continuing hostilities.[96] On the other hand, formal requirements of declarations of war were soon relaxed to include also conclusive behaviour from which an *animus belligerandi, i.e.* an intention to wage war, could be inferred. A type of act which suggested such an *animus* existed was, for example, a demand on third States to observe the laws of neutrality.[97]

Declarations could even be retroactive,[98] and thus introduce the legal effects of war with retrospective effect.

At the root of the rules on declarations of war was the 'state of war' doctrine, *i.e.* the doctrine of '*de jure* war' or the doctrine of 'war in the legal sense'. This doctrine linked the state of war to the intention of the parties to the conflict concerned or at least to the intention of one of them.[99] Such a doctrine is obviously 'absurd',[100] but it was adopted by statesmen. The doctrine makes the existence of war depend on the mere subjective will of a party who may admit, or not admit, that war exists irrespective of objective circumstances. Any such doctrine is designed to

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91 See the *Dalmia Cement Case*, 751.

92 Misc. No.4, 1950, Cmd. 8033.

93 ICRC, 1 *Commentary* 32 and 3 *ibid.*, 23. The drafting history of the article shows that the original proposed words were 'by parties concerned', ICRC, Report on 1947 Conference, 272. *Cf.*, Bindschedler-Robert, D., *A Reconsideration of the Law of Armed Conflict* (Geneva: Carnegie Endowment, 1969), 49; Gutteridge, J., 'The Geneva Conventions of 1949', 26 *BYIL*, 1949, 298. Brownlie is led to the conclusion that the article clearly dispenses with subjective tests by relying on an inaccurate text where 'one of them' has been replaced by 'any of them', Brownlie, I., *International Law and the Use of Force by States* (Oxford: OUP, 1963), 194 n.2.

94 *The Eliza Ann* (1813), 1 Dodson 244.

95 *Cf.*, on 'unequal wars', under D iii, below in this Chapter.

96 For example, the United States claimed in 1914 that a state of war did not exist with Mexico although the Mexican Foreign Minister had stated that he regarded his country to be at war with the United States because of the hostilities, US For. Rel. 1914, 493.

97 Brierly, J., 'International law and the resort to armed force', 4 *Cambridge LJ*, 1932, 308, 311–312.

98 Delbez, L., 'La notion juridique de la guerre', 57 *RGDIP*, 1953, 193.

99 7 *Moore* 153.

100 Brownlie, I., *Force, op. cit.*, 26.

be misused by States which may avoid the use of the term 'war' either to avoid time consuming constitutional procedures imposed in time of 'war', or simply in order not to offend pacific feelings of some of its citizens; there was often political advantages in applying armed force against another State without upgrading this action to 'war'.[101]

Later, as war became outlawed in the international society,[102] declarations of war became politically awkward. How could a State, bound by the Covenant of the League of Nations or by the Briand Kellogg Pact of 1928,[103] make any declaration of war when it was illegal to wage war? The reluctance to use the term 'war' dates from around this time.[104] But conflicts and war still occurred and States turned again to commence war without declarations. And States now saw great merit in treacherous attacks as they would take the enemy unguarded.[105]

But even after the first steps of outlawing war many still claimed that States could decide that war existed (or did not exist) by the subjective test, perhaps coupled with a test as to whether a state of war was 'recognised' by third States.[106]

It was thus accepted for a long time that it was the intention of States rather than the nature of their acts that decided whether a state of war existed.[107] But the provisions of the Covenant forbidding its members to resort to war[108] were at least occasionally interpreted in practice to imply that war should be assessed in the objective sense, *i.e.* regardless of the views of the parties involved. This was, for example, the case when Italy invaded Abyssinia in 1936 and the parties to the conflict both denied that a state of war existed between them. But the Council of the League decided that Italy had resorted to war.[109]

On the other hand, there were numerous other situations when the Council of the League of Nations allowed the subjective notion of war to prevail. In the Sino-Japanese conflict, for example, the Council held that no state of war existed

101 *Cf.*, *ibid.*, 27.

102 On the use in this work of the term 'international society' in preference to 'international community', see my *Concept*, *op. cit.*, 24–25: the term community should in law, as it is in the terminology of international relations, be reserved for groupings of States with defined common goals, with a high degree of integration.

103 On prohibition of war, see further below, Chapter 2.

104 However, some writers emphasised that wars are still allowed in certain circumstances and one should then speak of 'war; rather than of "use of force"', Undén, O., 'Om begreppet anfallskrig' (Uppsala: *Uppsala Universitets* Årsskrift, 1930), 11.

105 The invasion of Abyssinia by Italy in 1935 took place without any declaration of war, see further below, Chapter 2. So did the German invasion of Poland in 1939 and the Japanese attack on the United States in 1941.

106 Wright, Q., 'When does war exist?', 26 *AJIL*, 1932, 362. On the subjective test see also Fischer Williams, J., 'The Covenant of the League of Nations', in *Some Aspects of the Covenant of the League of Nations* (Oxford: OUP, 1934), 298.

107 See, for example, the Secretary General of the League of Nations, Doc.14, 1927, V.4, 83.

108 Article 12. But the article did not prohibit the use of force in general, see below, Chapter 2.

109 League of Nations, 1935 Doc. No. C.411.

between the parties in 1933.[110] Numerous other conflicts have also been held not to amount to any state of war.[111]

Declarations of war, depending as they did on the subjective will of States, made clear that war 'in a formal sense' existed, *i.e.* war existed in the 'opinion' of one or more of the parties to a conflict. But the formal dichotomy of state of war in a formal sense, relying on subjective criteria, and actual war in the material sense, is now probably obsolete.[112] A declaration also reduced a main advantage of surprise and it is clear that States would often not make a formal declaration to surreptitiously attack an enemy; one obvious example is the attack by Japan on Pearl Harbor in 1941. There probably is still, in inter-State wars, a need for fair warning before attacks lest such attacks appear treacherous.

b Declarations by Non-State Entities

The definition of war became more difficult when the incidence of civil and internal wars, *i.e.* non-State wars, increased. Bearing in mind the complexities of internal war and, in particular, the hazy area when a territorial unit or population group emerges from the grasp of the sovereignty of one State to form its own independent entity, it is difficult to say at which point war exists. The whole essence of guerrilla warfare is based on terrorist tactics and surprise attacks which is the only way rebels can outweigh the structural power supremacy of the organised State.

Certain terrorists, like the Irish IRA, often considered it opportune or 'fair' to give warning of an impending bomb attack.[113] In a similar fashion, such a declaration of 'attack' allows an opponent at least to be prepared and able to evacuate the most vulnerable human targets.

Some claim that it is not possible to declare 'war' on a terrorist movement.[114] But clearly, this is to ignore political realities and the obvious new situation to which international law must adapt: the US government issued in very clear terms a 'declaration of war' shortly after 9/11, the announcement of the commencement of *the War on Terror*, and this declaration of war was addressed to the Al-Qaeda terrorists.

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110 LONJ, 1933, Spec. Suppl. 122. 22.

111 On fighting between Japan and China in 1937, see Brownlie, I., *Force*, *op. cit.*, 387–388; and between Colombian and Peruvian 'bands', see *ibid.*, and below, in this Chapter section iii a.

112 *Cf.*, Castrén, E., *The Present Law of War and Neutrality* (Helsinki: Annales Academiae Scientarum Fennicae, 1954).

113 Not so Al-Qaeda or other Islamic militants who regularly attack even innocent civilians without warning.

114 See ICRC, 'IHL and international humanitarian law and the challenges of contemporary armed conflicts', 10 (2003), at 17–19 available at http://icrc.org/web/eng/siteeng0.nsf/htmlall/5xrdcc17–19; *cf.*, 10 ICRC *Official Statement*, 'The relevance of *IHL* in the context of *terrorism*', 21 July 2005, available at www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705. The ICRC appended a disclaimer to the latter: 'The following document is for information purposes only and does not provide the comprehensive institutional position of the ICRC on the issues raised', but then refers to the above-mentioned Report, which takes the same position.

The international scenario of today supplies ample evidence that war is not only fought between States. It used to be axiomatic to claim that war can only be an armed conflict between States.[115] It must be conceded that 'war' can exist between States and non-State entities: it follows that a declaration of war can then also be issued both to and also by a non-State body.

Entities that are not States can thus also issue effective declarations of war. In the new situation of the *War on Terror*, which is, as has been demonstrated, a war *sui generis*, it was actually the terrorists who first declared war and that, even before 9/11. In 1996, Osama bin Laden 'declared war' on the United States by issuing a formal declaration[116] that was reiterated in a 1998 statement ordering all Muslims to pursue the indiscriminate killing of American civilians and military personnel.[117]

The Islamist fundamentalists thus formally declared 'war' on the United States and on its allies. But in the way this declaration was phrased, the terrorists sought to claim that this action was *in response* to the fact that the United States, and others, had declared war 'on God' and on the Muslims.

A 1998 Fatwa signed by Osama bin Laden, the head of Al-Qaeda and by Ayman al-Zawahiri, the leader of the *Egyptian Islamic Jihad*, and others, contended that the activities of the 'Crusader-Zionist alliance', and in particular the United States, constitute 'a clear declaration of war on God, His messenger, and Muslims'.

It states:

> 'The ruling to kill the Americans and their allies — civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the Holy Mosque [Mecca] from their grip.'[118]

The document goes on to provide that:

> 'We – with Allah's help – call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid.'[119]

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115 Oppenheim defines war as 'a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases'. 2 Oppenheim, *op. cit.*, 202.

116 See U.S. Dep't of State, Fact Sheet, Usama bin Ladin (1998), available at http://www.state.gov/ www/regions/africa/fs_bin_ladin.html.

117 See World Islamic Front, *Jihad* Against Jews and Crusaders (23 February 1998), available at http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_28.html. This document was published by an umbrella organisation calling itself the 'World Islamic Front Against Crusaders and Jews', which is a vehicle used by Osama bin Laden to build working relationships between Al-Qaeda and other Islamic groups. Michael Scheuer, Coalition Warfare: How al-Qaeda Uses the World Islamic Front Against Crusaders and Jews, Part I, 2 *Terrorism Focus* (March 2005), available at http://www.jamestown.org/terrorism/news/ article.php?articleid=2369530.

118 *Ibid.*

119 *Ibid.*

That Al-Qaeda intended to attack the United States well before 1996, at least as early 1993, was made clear in the case *R ex rel. Abbasi v Secretary of State for Foreign & Commonwealth Affairs*[120] before the House of Lords in the United Kingdom in 2001.[121]

The treacherous hazards to established States in such warfare are enhanced as even after the specific declaration of war by Al-Qaeda, no one knows when and where the next attack will come.

vi Objective Assessment of the Existence of 'War'

There is good reason why the existence of war should be assessed regardless of the attitudes of the parties to the dispute, for example by considering views of third States.[122] The position now appears to be that war may well exist although there has been no declaration of war. This means that there is less emphasis on what the subjective views may be of the States engaged in a conflict.

That a declaration of war is not a condition for the existence of war is now also amply demonstrated by the increase of *internationalised wars, i.e* wars which have started as internal conflicts but which, as new States emerge, become wars on the world scene in the sphere regulated by international law. It is obviously desirable to devise objective, rather than subjective, criteria as a guide to whether there is a state of war or armed conflict.

But subjective criteria will still be relevant, albeit in different stages and layers, and can, it is submitted, never be completely eliminated, at least not until some impartial, possibly a judicial body, is entrusted with the task of identifying the existence of armed conflict. Even the assessment of third States cannot be wholly independent of their subjective opinions and will inevitably depend on information available to them as well as on their political attitudes.

In the case of declarations of terrorists, subjective elements are also useful to demonstrate the reason for their hostility to an 'enemy', such as hatred of a specific political system or of religious beliefs which they do not share. In such cases, declarations might even be helpful to put a 'target' on notice that an attack might ensue.

It will also often remain a matter of subjective assertion to establish the scale at which skirmishes transgress from the field of 'intermittent disturbances' to cross the threshold into the realm of 'war' or 'armed conflict'.

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120 *R (Abbasi) v Sec'y of State for Foreign & Commonwealth Affairs* [2002] EWCA (Civ) 1598.

121 See further Detter, I., 'The Law of War and illegal combatants', 75 *The George Washington Law Review*, 2007, 1049ff.

122 Brownlie, I., *Force, op. cit.*, 401; Borchard, 'War and peace', 27 *AJIL*, 1933, 114–117.

vii Distinction between War and Other Hostilities

a War and Armed Conflict

It has been said that between war and peace there is 'nothing'.[123] This is apparently correct in legal terms[124] although there may, of course, be a crisis verging upon war.[125] There is now a trend to prefer the term 'armed conflict' to that of 'war', almost as if it were a third category.

Some States have often denied that they are at 'war',[126] and preferred to call a conflict something different. Thus the United Kingdom underlined in the Korean War that 'We are not engaged in a war but in an action of the United Nations Forces in lawfully resisting aggression under the United Nations Charter'; this was also as the UK did not recognise North Korea as a 'State', another reminder that some consider that a state of war can only exist between 'States' and even only between 'recognised States'.[127] Yet, as indicated above,[128] there may be many other reasons why it is held convenient to call a conflict 'war'.

Some writers have chosen the term 'armed conflict' as opposed to the traditional type of 'formal war'.[129] It may be convenient – and there are certainly many eminent authors[130] who prefer to take this line – to avoid using the term 'war' and include internal wars under 'armed conflict' so as to explain the extension of the Law of War to such internal conflicts. But it is equally, and possibly more, convenient to extend the notion of 'war' to include also non-State armed conflict. After all, scholars may define terms as they wish, provided they are clear and consistent; and there is little merit in a term 'armed conflict' *per se,* especially if this term in German and Scandinavian languages comes across as rather long words[131] Furthermore, already Clausewitz prescribed as a main criterion of war 'an act of force to compel our enemy to do our will',[132] and it may then seem adequate to use the term 'war' for the problems dealt with in this work.[133]

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123 Grotius, *De jure, op. cit.*

124 McNair, A.D. and Watts, D.V., *The Legal Effects of War,* 4th edn (Cambridge: CUP, 1966), 45: this is also the position in English law: *Janson v Driefontein Consolidated Mines* (1902) AC 484 at 497. The '*status mixtus*' suggested by , Schwarzenberger, G., *The Frontiers of International Law* (London: Stevens and Sons, 1962), 242, probably obscures rather than clarifies by introducing an unnecessary category: Brownlie, I., *Force, op. cit.*, 401 n.3.

125 Lebow, R.N., *Between Peace and War: The Nature of International Crisis* (Baltimore: Johns Hopkins University Press, 1981).

126 On a similar position with regard to declarations of war, see above, in this Chapter.

127 The Foreign Secretary's Statement in the House of Commons, 11 June 1952, *Hansard,* col. 202: 'We are not engaged in a war with the Republic of North Korea because we do not admit that there is such a State. What we are engaged in is an action of the United Nations Forces.'

128 See above in this Chapter under B i.

129 Bindschedler-Robert, D., *Reconsideration, op. cit.*

130 Apart from *ibid.*, see Rousseau, Ch., *Le droit des conflits armés, op. cit., loc. cit.*

131 For example, '*bewaffnete Konflikte*' in German and '*beväpnade konflikter*' in Swedish.

132 Clausewitz, *Vom Kriege, op. cit.*, Bk.1, Ch.1, 75.

133 Especially as Clausewitz qualified 'force' by requiring it to be 'physical', thus eliminating economic warfare, which is not dealt with in the present work.

But Clausewitz's requirement of force by a sovereign power has to be discarded for the purpose of modern regulation of war; as we shall see even new treaties on the Law of War recognise the status of rebels and several instruments envisage such groups as parties to treaties.[134]

A further, probably erroneous, reason for a distinction between war and armed conflict, is the spurious, or now obsolete, claim that only States can wage wars.[135] One can no longer say that only States are 'entitled' to engage in wars since they are no longer legally empowered to start wars now that war has been forbidden. But, as we know, wars are still rampant although States prefer to claim that they are (at least initially) mere 'interventions'[136] or say that hostilities are carried out in 'self-defence'.[137]

The claim that only States can wage wars is nowadays inaccurate. It may be that States are the main entities with an established war waging machinery.[138] But non-State entities also gradually organise themselves with weaponry similar to what States use and are no longer reduced to mere guerrilla tactics, even if these remain an important strategic policy of terrorists and other non-State actors.

Most recent hostilities have involved units other than States. In certain of these cases, a belligerent may have been a republic, forming part of a larger federation, breaking away from a federal structure to become an independent State. This was the case of Slovenia and Croatia, emerging as sovereign States in 1991. In these hostilities, the federal army of Slobodan Milosović, the fourth strongest army in Europe, sought to prevent the independence of these two countries – which under the federal constitution had the right to secede. In the hiatus between constituent republics of a federation and independence, it is clear that the Law of War applied: the subsequent trials before the International Tribunal in the Hague shows that there are compelling rules of warfare even before actual independence and statehood.[139]

It serves little to distinguish war from armed conflict and attempts to establish distinguishing characteristics appear futile. For example, as some have suggested, as seen above, that 'war' is 'the state of force between States with suspension of peaceful relations', such a definition could not apply to non-States: a rebel unit can, by definition, not have had peaceful relations, or any other 'official' relations, with its opponent. The non-State actor may wish to establish such peaceful relations once his goal has been won and it represents his own State, but, until such time, there will not have existed any peaceful relations which can be partially or totally broken.

Much confusion has also been created by the new use of the term armed conflict. Which is the larger concept, 'war' or 'armed conflict'? The *Institut de droit international* has considered whether armed conflict is short of war or includes

134 See below, Chapter 4 on the War Waging Machinery.
135 See, on the attitude of the United Kingdom in 1952, note 126 above.
136 See below, Chapter 2 B viii on various forms of intervention.
137 See below, Chapter 2 B iii on various justifications of self-defence.
138 See below, Chapter 4 section B on Belligerents and Combatants.
139 See further Chapter 12 on Responsibilities for Breaches.

war.[140] And is aggression short of war or does it include war?[141] Is aggression an act of war or is war a type of aggression?

Many members of the *Institut* objected to any exaggerated importance of definitions.[142] It may be questioned whether discussions on the meaning of terms like these are fruitful in the absence of obvious logic or in the absence of common agreement on the contents of a term. It may appear better to allow for some flexibility of meaning.

But many writers and commentators use the term armed conflict to denote something less than war, assuming thus that war is the larger concept implying a more intense or full scale situation than armed conflict.

For the purpose of this work, however, the general term 'war' has been chosen as occasionally synonymous with 'armed conflict' or, at least, to include armed conflicts of certain dimensions.[143] Not all armed conflicts amount to war, so armed conflict may be, or it may not be war. Since the subjective meaning of war has been abandoned,[144] there is a similar problem with regard to 'armed conflict': an armed conflict may be 'war' or it may not be 'war'. But nothing will be solved by preferring a particular term to another as both concepts require a certain threshold to apply according to contemporary practice. Yet, the distinction between 'war' and 'armed conflict' is not really fruitful as it is not one of difference in type but one of difference of scale and degree.

b War, Raids and Expeditionary Forces

There must obviously exist a *de minimis* rule to distinguish war and other forms of armed conflict from raids. Sporadic operations fall outside the concept of 'armed attack'[145] unless 'powerful bands of irregulars' are involved in a 'coordinated and general campaign'.[146]

There are considerable problems *in casu* to decide whether the required 'intensity of coercion'[147] has come about for there to be actual armed conflict. All might agree that it must be dispute of a certain 'magnitude'[148] but it remains for a decision in each individual case to draw the relevant line.

What is clear, again in principle rather than by detailed criteria, is that no international conflict will exist if raids are carried out by expeditionary forces which do not represent their government,[149] or by other units for which a State is not

140 *Cf., Annuaire,* 1981, 204.

141 See below, Chapter 2 section A ii on aggression.

142 See statements in the *Institut, Annuaire,* 1981, *op. cit.,* by Verosta, *ibid.,* 254; McDougal, *ibid.,* 251. *Contra,* Zourek, *ibid.,* 258.

143 See below, B vii b on War, Raids and Expeditionary Forces.

144 See above on this question.

145 Brownlie, I., *Force, op. cit.,* 278.

146 *Ibid.,* 279.

147 Institut de droit international, *Annuaire,* 1981, 251, comments by McDougal.

148 *Cf., ibid.,* 258, comments by Zourek.

149 *Eastern Carrying Insurance Co. v National Benefit Life and Property Insurance Co.* (1919) 35 TLR; *Pesquerias v Beer* (1947) 80 *Lloyd's Rep.* 318.

responsible,[150] or for which it declares that it is not responsible, and for which no other State assumes responsibility.[151] In cases where it is clear that one State is responsible for such raids,[152] there may still not be any international armed conflict if fighting is not extended. But a war of another type may exist in such a case between the group responsible for the incursions and the attacked State, provided, again, that hostilities do not fall within the *de minimis* rule.

But nothing prevents individual volunteers[153] from joining other forces, provided they are not (real) mercenaries.[154] Furthermore, neutral powers do not incur any responsibility if persons on their territory cross the frontier to offer their services to one of the belligerents.[155]

On the other hand, State-encouraged or State-sponsored participation may be prohibited as assisting strife in another country; the limits and implications of such assistance will be discussed later.[156]

Yet, unless incursions by groups sponsored by a State or self-sponsored groups are of prolonged and intensive nature, they will fall under *de minimis* rule and will not constitute war.

c War and Terrorism

(1) State Terrorism

Many writers suggest that traditional forms of 'terrorism' have something to do with the reign of Terror during the French Revolution.[157] But suppression by a State of its own subjects in its own territory on a scale of 'terror' is better referred to by other terms.[158] Terrorism, on the contrary, implies, to most observers, necessarily acts *against* the State (or against citizens) rather than acts by the State.

One type of terrorism is perpetrated by the State, not against its own subjects in its own territory as discussed above, but against other States and other citizens in furtherance of its own interests. Such State terrorism may be divided into two

150 *E.g.* the incursions by Jameson and his 800 men into Transvaal in 1895–6, Gelsvik, N., 'Militaert forsvar eller civil vern?', *Syn og Segn*, Oslo, 1930, 4.

151 On Pakistani raids into Kashmir in 1965, see UNYB, 1965, 159; on Indonesian raids into Malaysia, in 1964–5, see 5 IRRC, 1965, 71.

152 On *e.g.* US raid at the Bay of Pigs in Cuba see, 10 *Digest of International Law*, 236.

153 See below, Chapter 4 section C ii (2) (i) on volunteers.

154 Note that military companies may not be outlawed as 'mercenaries', see below, Chapter 4 section C ii a (iii) on military companies and C ii b (2) on mercenaries.

155 Hague Convention V 1907 on Rights and Duties of Neutral Powers and Persons in War on Land, 3 NRGT 3 série, 504, article 6; Hague Convention XIII 1907 on Rights and Duties of Neutral Powers and Persons in Maritime War, *ibid.*, 713, article 8.

156 See below Chapter 2 section A iii b on assistance to governments and groups in times of conflict.

157 Friedlander, R., 'Terrorism and international Law: what is being done', *Rutgers Camden Law Journal*, 1977, 41; Paust, J.J., 'Nonprotected persons or thing', in Evans, A.E. and Murphy, J.F. (eds), *Legal Aspects of Terrorism* (Lexington: Stanford University Press, 1978), 341 on 'system of general terrorisation' in Belgium during the Second World War.

158 Geneva Convention IV on Civilians also uses 'terrorism' to signify measures taken by a State. Thus 'Collective penalities (against the civilian population) and likewise all measures of intimidation or of terrorism are prohibited, see article 33.

groups. One of these concerns assassination missions against undesirable persons in other States, for example the elimination of certain subjects resident in other countries.[159] Another group concerns acts of a more random character against targets in some way representing or connected with a 'hostile' or disliked country. An example is the attack in 1986 on a West German disco used by American soldiers. This attack was first attributed to Libyan agents and later to Syrian involvement. Another example is the attack on an Israeli jet plane at Heathrow, also in 1986, presumably by Syrians.

The *Lockerbie disaster* on 21 December 1988 – an attack by a concealed bomb on a Pan-American aircraft from London to New York was, it was later discovered, planned and carried out by Libya. Abdelbaset Ali Mohmed Al Megrahi, a Libyan, was convicted for the bombing in 2001 and sentenced to life imprisonment in Scotland.

The UN Security Council adopted Resolution 1506 on 12 September 2003 to lift sanctions against Libya after the Libyan government offered to pay compensation to the victims of the Lockerbie disaster, and pledged to cooperate in the investigation of the bombing. Although Libya declined to express regret, the declaration on their side did imply acceptance of responsibility in law. In the meantime, Megrahi, who had only served eight and a half years of his sentence, appealed and, when his appeals were refused,[160] applied for compassionate release claiming that, according to his doctors, he had only three months to live. Accepting the prognosis, a controversial decision[161] was taken to release him on 20 August 2009. He was flown back to Libya where he was welcomed in Libya as a hero; and three years later he was still alive – but in May 2012 he died.

The terrorist attacks by Libya must be seen against the historical background of disputes between this country and the United States and, in particular, the conflicts in the Bay of Sidra where two Libyan planes had been shot down in 1981 and two Libyan ships had been sunk in 1986, allegedly by the US Navy. The above-mentioned attack in 1986 on a disco in Berlin, frequented by US military personnel, was widely held to have been organised by Libya in response to the Sidra incidents.

In the spiral of events, the Reagan administration then ordered *Operation El Dorado Canyon* under which targets in Tripoli and Benghazi were bombed. In one raid, Hanna, the adopted daughter of Colonel Gaddafi was killed: in response to that Libya arranged for the hijacking of Pan Am flight 73 in Karachi. The United States then assisted Chad with satellite intelligence in their conflict with Libya and as a result the Libyan army had to give up expanding south into Chad. The further reaction from Libya was the Lockerbie bombing as well as a further attack in September 1989 on a French civilian aeroplane, flight UTA 772, flying from Brazzaville in the Republic of Congo to Paris, killing, among others, the wife of the American Ambassador to Chad. Six Libyans, including Abdullah Senussi,

159 On wars of assassination see above in this Chapter.

160 *Abdelbaset Ali Mohmed Al Megrahi v Her Majesty's Advocate* [2008] HCJAC 58. Appeal No: XC524/07.

161 It is possible that his release was linked to negotiations about oil deliveries from Libya.

the brother-in-law of Colonel Gaddafi, deputy head of Libyan intelligence, were convicted *in absentia* for this attack by a Paris court.[162]

On the other hand, in 2001, an attempt to take action against Colonel Gaddafi failed as the French Court of Appeal held that international law does not allow an action against a Head of State.[163]

But other courts and tribunals claimed that international law on this had changed, and numerous Heads of State have been indicted by courts and tribunals.[164] This change is of major significance in later trials against Heads of State,[165] as traditionally international law did grant immunity to Heads of State.[166]

The Libya–US–France confrontations may illustrate the spiralling pattern of this type of terrorism: an attack by United States, or their or France's military support of Chad, is followed by a response, by terrorist tactics, by Libya. Yet, although the *Islam Jihad* initially claimed responsibility for the UTA 772 attack, it became clear that the attack was one in the series of acts State terrorism perpetrated by Libya.

(2) Intra-State Terrorism or Terrorism against a Specific State

The more common kind of 'traditional' terrorism is not perpetrated by States but precisely directed against them. It may be carried out either by groups of the State's own subjects, like the Baader-Meinhof Gang, and later the Red Brigade, in Germany, or by groups whose political headquarters are based in another country, like the IRA in Ireland, or, on a different scale, the Tamils taking action in Sri Lanka and India. The 'cause' for which such groups may take action is usually political, but covers a wide spectrum, ranging from the declared objective of 'anarchy' of the Baader-Meinhof Gang to the quest of self-determination of a province, as in the case of the IRA, or for greater autonomy without necessarily claiming independence, like the Tamils in Sri Lanka, or for independence of a nation, as in the case of ETA and the Basque region on the border of Spain and France.

Sometimes the 'cause' concerns general dissatisfaction with the political and economic structure of a country and action is taken from within against specific targets who are thought to be representative of this structure. As one example of this pattern one may mention the activities of *Action Directe* in France.

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162 *Cour d'Assises*, Paris, 1999, conviction by *contumace*, a devise used to avoid the operation of any statute of limitation (*de contumace capiendo* = 'for contempt of court, seize him'). This procedure was abolished in France by the so-called *Loi Preben II* in 2004 after criticism by the ECHR in the *Kromach Case* in 2001, and replaced by a 'défaut criminel' procedure where the absent accused is represented by a lawyer. International arrest warrants were issued in 1999 for the six Libyans who had carried out the attack and these warrants are valid until 2019.

163 Cour de Cassation, N° Z 00-87.215 FS-P, F N° 1414 13 mars 2001 DF, M. COTTE président.

164 See below, Chapter 12 C, on individual responsibility for war crimes.

165 See below under Chapter 12 C ii.

166 But there had been an attempt to indict the Kaiser of Germany after the First World War, see below, Chapter 12 C ii.

(3) Genocidal Strategies: Global *Jihad* Terrorism

On 9 September 2001 international law underwent a dramatic change with regard to attitudes to terrorism. The attack of terrorists on the Twin Towers in New York, killing over 4,000 persons, and the attack, on the same day, against the Pentagon in Washington, convinced the United States that forceful measures would have to be taken to defend innocent people from the fanatic attack of the Al-Qaeda terrorist organisation.

The scenario at present with regard to terrorists[167] is strikingly different from how terrorists were viewed before the 9/11 attack.[168] Earlier, it might have convenient to attempt a delimitation between terrorism and war; but now terrorists have become main actors in war situations. The essence of this form of terrorism is a pronounced hatred of certain values, especially of Christianity and 'Western' attitudes, coupled with self-sacrificing perpetrators who practice suicide attacks.

After 9/11 it became clear that further attacks were planned and designed by a virtually global network, the so-called Al-Qaeda Muslim fundamentalists, and were to be carried out against targets in a number of countries. The main leader was Osama bin Laden, finally attacked and killed in a US raid in Afghanistan in 2011. But the network is still highly active and is responsible for numerous terrorist attacks.

This new type of terrorism can be distinguished from the intra-State form or from the type of terrorism which is directed against a specific State. Although Al-Qaeda has specified the United States to be its main enemy, the *jihad* network attacks are also directed against a number of other States, against any people who are not Muslim – and even against some Muslims if they are not sufficiently 'fundamentalist' – like, for example, persons in Saudi Arabia which is held to be too 'pro-American'. Attacks have been carried out in the United Kingdom, in Spain, and in numerous other countries.[169]

A further characteristic of this new form of terrorism is the suicide aspect: here, the terrorists deliberately sacrifice themselves and believe this to be an offering for their religious beliefs and assume that they will be rewarded in Paradise. The suicide aspect obviously makes security of protected persons hazardous if not impossible. Earlier in history, in the case of regicide or other attacks, the perpetrator would normally seek to save himself, but the genocidal/suicidal terrorists do not even have respect for their own lives. Apart from the Japanese Kamikaze pilots in the Second World War, it is difficult to find similar attitudes.

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167 According to the 2012 edition of *The BBC Guide to Objective Journalism*, one should avoid using the term 'terrorist' and instead speak of 'radicals'. Even Abu Qatada, Osama bin Laden's right-hand man in Europe, who incited the mass murder of British civilians in the name of *jihad*, should not be referred to as a 'terrorist' or even an 'extremist' but, with a milder term, a 'radical', see the *Sunday Telegraph*, 12 February 2012. Such a change of terminology is likely to confuse rather than qualify.

168 Guillaume, G., 'Terrorism and international law', 53 *ICLQ*, 2004, 537; Arnold, R., 'The prosecution of terrorism as a crime against humanity', 64 *ZaöffR*, 2004, 979; as for new methods to prosecute, see Arnold, R., *The ICC as a New Instrument Repressing Terrorism* (New York: Transnational Publishers, 2004).

169 For example, see below in this section on terrorist Islamic militant groups affiliated to Al-Qaeda and on numerous attacks.

The target of the Al-Qaeda attacks are furthermore often innocent civilians, virtually by definition without power to grant any of the terrorists' demands. Such demands are often also not specified although there are instances when they have demanded the release of some of their associates. It appears that the attacks are more motivated by hatred of Western values and especially of the United States, than by any ambition to achieve anything specific in the short term.

Al-Qaeda, and its numerous sub-groups, has committed horrendous acts of war, some before and some after its first 'declaration' of war in 1996.[170] Al-Qaeda bombed the World Trade Center in New York City in 1993, the Khobar Towers in Saudi Arabia in 1996, the United States embassies in Kenya and Tanzania in 1998, and attacked the *USS Cole* in Yemen in 2000.

After 9/11 in 2001, there were further numerous attacks by Al- Qaeda or by their numerous Islamic militant sympathisers: in 2002 and 2011 there were attacks in Bali and Cirebon in Indonesia; in 2002, 2003, 2006, 2008 and 2011 terrorist attacks in Mumbai, India; in 2003 and 2011 several attacks were carried out in Israel; in 2003 and 2007, there were attacks in Casablanca, Morocco; further attacks took place in 2003 in Istanbul, Turkey; in 2004 there was a serious attack in Madrid, Spain; in 2004 and 2010 targets in Moscow, Russia, were attacked; in London there was the 7/7 attack in London and a further attack in Glasgow, UK; in 2007 there was an attack in Algiers, Algeria; in 2007, 2009, 2011 and 2012 there were numerous attacks in Pakistan; in 2011 attacks in Alexandria and in Cairo, Egypt, in 2011; in 2011 and 2012 there were numerous attacks in Afghanistan and in Iraq.[171]

Osama bin Laden was killed on 2 May 2011 in Afghanistan by US forces in an attack code-named *Operation Neptune Spear*. After his death, many of the Al-Qaeda activities were moved from Afghanistan to Yemen. Anwar Al-Awlaki then became the Al-Qaeda leader on the Arabian Peninsula but was killed in a US airstrike by drones on 30 September 2011. Fahd Mohammed Ahmed Al-Quso, possibly Al-Qaeda's expert bomb maker, succeeded him but, in turn, he too was killed by a US drone on 5 May 2012.[172]

The Al-Qaeda global network spreading to various countries is supplemented by internal factions following similar ideology and attitudes: in Nigeria violence blamed on the radical Islamist group *Boko Haram* is said to be even worse than the country's 1960s civil war which killed over a million people; in Algeria there is the *Salafist Group for Preaching and Combat* (*GSPC*), later called the *Al Qaeda Organisation of Islamic Maghreb*, expanding south and in April 2012 occupying

170 See above under B iii b.

171 Some attacks were unsuccessful: for example, the bomb carried on to an aeroplane in December 2001, three months after 9/11, by the 'shoe-bomber' Richard Reid failed to explode; so did the so-called 'Christmas bomb' carried by Umar Farouk Abdulmutallab in 2009. Mohammed Rauf failed in his attack on Brooklyn Bridge in 2003; and so die Joe Padilla with his radioactive bomb in 2002; see for the last attack, *Rumsfeld v Padilla* (2004) 542 US 426 and further criminal trial in Miami and then, in 2007, in the Court of Appeal for the 11th Circuit, finally sentenced in 2008 to 17 years and four months in federal prison. *Cf.*, Chapter 4 C b on illegal combatants, Chapter 9 B 4 on alleged torture and Chapter 12 C g on claims for immunity of State officials.

172 See below, Chapter 7 B vi, on drones.

almost half of Mali, having advanced with brutality (and said to have acquired massive arms supplies from the 'over-armed' rebels in Libya to whom Western States had 'helped' with arms).[173]

In Bangladesh, the group *Jamaat-ul-Mujahideen Bangladesh* exploded 300 bombs in 2005, simultaneously, targeting government buildings and airports; in the Philippines; the *Abu Sayyaf* or the *al-Harakat al-Islamiyya* group has carried out numerous terrorists attacks; in Afghanistan, there is the *Taliban* and the *Hezb-e-Islami Gulbuddin*, following the Al-Qaeda principles; in Indonesia, the *Jemaah Islamiyah* terrorist group, openly affiliated to Al-Qaeda, has violently attacked numerous 'Western' targets, such as the Stock Exchange and the Bali resort; in Turkey there is the Islamic terrorist *Hezbollah*, unrelated to the *Hezbollah* in the Lebanon; in Russia, the pro-Chechen multinational group, the *Riyad-us Saliheen Brigade of Martyrs*, took over 1,000 hostages in 2004 in the Russian Republic in North Ossetia.

Al-Qaeda has become a proper, and frequent, belligerent force, operating through a network of sub-groups; its members do not always have much respect for the Law of War. The followers of Al-Qaeda violate the most basic tenet of the Law of War in that they disguise themselves as civilians and do not wear military insignia to distinguish themselves from ordinary civilians.

On the other hand, with regard to its influence in modern warfare, Al-Qaeda can be placed on an equal footing with States in the operations. An illustrating example may be the recapture of an region occupied by Al-Qaeda and the following fighting between Al-Qaeda and government forces in Yemen in 2012. The background to this military operation was the uprising in Yemen in 2012 following the Arab Spring in North Africa in 2011. President Ali Abdullah Saleh was forced to step down for the vice president, Abdu Rabbu Mansour Hadi, widely thought to be more democratic, to take his place. Hadi promised to fight Al-Qaeda which had taken a strategic gateway in the south of Yemen. Hadi ordered an attack against Al-Qaeda's branch in Yemen, 'Al-Qaeda in the Arabian Peninsula', thought by many to be one of the movement's most dangerous offshoots. Government forces attacked the Al-Qaeda members in the mountainous region of the Lahj Province and retook this area from Al-Qaeda with two consecutive surprise attacks.[174] This military campaign was fought on the lines of a traditional armed conflict between States, apart from the fact that the Al-Qaeda militia still refuse to wear any signs indicating that they are soldiers. They are thus clearly illegal combatants[175] but the manner in which they operate, in this instance, has all the hallmarks of traditional warfare.

Some of the terrorist groups have as their objective to establish an 'Islamic' State or a group of Islamic States, like the *Caucausus Califate* or *Saharan Califate*.[176] If it were not for their extreme and fundamentalist views, their action would not be dissimilar to earlier liberation movements.[177] But these groups and movements

173 *Le Figaro*, 5 April 2012.

174 *International Herald Tribune*, 4 April 2012.

175 See below, Chapter 4, C I and ii.

176 See, below further, in this Chapter, under B vii e.

177 See below in this Chapter under D ii a.

announce, even *a priori*, that their ambition is exclusive of any other religion or of any other views and directed specifically against, *inter alia*, Christians, now often referred to as Crusaders, intended as a pejorative term.

(4) Prevention of Terrorism

There is now a series of international conventions to suppress international terrorism, for example in the form of hijacking,[178] or kidnapping of diplomats,[179] bombing by terrorists[180] or financing of their activities.[181] The 9/11 attacks were followed by a surge of further efforts to combat the new form of terrorism. By Resolution 1373 (2001) the Security Council established a Counter-Terrorism Committee (CTC) immediately after 9/11 with a mandate to further criminalise terrorism and, above all, to prevent the financing of terrorism, and to devise mechanisms for the immediate freezing of their funds.[182] Other measures were also introduced to ensure activities of terrorists were stifled.[183]

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178 The Tokyo Convention of Offenses and Certain Other Acts Committed on Board Aircraft, 1963, 704 *UNTS* 219; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, TIAS 7192; the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, 10 *ILM* 1151; certain agreements concerning the safety of ships, Protocol of 2005 to the Rome Convention of 1988 for the Suppression of Unlawful Acts Against Safety of Marine Navigation, available at https://www.unodc.org/tldb/en/2005_Protocol2Convention_Maritime%20Navigation.html; agreement on safety of nuclear material, Amendments to the Convention on Physical Protection of Nuclear Material, 2005, available at http://ola.iaea.org/OLA/what_we_do/AMCPPNM.asp; Protocol of 2005 to the 1988 Rome Protocol on Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, available at https://www.unodc.org/tldb/pdf/Protocol%20Fixed%20Platforms%20EN.pdf; and the following instruments, updating the Hague and the Montreal Conventions in the light of 9/11, the 2010 Convention on Suppression of Unlawful Acts Relating to International Civil Aviation, the so-called Beijing Convention, *available at* http://www.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf; and the 2010 Protocol to the Convention on the Unlawful Seizure of Aircraft, the Beijing Protocol, *available at* http://www.icao.int/DCAS2010/restr/docs/beijing_protocol_multi.pdf.

179 The OAS Convention; to Prevent and Punish Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance 1971, TIAS 8413; 65 *AJIL*, 1971, 898; the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents 1973, TIAS 8532; 13 ILM, 1979, 41; The UN Convention Against the Taking of Hostages 1979, 18 *ILM* 1456.

180 International Convention for the Suppression of Terrorist Bombings, 1997.

181 International Convention for the Suppression of the Financing of Terrorism, 1999.

182 For example, the UNSC *Resolution 1373*, adopted under Chapter VII, and thus binding, establishing UNSC Counter-terrorism Committee (CTC) to monitor compliance, see also further UNSC *Resolutions 1390* (2002), 1456 (2003), 1535 (2004), 1566 (2004) and 1624 (2005).

183 The mandate of CTC was enlarged by SC Resolution 1624 (2005). The General Assembly also adopted a series of documents on a Global Counter-Terrorism Strategy, see *Report by the Secretary General on Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, doc A/60/825, and GA A/Res/64/297, 2010.

d Definition of Terrorism

(1) 'Traditional' Terrorism

Under the earlier general Conventions to prevent terrorism,[184] there were no attempts to define terrorism. Nor did the earlier literature on terrorism[185] provide much clarification. However, we may identify certain essential characteristics of 'traditional' terrorism, that is to say the form of terrorism that was rampant in international society *before* 9/11.

It appears that terrorism invariably implied (or implies – since this form of terrorism still occurs) a demand that certain acts are taken by someone else. The demand may be clearly expressed or merely assumed to be understood by whoever is empowered to take the acts requested. Traditional terrorism is thus basically 'extortionate' as its perpetrators seek to obtain certain ends by force. Normally there will be political demands; but there is very little difference in technique between this type of political extortionate terrorism and the type for private ends.[186]

But the second hallmark, which is never sufficiently underlined by commentators, is that the force or the threat of force applied by terrorists is not normally against the persons who can grant the wishes of the terrorists but against some other person(s) or authority. For example, if terrorists hijack an aeroplane or kidnap an ambassador, they do so to apply force against a State to release certain persons from custody; or if terrorists plant bombs which kill or maim innocent citizens in a large city, they are thereby applying force against their government to grant certain claims to independence.

If the demands are made by persons in one State against others in that same State for acts to be performed in the same territory, this still does not mean that this type of terrorism is intra-State and non-international. It must be investigated if the demands made concern the granting of independence for, if they do, we may still speak of international terrorism. The terrorists wish to set up their own State and the situation is thus potentially international. Secondly, in this case there is often outside support, in one form or another, which is another aspect that may

184 The Strasburg Convention (Council of Europe) 1977 on Suppression of Terrorism, 15 *ILM*, 1979 1972; The Dublin (EEC) Convention on Suppression of Terrorism, 19 *ILM*, 1980 325; *cf.*, the Bonn Declaration on international Terrorism 1978, 17 *ILM* 1285.

185 For works on terrorism, see Alexander, Y. and Gleason, J.M., *Behavioural and Quantitative Perspectives on Terrorism* (Oxford: OUP, 1981); Livington, M.H. (ed.), *International Terrorism in the Contemporary World* (Westport: Greenwood Press, 1978); Alexander, Y. Carlton, D., and Wilkinson, P., (eds), *Terrorism: Theory and Practice* (Boulder: Westview, 1979); Lodge, J. (ed.), *Terrorism: A Challenge to the State* (Oxford: Martin Robertson, 1981); Rozakis, C., 'Terrorism and the internationally protected persons in the light of the ILC's draft articles', 23 *ICLQ*, 1974, 44; Sobel, L.A., *Political Terrorism*, vol. 1 (New York: Facts on File, 1975; vol. 2, New York, 1979); Evans, A. and Murphy, J.F., *Legal Aspects of International Terrorism* (Lexington: Lexington Books, 1978); Alexander, Y. and O'Day, A., *Terrorism in Ireland* (London: Croom Helm, 1984).

186 For example, the type whereby an individual is kidnapped and a demand for money is made to a bank which employs him, or from his own family. In one instance, in 1974, a German bank employee, Herr Rolf Schild, was kidnapped in Italy with a substantial demand for ransom in the erroneous assumption that he belonged to the Rothschild family.

internationalise an otherwise national situation.[187] Thirdly, even in situations which do take place within the national layer, acts of terrorists, as well as treatment of terrorists by the authorities, may no longer be a matter for domestic jurisdiction alone, either if there is Convention restricting the power of the territorial State,[188] and perhaps also in other cases.[189]

The way traditional terrorist acts are carried out often imply attacks directed against either important and valuable assets such as aircraft or, as in the recent *Achille Lauro* incident in 1985, a ship;[190] or against persons who, as representatives of their government, are particularly 'valuable', such as diplomats, as the attack against the West German Ambassador Spreti in Guatemala in 1973; or against other instrumentalities of the attacked State, the armed forces, as the attacks on the Guards in Hyde Park and Regent's Park in London in 1983; or finally – and this is the type which most leads to public indignation and which furthermore may be the least 'effective' type – against completely unconnected and innocent members of the civilian population, as the bomb attacks at Harrods in London on 17 December 1984.

A definition may be ventured in spite of the obvious problems to cover a somewhat hazy area:

> 'Traditional' terrorism implies the intermittent use or threat of force against person(s) to obtain certain political or economic objectives of from a third party.'

(2) Genocidal or *Jihad* Terrorism

For this type of terrorism the above-mentioned definition is not appropriate. Suicidal terrorists do not seek to obtain anything from any third party by inflicting harm on others. They are motivated, as mentioned above, largely by hatred and rarely specify what they seek to achieve, apart from being destructive.

After 9/11 there have been strenuous efforts to define what the present hallmarks of terrorism are as a definition is becoming essential to devise strategies to combat terrorism. With a slightly circular argument the European Union has thus suggested, in a document issued in 2001 on the EU 'Common Position', that terrorists are those who commit terrorist acts. The document states that:

> 'persons, groups and entities involved in terrorist acts' (and) shall mean: persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts, groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or

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187 See on such assistance, below, Chapter 2 section A iii.

188 As, for example, under the European Convention of Human Rights, *e.g.* the *Ireland v United Kingdom Case* (1978), 23 European Court of Human Rights, *Pleadings*, 1 and 2.

189 On the power of a State as limited in its own territory, see my *International Law and the Independent State*, 2nd edn (London: Gower, 1987), *passim*.

190 See the link here between terrorism and piracy, below, Chapter 4 C ii b 5.

> controlled directly or indirectly by such persons and associated persons, groups and entities.'[191]

But, more helpfully, terrorist acts are then defined as one of certain enumerated 'intentional' acts which:

> 'given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:
> 1. provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.
> (i) seriously intimidating a population, or
> (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
> (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
> (a) attacks upon a person's life which may cause death;
> (b) attacks upon the physical integrity of a person;
> (c) kidnapping or hostage taking;
> (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
> (e) seizure of aircraft, ships or other means of public or goods transport;
> (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
> (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
> (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
> (i) threatening to commit any of the acts listed under (a) to (h);
> (j) directing a terrorist group;
> (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.'[192]

A terrorist 'group' is defined as few as two persons who share the above-mentioned objectives. Such a 'group' must be a 'structured' group which nebulously is said to mean one which is not 'randomly formed for the immediate commission of a terrorist act'.[193]

An Annex sets out further persons and groups that are held to be terrorist organisations. In this respect the EU possibly confuses what could have been a

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191 Council Common position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), revised in 2011.

192 *Ibid.*

193 *Ibid.*

useful attempt to define genocidal terrorism. What is needed at the present time may appear to be a definition which limits and defines the new form of global *jihad* terrorism. But the EU has seen fit to include in its Annex also groups like the IRA and ETA which clearly have very different characteristics.

Yet, it may be useful to note that some of the activities now listed in the above-mentioned EU document on a 'Common position' have been regulated by conventions many years ago, such as for example, of hijacking or attacks on diplomats. Other terrorist acts are covered by the various weapons Conventions.

But the Al-Qaeda terrorists are different. The Al-Qaeda movement has openly announced that it aims to do anything to harm the United States and American interests anywhere in the world.[194] Its 1998 exhortation that it is a personal duty of every Muslim to kill Americans and their allies, civilians or military, is a clear incitement to genocide, which is a crime not only under American law but under international law. The Genocide Convention of 1948 applies both in peace and in war and leads to both State and individual responsibility.[195] As evidenced by the Nuremberg and Tokyo Trials, no individual can escape responsibility for genocidal acts, so it is clear that not only States are bound by the Genocide Convention. The 1945 War Crimes Tribunals also demonstrate that relevant rules operate even outside the Convention, as they adjudged their cases before the 1949 Convention.

We may still attempt a definition of what we call genocidal terrorism and which is essentially different from traditional terrorism insofar as there are no demands or clear short-term objectives that the terrorists seek to achieve. In a sense the genocidal terrorists have something in common with the nineteenth-century anarchists who were motivated by general resentment of a political order; but even they did not commit their acts with suicidal motivation, nor did they normally aim their attacks to focus on more than one or two persons.

The specific risks with genocidal terrorist war is that, contrary to conventional war, it is impossible to know where the 'enemy' is located and where attacks could conceivably be planned. To this must be added the suicidal element in the case of genocidal terrorist war which also makes it virtually impossible to protect any target selected by the terrorists for attack.

One may tentatively attempt a definition of genocidal terrorism to suggest that:

> 'Genocidal' terrorism implies the intermittent use or threat of force against large number of randomly selected 'Western' persons and targets to demonstrate, by suicidal acts, the intention of replacing the Western system of values with a fundamentalist Muslim religious order.'

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194 See *World Islamic Front, Jihad Against Jews and Crusaders*, 23 February 1998, cited above in this Chapter in note 116. *Cf. Michael* Scheuer, 'Coalition Warfare: How al-Qaeda Uses the World Islamic Front Against Crusaders and Jews', Part I, 2 , *Terrorism Focus*, March 2005, available at http://www.jamestown.org/terrorism/news/ article.php?articleid=2369530.

195 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 *UNTS* 277 art. III(c).

(3) Common Characteristics of all Forms of Terrorism

All forms of terrorism have a primary objective to harm, kill or injure innocent persons, often selected at random or chosen as targets which to the terrorists represent certain values with which they disagree.

One hallmark is often the deliberate choice of targets to inflict maximum injury, for example, by bombs equipped with nails or other devices which cause secondary effects. The cruelty is a striking feature in how terrorists operate without mercy to spare even children.

The intermittent time factor is another typical feature of the tactics of terrorists. There is often a lull in the activities of terrorists so that the next attack is gauged to when no one expects it: this forms the backbone of treacherous attacks by surprise.

The aim of terrorists may be to create chaos so that new repressive measures introduced by the government will make the population inclined to revolutionary change when the terrorist movement could become a guerrilla movement.[196] But these last remarks may also indicate that initial terrorist attacks are conceptually to be conceived as a preliminary step of unconventional warfare.[197]

But the intermittent factor, which is a hallmark of terrorist attacks, excludes those, at the same time, from constituting *per se* a war. Yet, if such attacks form a continuous pattern, as the attacks by Al-Qaeda and their sympathisers now do, we are justified to perceive these hostile acts as constituting a 'war' properly so called. As will also be shown, terrorist tactics are also often adopted in war,[198] for the purposes of guerrilla warfare.

e A Specific Definition of War

It may be realistic to admit the following: (1) war still occurs; (2) the belligerents in recent wars are often non-States and very often terrorists, acting alone or in groups; (3) the distinction between war and armed conflict can only be used loosely to indicate the scale of hostilities.

All types of war are fought by individuals, with different allegiance to different entities and these entities are not always States. War remains essentially a sustained struggle between individuals by armed force. In a war individuals will be organised to pursue their hostile or defensive acts for a group, either the traditional nation State, or for another unit such as a 'people' of ethnic, religious, cultural or political unity and/or for an organisation with specified goals, at times to reach its own statehood, at other times for a motivation of religious zeal to fight and destroy what they perceive as 'evil'. The latter case is the pattern followed by Al-Qaeda and its subsidiary groups, although they, too, seek to establish new nations, like, for example, the '*Califate of Caucausus*'.[199]

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196 See further, Clutterbuck, R., *Guerrillas and Terrorists* (London: Faber & Faber, 1977).

197 See below in this Chapter under D iv on guerrilla warfare.

198 Below, *loc. cit.*

199 This would be a militaristic Sharia-based dictatorship between the Caspian and the Black Sea, *Washington Post*, 9 April 2005. *Cf.*, above in this Chapter, B vii c (3).

But not every group can be a belligerent; and not every type of fighting constitutes war. With regard to the organisation of a group there must be certain requirements regarding its structure to warrant the status of belligerent. Similar rules are those which apply under recent conventions,[200] for the status of combatant to be adopted. It should thus be required that members of the relevant group wear uniform and that they are subjected to military discipline.

If such criteria are adopted we evade the illogical situation of which many now approve, at least by acquiescence, namely that there are combatants recognised as such by international conventions,[201] but who do not fight on behalf of a belligerent as only States, according to these authors, can wage wars. It may be impossible to answer with absolute certainty which acts bring about a state of war.[202] But at some given point, which may not be possible to define *a priori*, the scale of hostilities may reach the point when it may be reasonable to speak of war.

With regard to the intensity of hostilities, fighting must surpass a certain threshold in order to constitute war, according to the *de minimis* rule. There will almost be some latitude for uncertainty in this respect and certain reliance of subjective criteria is inevitable.

With regards to the distinction between 'war' and 'terrorism' it may no longer be warranted to exclude terrorism from the concept of 'war' and most warlike situations nowadays do involve terrorists. This does not mean that all terrorist activities form part of 'war' but rather that a series of strategies of terrorism for specific ends may, if incidents are regular, repeated and sustained for a certain time, well qualify to be called 'war'. At present, we have thus, on the one hand, a 'war by terrorists', especially by Al-Qaeda and their Islamic militant followers, and a 'war against terrorists', the *War on Terror*.

It may be useful to retain a pragmatic definition or war – even if that term may be defined differently in different situations by national courts, adopting a wide or a narrow definition, so that justice is ensured in an individual case.[203] There is no question that most people would think of the conflict in Afghanistan as a 'war' although it is, of course, not against Afghanistan but against terrorists. And after Saddam Hussein had been deposed, there was still a 'war' going on in Iraq, in the opinion of most people, although, again, it was a war against terrorists.

What is different between traditional forms of inter-State war and the present warring conflicts between States and terrorists or between various factions of terrorists, is the degree to which the Law of War will apply in armed conflicts or wars with non-State actors. As will be demonstrated further in this work, the Law of War does apply to wars fought with terrorists and terrorists assume obligations under this legal system; but the terrorist combatants will, by definition, be 'illegal combatants',[204] and, as such, they will not benefit from rules concerning

200 See below, Chapter 4 section B on belligerents.

201 See below, *loc. cit.*

202 Guggenheim, P., *Traité du droit international public* (Geneva: Goerg, 1952), 350.

203 See above in this Chapter under B i.

204 See Detter, I., 'The law of war and illegal combatants', *Law Journal of George Washington University*, 2007, 1050 *et seq.*

treatment, for example, as prisoners of war,[205] although they will enjoy certain limited human rights.[206]

> 'War is thus a sustained struggle by armed force of a certain intensity between States, or groups of a certain size, consisting of individuals who are armed. If these individuals wear distinctive insignia and if they are subjected to military discipline under responsible command, they will be legal or privileged combatants under the Law of War; if not, they will be considered to be illegal combatants, deprived of enhanced protection under the Law of War, but subjected to other specific treatment with certain rights on a scale of a global minimal standard.'

Such a definition is the natural consequence of the concept of a 'legal combatant' who enjoys the protection of the Law of War.[207] For if a combatant is defined as someone who distinguishes himself from the civilian population, carries arms openly[208] and is subjected to an internal disciplinary system, he is also a belligerent. That belligerent, a State or another party, are thus parties to war.

Hence, war is a conflict between groups of combatants, as those have been defined in contemporary Law of War.[209] The 'State' also covers its various authorities if citizens are attacked: the above-mentioned definition will thus also cover the atrocities in Libya or Cambodia.[210]

However, only those who fulfil the criteria set out above (of wearing insignia or uniforms, of being subjected to military discipline and obeying the Law of War) will be considered 'legal combatants' whereas others, who disguise themselves to blend in with the civilian population, may well take part in war, but they will be 'illegal combatants'. As such, they are subjected to the Law of War but largely deprived of the protection of this system as they have not abided by the most important requirement for a combatant: to show, by a uniform and/or distinguishing insignia, that they are members of armed forces.[211]

In other words, a terrorist (or for that matter, a State official, or a civilian) who takes part in an armed conflict of a certain magnitude may be a 'belligerent' and 'combatant', but unless he distinguishes himself from the civilian population by proper insignia, he will be an 'illegal combatant' and, as such, subjected to a less favourable regime under the Law of War than a regular soldier.[212] And State officials

205 See below Chapter 9 B iii f.

206 *Ibid.*

207 See below, Chapter 4 C on combatant status.

208 See below, *loc. cit.* It should be added that the requirement that a legal combatant does display his arms openly possibly excludes the cyberspace operative but who is shielded by the nature of his 'arms'. See below, Chapter 7 G on cyberspace warfare.

209 See below, *loc. cit.*, for details on requirements of combatancy.

210 For the war crimes tribunals for such crimes see below, Chapter 12 C ii.

211 See, for their 'minimum rights', below, Chapter 9 B iv d and see Detter, I., 'Illegal combatants', *op. cit.*, 1086ff.

212 See further below, *loc. cit.* and Chapter 9 B iv c on minimum standards for treatment of illegal combatants.

who take part in atrocities, or Heads of State who order such measures, do not enjoy any immunity for their actions.[213]

The adjective 'sustained' should be qualified in views of the active new belligerents, the *jihad* terrorists: the 'war' is sustained in the sense that the continuous form may be 'dormant' but, at irregular[214] intervals, attacks flare up, usually to target unsuspecting civilians.

'War' is thus a wide subject covering armed conflicts between States, between States and terrorists, between various factions of terrorists, and also what amounts to armed suppression of insurgents, a state of affairs which is on the brink of developing into civil war and, as such, also subjected to the Law of War.

One may expect some reluctance, more on behalf of academics than of courts, to disagree with the above-mentioned tentative definition of 'war'. Yet, if we do not accept this far-reaching metamorphosis of the Law of War, and a wide definition of 'war', it will become difficult to convict so-called 'war criminals' who nowadays may be terrorists, State officials, Heads of State or members of the armed forces who overstepped what the Law of War allows.

C CHANGES IN THE INTERNATIONAL SOCIETY

i Democratisation of the International Society

The right of unrecognised groups to wage war is the result of a sudden and intense development in the international society, a development which probably started around the end of the First World War.

The change has first of all to do with the territorial context. The State is the prime geographical and political unit. But in recent practice increased attention has been focused on other ethnographic concepts than States. For example, the Peace Treaties after the First World War offered *options* for the choice of nationality by individuals based on ethnic rather than on geographical criteria[215] coupled with protection for minorities – in all a development showing the loosening of the State from its territorial base[216] or at least a loosening of the ethnic groups from the framework of the territorial State.

On the other hand there was a marked trend, *inter alia* in the practice of the United States to require popular support for a government before it was recognised: conditions of plebicites were often made before recognition would be forthcoming.[217] This is another way of placing individuals in the foreground and it marks an important, and not often analysed, change in international relations. The

213 See below, Chapter 12 C ii g on war crimes and immunity.

214 See also the definition of genocidal terrorism, above in this Chapter under vii d: irregularity is a hallmark of terrorism making attacks unforeseeable.

215 *E.g.* Versailles Treaty on 'Czechs' and 'Poles' of 'German nationality', see articles 85 and 91 respectively, *AJIL*, 1919, Suppl., 193 and 200.

216 *Cf.*, Schätzel, 3 *Internationales Recht* (Bonn: Röhrscheid, 1962), 180–186.

217 1 *Hackworth* 30.

concern for minorities, on the one hand, and the requirement for popular consent, on the other, mark the advent of democratisation of the international society.

The majority of international lawyers still insist that only States, and perhaps international inter-governmental organisations, are 'subjects' of international law, *i.e.* capable of assuming international rights and duties. The system they present is increasingly incoherent and illogical as they refuse to accept that, at least in modern times, non-State actors, and certain groups of individuals, and individuals themselves, also can be bearers of such rights and duties.[218] The main point, often missed, is, however, that if we ignore certain actors to be bearers of rights, they can hardly be held to have any duties. The better view is surely that, in order to control the numerous non-State actors now engaged in war on a proper scale, we must insist that they also have compelling duties under the Law of War.

New ideas in other fields, such as in politics and in international relations studies, have gradually had their impact on the system of how the international legal order is viewed, although few theorists of law have seen any reason to adapt their static view that the system, as they see it, essentially applies between States and inter-governmental organisations, based on a treaty. The best example that this cannot be right, in a proper theory of international law, is that INMARSAT, an international organisation assisting the navigation of ships by satellite relays, was a recognised inter-governmental organisation which was later privatised.[219] Does this mean that this organisation was one day a 'subject' of international law and the following day not so?

Another striking example within the Law of War is that the Red Cross, a main actor in numerous conflicts, is a non-governmental organisation and, thus, according to the 'traditionalists', not a 'subject'. Again, a view compatible with present political attitudes is to admit a series of subjects of international law as this appears to be how States and other actors behave in contemporary international society.[220]

The attitude to refuse individuals their status in international society as capable of *directly* assuming rights and obligations is aggravated by the insistence, in countries like France, Spain and Italy, that there is a sharp distinction between *public* and *private* law. After all, a legal system exists only for the convenience of its subjects and, if it is no longer realistic to insist that international law only binds States – and inter-governmental organisations – we might as well dispense with the tag 'public' international law. Since this system also binds individuals by imposing clear obligations, amply shown by the Nuremberg, Tokyo and Hague Trials, and also conversely, confers rights on individuals, as shown by the rules regulating human rights, refugees and nationality, it is clearly a truly *international* system, which covers both private and public aspects. It is unfortunate that some law faculties still insist that public and private international law are taught separately. Private

218 For a new theory on the role of subjects/creators/actors in international law and on the formation of rules, see my work on *The Concept of International Law*, 2nd edn, *op. cit., passim.*

219 Detter, I., *International Legal Order* (London and New York: Gower, 1992), Chapter IV.

220 Detter, I., *International Legal Order*, *op. cit.*, Chapter I and Detter, I., *Concept*, *op. cit.*, Chapter One.

international law rests also, to a very large extent, on commonly adopted universal rules and is only in a formal sense part of national law.

It is far more fruitful to discuss and analyse *all* rules affecting international contacts without preconceived ideas that they are different in origin, character and legal force.[221] As it is now, in many countries, some subjects are never studied at all as they fall between the so-called public and private disciplines. Multinationals, refugees and questions of duties of soldiers on the battlefield are thus often left out as they do not readily fall under the 'public' or the 'private' field of law. Even the law of prize[222] is not studied in most law faculties as professors find it difficult to include a subject which is too 'international' to be accommodated in the usual syllabus, not falling within the accepted frame of traditional international law, nor within the Law of the Sea and nor within the limits of traditional national subjects.

One idea, taken up by writers on international relations, as well as by the United Nations and by certain statesmen, especially those representing the Third World, is that of 'democracy', as a new imperative rule in the international society rather than merely representing an alternative form of government. It appears that it is no longer possible for States to argue that the way they organise their internal affairs is merely a concern for themselves. One result that flows from this new idea of 'compulsory' democracy is that of self-determination.

Self-determination means that individuals have the right to determine the social rules that are to bind them.[223] Self-government to some would mean 'moral consensus' and would rely on many ideas of, for example, Rousseau.[224] But problems arise when assessing which individuals shall have such right of self-determination. Some take the extreme view that it is literally a question of a right of single individuals.[225] The Marxists say the right belongs to a 'class' of people. Others claim that it is a right enjoyed by a 'people'. A president of the United States even used those two terms as interchangeable when he stated, at the time of the Russian Revolution, that 'No people must be forced under sovereignty under which its does not wish to live'.[226]

In recent days the problem of self-determination has attracted considerable attention from scholars and statesmen. From a modest concern for the protection of minorities,[227] it is now claimed that certain liberation movements, whether or not representing such minorities, should have the right of self-determination.

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221 See Detter, I., *International Legal Order, op. cit., passim.*

222 See below, Chapter 10 C iv (2).

223 Lively, J., *Democracy* (Oxford: Blackwell, 1980), 136.

224 For criticism, see Cobban, A., *Rousseau and the Modern State*, 2nd edn (London: Allen & Unwin, 1964), 47. *Cf.*, Rousseau, J.J., *Contrat social et discourses* (Paris, 1762) (ed. Oxford: OUP, 1947), 12.

225 Rowen, D., *The Quest for Self-Determination* (New Haven: Yale University Press, 1979), 54–55.

226 Message from President Woodrow Wilson on 16th May 1917 to Russia, see Baker, S.B. and Dodd, W.E., *War and Peace, Presidential Messages, Addresses and Public Papers 1917–1924 of Woodrow Wilson* (New York: Harper and Brothers, 1927), i, 50.

227 See Capotorti, in UN E/CN.4/Sub.2,384 and Adds.17.

There were early Resolutions on self-determination in the United Nations[228] culminating in 1960, at the beginning of the massive decolonisation phase, in the Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples. The Resolution was later supplemented with a supervisory mechanism to ensure[229] implementation.[230] Numerous specific resolutions emphasised the importance of the right of self-determination in specific territories.[231]

The General Assembly Resolution on Friendly Relations and Cooperation of States in 1970[232] specified the modes of implementing the right of Self-Determination, *inter alia*, to establish a sovereign and independent State, associate or integrate with another, or to merge into 'any other political status freely determined by a people' with a corresponding duty of States to 'refrain from any forcible action' which would deprive peoples of such a right. But the Resolution contains a *caveat* that it must not be construed to authorise or encourage any action which would dismember or impair the territorial integrity, or political unity, of a sovereign State *if that State has complied with the principle of equal rights and self-determination and if that State has a government representing the whole people*. The Resolution thus states that the right of self-determination does not include any right of secession from a parent State which has safeguarded the rights of all and which has a democratically elected government. On the one hand, that part of the Resolution has been largely discarded by many liberation movements which claim that the paramount objective of their work is precisely to establish their own State, in order to safeguard rights which they claim were never respected by the former parent State.

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228 GA Res. 421 D (V), 1950; 545 (VI) 1952; 637 A (VII) 1952.

229 This implies, from the point of theory of international institutions an interesting control of the execution of a technically unbinding Resolution; but *cf.* the 'sanctioned recommendations' in EFTA, see my 'Aspects institutionnels de l'Association Européenne de Libre Echange', 6 *Annuaire français de droit international*, 1960, 460.

230 See Resolutions 1654 (XVI) 1961 on the creation of a Special Committe charged with special duties with regard to implementation; 1810 (XVII) 1962, on its membership; 1815, 1817 (XVII) 1962 and 1970 (XVIII) 1963 on its functions; 35/118 1980 on a Plan of Action for Full Implementation; 36/52 1981 and 37/82 1982 on further implementation.

231 See, for Rhodesia/Zimbabwe see GA Res. 1747 (XVI) 1962; 2024 (XX) 1965; 2151 (XXI) 1966; 2262 (XXII) 1967; 2383 (XXIII) 1968; 2505 (XXIV) 1969; 2652 (XXV) 1970; 2769 (XXVI) 1971; 2945 and 2946 (XXVII) 1972; 3115 and 3116 (XXVIII) 1973; 3297 and 3298 (XXIX) 1974; 3396 and 3397 (XXX) 1975; 31/154 A and B 1976; 32/116 1977; 33/38 A and B 1978; 34/192; *cf.*, SC 216 and 217 1965; 221 and 232 1966; 253 1968; 277 and 288 1970; 314,318 and 320 1973; 388 1976, 403, 406, 409, 415 1977; 423, 437 1978; 445, 448, and 460 1979; and 463 1980; for Namibia, GA Res. 65 (I) 1946; 2145 (XXI) 1966; 2248 SV 1967; 31/147 1976; 34/92 A 1979; 35/227 1981; 30/121 C 1981; 37/233 C 1982 (continuing); *cf.*, SC 245 and 246 1968; 264 and 269 1969; 276,283 and 284 1970; 301 1971; 309, 310, 319 and 232 1972; 342 1973; 366 1974; 385 1976; 431, 432, 435 and 439 1978; 447 1979; 475 1980 (continuing; on Palestine GA Res. 2535 B (XXIV) 1969, 2628 and 2672 (XXV) 1970 (on equal rights and self-determination), 2787 and 2792 (XXVI) 1971; 2963 (XXVII) 1972; 3236 and 3237 (XXIX) 1974; 3376 (XXX) 1975 on the establishment of a Committee on Self-Determination, to 37/86 A 1982 (continuing); *cf.*, SC 446 1979; on East Timor GA Res. 37/30 1982; on Western Sahara, GA Res. 34/37 1979 and 37/28 1982.

232 Resolution 2625 (XXV) 1970. See further, my *International Law and the Independent State*, 2nd edn (London: Gower, 1987), 8ff.

On the other hand, the Resolution in all its parts has been flagrantly violated in numerous recent conflicts, *i.a.* by the federal government in Belgrade, when it refused permission of Slovenia and Croatia to secede in 1990; it was obvious that the federal government, as well as the army and the diplomatic corps, were heavily controlled by Serbs, that the government did not represent 'the whole people', that equal rights had not been secured, and that there was little freedom of speech, of assembly and, especially, no freedom of religion.[233]

It is clearly important to distinguish between movements which are hoping to establish their own State, or to join with another State than the one where they are present, and the movements which seek to enhance the protection of minorities which they represent. The liberation movements aiming for own new States must also be distinguished from movements like, for example, certain action groups in Brazil, which merely seek to improve their social conditions but which do not which to secede from any State. It may be that a State which respects the social and equality needs of all its nationals may avoid that a movement, initially social in character, develops into a political force, eventually causing the fragmentation of a State. Recent talk of 'ethnic tensions' may be somewhat exaggerated. In Rwanda certain political observers noted that the internal conflict was partly not so much due to 'ethnic' rivalry as to political ambitions of would-be leaders.[234]

The Resolution on Friendly Relations clarifies that an entity may not necessarily exercise its self-determination on its own by forming its own independent State but may wish to merge with another State. This implies also that an entity may prefer to stay with a parent country. For example, the United Kingdom argued in the Falklands War that the right of the Falklanders to stay under British rules was an expression of the principle of self-determination.[235] In 2012 the discussion flared up again as to whether geographic proximity would prevail over the rule of democratic self-determination. But the 'will' of a community must be decisive whether the right of self-determination is to be exercised: the demands of the republic of Kosovo in 2008 demonstrated that even a small nation may have the right of self-determination and even independence. But then Kosovo has a population of almost two million and an even much smaller State, Dominica, an island in the Caribbean, gained its independence 10 years earlier, in 1978, by popular will, with a population of about 73,000.

In other situations it has been found that the 'ties' between one State and a certain people were not sufficiently strong to bring the rule of self-determination into application for the purpose of affiliating that people to that State.[236] The rule of self-determination has now been said to be a 'strong' rule, ousting competing claims based on other legal ties with a people.[237] But in other examples, especially

233 Catholic teaching was forbidden in schools and universities; even Croatian and Slovenian folksongs were prohibited.

234 See, Feil, S.R., *Preventing Genocide; How Early Use of Force Might Have Succeeded in Rwanda* (New York: Carnegie Commission on Preventing Deadly Conflict, 1998), 3.

235 *Cf.*, Murphy, J.F., *The United Nations, op. cit.*, 71.

236 *Western Sahara Case*, ICJ, Advisory Opinion, Reports, 1975, 68.

237 *Ibid., loc. cit.*

in earlier practice, the right of self-determination was denied, and, in spite of entrenched and undisputed ties with a State, a people could be denied the right to merge with that country. That this could happen and be endorsed by other States as well as by the League of Nations, often called the 'World Organisation' the predecessor of the United Nations, was amply illustrated in the Åland Island referendum.[238] However, there is now a marked change of attitude. The rule of self-determination has been treated with such priority that it is often held to be more important than individual rights. It has been inserted as article 1 of the United Nations Covenants on Human Rights of 1966.[239] Some claim that the whole doctrine is the result of an ideological intrusion of a notion invented by or for the Third World and supported by the then Soviet Union.[240] But as has been shown above it is ample evidence in practice that there has been a long development, not least supported and encouraged by the United States, to bring into focus the notion of 'popular support' for a government and it is this, more than anything else, which is at the root of the rule of self-determination.

Another implication of the rule of self-determination is, of course, to allow indigenous populations, separated from a colonial country by great distance, to obtain self-rule and independence. Most of the decolonisation process, massively carried out through the 1960s, is now complete. But there are some territories left of which European powers have not wished to rid themselves. French attitudes have recently said to be incompatible with the rule of self-determination.[241] But, on the other hand, it has been claimed that it is precisely the exaggerated views expressed in the United Nations with regard to self-determination which have contributed to the growth of undesirable liberation wars.[242]

Individuals may have numerous rights and duties under international law. However, to join the international society and be able to act as a unit vis-à-vis other States, conclude treaties with them and fully act as spokesman for its members, a liberation movement must establish itself as a State. The State-centric paradigm may have been abandoned in certain international relations theory but, in practice, the State still remains a most important focus of imputation and a most important power structure.

Even those who see States as mere 'clusters of systems and parts of systems' within geographical areas controlled and integrated in some degree by politically created administrative systems[243] accept that new members admitted to international community are units called States. But within those States self-determination must be granted to certain groups and units so that they, in turn, can become 'States'. Some

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238 See Detter, I., *Independent State*, *op. cit.*, 183 *et seq.*

239 6 *ILM* 360; 6 *ILM* 368.

240 Kohl, A., *Der Menschenrechtskatalog der Völkerrechtgemeinschaft* (Vienna: Braumüller, 1968), 46.

241 Oraison, A., 'Quelques reflexions critiques sur la concession française du droit des peuples à disposer d'eux mêmes à la lumière du differend franco-comorien sur l'île de Mayotte', 47 *Revue belge de droit international*, 1983, 655ff.

242 *Cf.*, Green, L.C., 'The legitimation of terrorism', in Alexander, Y. (ed.), *Terrorism*, *op. cit.*, 175ff.

243 Burton, J.W., *Systems, States, Diplomacy and Rules* (Cambridge: CUP, 1968), 27.

have claimed that small entities may not be 'viable' and thus not able to become States: others may refused statehood because of their internal politics or because of the politics of other States.[244] Decisive is finally whether a nation will be 'recognised' as it will otherwise find itself unable to operate in the international society.

Difficult problems of definition arise. What is a 'people' or a 'nation'? Surely any fragmentation into minute units cannot be condoned?[245] However, it is possible to distinguish certain liberation movements which appear to represent a considerable part of the population in a State and which, according to now accepted ideas, then ought to have a right of secession from the central government.[246]

Even if there is agreement as to the required constituent hallmarks of a State it is also admitted that there are units in the contemporary system which lack some of these features and which are yet allowed very much the same prerogatives of a State: there are liberation movements which have become so consolidated that they are accepted, by States and by international organisations, as full-scale actors in the community. They send 'representatives', if not ambassadors;[247] they conclude agreements which are certainly akin to treaties; they 'adhere' to State treaties;[248] and they even wage war, the traditional monopoly of States. They are allowed as 'observers' or 'unofficial members' of inter-governmental organisations.

Naturally, there are sometimes protests and disagreements but this is normally only the case when there are delicate political issues: there were serious protests from Israel when UNESCO, one of the UN specialised agencies, allowed Palestine as a full member of the organisation in 2011. The United States threatened to cut its contributions to UNESCO, amounting to almost a fifth of its budget, and Canada joined in this protest. Then there were protests in Sweden which had voted against Palestine joining as a member and fierce discussion continued on all sides. And this is although UNESCO is a cultural, educational and scientific organisation without any political power and even deprived of any power to take binding decisions.[249]

There is a considerable problem of reconciling the modern attitude vis-à-vis liberation movements and the rules of the *reserved domain*. Under traditional international law, especially as entrenched in article 2(4) of the United Nations Charter, no other State, and no international organisation, may scrutinise what is happening inside a State except with full consent of the territorial State. These

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244 See, *inter alia*, Security Council Resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council Resolution 541 (1983), concerning Northern Cyprus; and Security Council Resolution 787 (1992), concerning *Republika Srpska*.

245 See Detter, I., *The Independent State*, *op. cit.*, 17; *cf.*, 13ff.

246 See General Assembly Resolutions 637(VII) of 1952 on self-determination, 1514(XV) of 1960 on Independence of Colonial Countries and Peoples and 2625 (XXV) of 1970 on Friendly Relations and Cooperation Among States which states that a territory of a colony or other 'non-self governing territory' has, under the Charter, a 'status separate and distinct from the territory administrating it'; *cf.*, article 21 of the Universal Declaratioon on Human Rights; article 1 of the International Covenant on Economic, Social and Cultural Rights and on Civil and Political Rights. *Cf.*, further, Detter, I., *The Independent State*, *op. cit.*, 13ff.

247 Below, in this Chapter section D ii (3).

248 Below, Chapter 6 section B i d.

249 See Detter, I., *Law Making by International Organisations* (Stockholm: Norstedt, 1965), Ch. 4.

attitudes are nowadays most vehemently put forward in the context of verification techniques where, naturally, States are most jealous of their territorial integrity. However, in other fields, there has certainly been some relaxation of the previous rule which used to be firmly held: there is virtually universal agreement that any maltreatment of citizens is a matter for which other States and organisations may take legitimate interest and even stipulate a changed course of action, possibly sanctioned by severe economic measures. For example, only a changed view of the *reserved domain*[250] can explain how it was possible, and legitimate, to put pressure on Rhodesia (now Zimbabwe), a State by any of the traditional tests, to change its minority rule policy or on South Africa to change its apartheid policy; or on certain Latin American States to restore 'democracy'.

Similar views have now permeated international society to such an extent that entirely novel and different rules apply to the practice of intervention in another State. It was largely the treatment of nationals, in particular the bombing of its own civilians, that led to the intervention in Libya in 2011.[251] Similar attitudes to the maltreatment of citizens of Egypt, Syria and Bahrain led to worldwide criticism.

Self-determination is thus the main field of focus when it comes to assessing the 'democratic' rights of peoples in other States, but, as has been shown, there are also other incidental rights, such as the right not to be subjected to apartheid, which are now lifted up to the level of international rights, that is to a level of international and not merely of national concern.

There is another aspect to the democratisation of the international society. Not only is there a firm trend to allow groups in other States to be granted their independence, and to seek international protection of certain vulnerable groups even if these do not wish their independence. There is also a trend to allow more multiplication of States from under-represented areas of the world into the international society. It is thus normally admitted that the 'democratisation of foreign policy' implies the admission into the international society of more Third World States.[252]

Democratisation of international society thus means several different things. For example, it describes how international law, especially rules on democracy, human rights and humanitarian law, operate inside States. Furthermore, the notion implies that the way a State organises its society is no longer a purely internal matter: rights of individuals must, at all times, be respected. It also indicates that a government may no longer be legitimate if it does not have popular support. The concept furthermore indicates that, within States, new units may have the right to split from the parent State if there is considerable popular support for a liberation movement. Finally, democratisation of the international society also implies that States of the Third World should have more influence on international affairs than the traditional pattern admitted and be the equals of the older or more developed States. These aspects have never been systematically studied or analysed by

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250 See further below on the *reserved domain*, Chapter 2 A iii, under intervention.

251 See below Chapter 2 B viii.

252 Burton, J.W., *International Relations: A General Theory* (Cambridge: CUP, 1965), 109 *et seq.*

international lawyers who traditionally consider international law as a system only concerned with the relationship between States and, possibly, international organisations.[253]

In the context of this work on the Law of War the most relevant aspect of democratisation of international society is the increased application of rules pertaining to this system inside States and to other units than States, and to 'States' in the making.

ii The Cross-Effects of Practices in Different Wars

Because States have recently had to adapt to warfare by insurgents, freedom fighters, guerrillas and terrorists, they have adopted new methods themselves, and developed new weapons, which in all probability will be carried over into the realm of inter-State wars. There have already been many examples of this development. One may note that it is not only the State involved in guerrilla warfare that modifies its contingent arsenal for potential inter-State wars. Also other States have studied, observed and learnt from the strategy and adaptation of methods of one more 'experienced' State and may have adopted similar modifications, often entailing the deterioration of ethics of war.[254]

The United States changed to completely new methods to combat the Vietnam guerrilla who were much helped by the type of natural environment, the jungle. From the point of view of method, the United States resorted to more flexible and more mobile warfare. It was decided to employ airborne troops, not parachutists, as had been the practice during the Second World War, but helicopter airborne troops who could be landed and picked up with the speed required by the quick, mobile guerrilla warfare.[255]

With regard to weapons the United States resorted to new types, many of questionable legality, such as napalm,[256] gas[257] and Agent Orange, a defoliage weapon.[258]

In the Iran–Iraq War (1980–8), an inter-State war, there were persistent reports of the use of gas.[259] Such weapons had not even been used in the Second World War – at least there was no evidence of such practices. It may perhaps be assumed that recent warfare, in certain internal wars, has lowered the standard of ethics with regard to biological and chemical weapons.[260]

Conversely, the adoption of new or outlawed weapons by States in their inter-State disputes carries with it a danger that the use of such weapons may be carried over – and back – into the realm of internal conflicts, especially if it can be argued

253 *Cf.*, above; for criticism, see my *Concept, op. cit.*, 18ff.

254 On the concept, see below, Chapter 5 C v.

255 On guerrilla tactics, see below, this Chapter section D iv.

256 See below, Chapter 7 section A ii f on the legality of incendiary weapons.

257 See below, Chapter 7 section D on the legality of biological weapons.

258 See below, Chapter 7, section E on the legality of environmental weapons.

259 See *Report by the Secretary General of a Mission*, S/1985, 19 February 1985.

260 See below, Chapter 7 section D on these weapons and recent prohibitions by treaty.

that non-States are not bound by prohibitions in treaties concluded by States.[261] Guerrillas are also often obliged to resort to primitive weapons and methods, many of which are cruel,[262] because of their lack of access to 'sophisticated' weapons. As a result counter-guerrilla tactics have been developed, sometimes using similar means.

Apart from such cross-effects in the use of weapons and methods, there is also a fundamental connection between inter-State and internal war. It may be argued that the whole situation of inter-State war will encourage a spiral of internal wars by their very existence and their impact and production of tensions inside States.[263] On the other hand, internal war situations may, in turn, increase the likelihood of international war.[264]

D TYPES OF WAR

i Geographical Wars

Wars can be classified according to their geographical ambit and they thus fall into two broad groups of inter-State wars and civil wars, and other wars which are 'internal' to a State.

a Inter-State War

The traditional inter-State war is the war *par excellence*, with the wealth of refined detailed rules that only history can provide in an area where violence has so often rewarded State interests.

It is uncertain how wars start. War often result from a host of different factors,[265] which, by coincidental juxtaposition and timing favour the outbreak of a war. Some insist that inter-State war results from 'rational'[266] or even 'cold'[267] decisions. Ambition to increase the territory or income of a State is sometimes apparent. There might even be internal interests in a State which favour a war for economic

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261 See below, Chapter 6 section B i on that argument.

262 Below, in this Chapter, section D iv.

263 For example, the external wars of Russia contributed to the October Revolution in 1917; *cf.*, Rosenau, J.N., *International Aspects of Civil Strife* (Princeton: Princeton University Press, 1964), 49–50. *Cf.*, Miller, L.B., *World Order and Local Disorder, The United Nations and Internal Conflict* (Princeton: Princeton University Press, 1967), 35 on internal disputes caused by Cold War tension.

264 *Cf.*, Rosencrance, R., *International Relations: Peace or War* (New York: McGraw-Hill, 1973), 33.

265 *Cf.*, Howard, M., 'Reflections on the First World War', in Howard, M. (ed.), *Studies in War and Peace* (London: Maurice Temple Smith, 1970), 109.

266 Bernard, J., 'The sociological study of conflict', in Bernard, J., Pear, I.H. and Aron, R. (eds), *The Nature of Conflict: Studies of the Sociological Aspects of International Tensions* (Paris: UNESCO, 1957), 40.

267 Osgood, R.E. and Tucker, R.W., *Force, Order and Justice* (Baltimore: Johns Hopkins University Press, 1967), 9.

reasons. Above all, the greatest difference to inter-State wars in historical terms is clearly that, for a long time, war was not prohibited.[268]

There is a vast literature on traditional inter-State war and on classical warfare.[269] But in the contemporary world such wars are but one type, and perhaps no longer the most common type, of war. Yet, as the State remains the main war waging machine[270] the characteristics of inter-State wars are important. It may be sufficient here, in an area of the most prolific writings in international law and in politics, to mention but a few areas where inter-State war has changed.

The main changes in inter-State war concern new tactics and strategies adopted initially to combat guerrillas:[271] these practices are likely to be adopted in inter-State wars. Other recent changes in inter-State warfare concern the potential use of indiscriminate weapons,[272] involving, almost by definition, attacks on illegitimate targets[273] and other swift or comprehensive types of attacks, elimination of the earlier distinction between the theatre or region of war and areas outside the battle zone.[274] There is also a trend, on the part of States, to save lives of their soldiers by resorting to remote control weapons, like robots and drones.[275]

The pattern of wars by terrorists and insurgents have sometimes copied the strategies and idiosyncrasies of inter-State war. In turn, States have also renewed their methods in response to tactics deployed by guerrillas.[276]

b Civil War

The traditional notion of a war as an inter-State conflict is no longer prevalent. Nowadays, wars frequently occur 'within the national layer of society, with or without external participation'.[277] This is said as if civil war was something new. It may be that there has been a period of relatively few such wars but the development must been seen in the accurate historical light. It was because there were so many civil wars, or perhaps one *bellum omnium contra omnes*, in the Middle Ages, that the rise of the nation State in the sixteenth and seventeenth centuries came about, precisely to put an end to such strife.[278] Thus, the very reason for the State, which is

268 On the present position see below, Chapter 2 on the prohibition of war.

269 For some of these works, see above, in this Chapter, under section B on the definition of war.

270 Above, in this Chapter, section B iii a and below, Chapter 4 section C ii (2) (iv).

271 Above, on cross effects of practices in different wars and below, in this Chapter, section D iv, on guerrilla warfare.

272 Below, Chapter 5 C v.

273 Below, Chapter 8 A ii.

274 Below, Chapter 6 A viii.

275 Below, Chapter 7 B viii.

276 Below, in this Chapter, D iv.

277 Modelsky, G., *Principles of World Politics* (New York: The Free Press, 1972), 304.

278 Weill, G., *Théories sur le pouvoir royal en France pendant les guerres de religion* (Paris: Weizsäcker, 1892); Meinecke, F., *Die Idée der Staatsraison in der Geschichte*, 4th edn (Berlin: R. Oldenburg Verlag, 1957); Friedrich, C.J., *Constitutional Reason of State* (Providence: Brown University Press, 1957); Botero, G., *Della Ragione di Stato* (Turin: Giuffré, 1948); Cornelissen, A.J.M., *De strijd om de moderne staatsidée* (Nijmwegen: Decker & van de Vegt, 1946); Müller, G., 'Zur Grundlegung von der Lehre von der Staatsallmacht in der politischen Theorie des

now seeing its monopoly of war waging encroached upon by civil wars (and other internal wars),[279] was the extent of civil unrest and civil disturbances of clear warlike dimensions earlier in history. It is in this historical context that we must see modern internal wars.

It is not sufficient to dismiss the *Staatsraison* as 'pathological'.[280] One may as well, for the sense of equality, dismiss 'guerrilla *raison*' as equally 'pathological'. For it is the guerrillas who, when their demands for self-determination or other rights are not met, resort to arms against the State; and the State then takes violent counter-measures to suppress them whereupon a full-scale war often ensues. The 'fault' often lies with the State for not having given some leeway to the demands of the internal democratic movements. But the violence nearly always starts on the side of the insurgents.

For the more traditional category of internal war, usually termed 'civil war', specific rules developed once such wars started again within the consolidated nation State. In these wars citizens of one State become belligerents against their own State. Because of the limited geographical scope of civil wars, and often because of their limited impact, such wars have been called '*Kleinkriege*', *i.e.* 'small wars', in German.[281] By tradition, the status of insurgents have been subjected to a number of formal rules,[282] for example the rules on recognition.[283] Thus, it has been claimed, even in modern textbooks, that the legal situation changes fundamentally once insurgents have been recognised.

For example,

> 'There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of being at peace with the legitimate Government. But matters are different after recognition. The insurgents are then a Belligerent Power and the civil war is then a real war. Foreign States can either become a party to the war or remain neutral...'[284]

Thus, insurgency can be distinguished, it is said, from belligerency.[285]

According to the classical theory and practice, rules of the Law of War can only apply once a State has recognised, by its discretionary decision, the insurgents as

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17. Jahrhunderts', *GWU*, 1952, 3; Laski, H.J., *The Foundation of Sovereignty and Other Essays* (New York: Harcourt, Brace & Company, 1921); de Jouvenel, B., *De la souveraineté* (Paris: Génior, 1955); v.d. Heydte, F.A., *Die Geburtsstunde des souveränen Staates* (Regensburg: Josef Habbel, 1952); Kraus, K., 'Die absolute Monarchie und die Grundlegung des modernen Staats', *GWU*, 1957, 8; on earlier 'private wars' or *Faustrecht* see Nys, E., *Le droit de la guerre et les précurseurs de Grotius* (Brussels: Librairie Européenne, 1882), 54ff.

279 Below, Chapter 4, section C.

280 Krippendorff, E., *Staat und Krieg* (Frankfurt: Suhrkamp Verlag, 1985), 16ff.

281 *Cf.*, below, in the Chapter, section D iv on the meaning of guerrilla.

282 On the historical aspects, see, Oglesby, R.R., *Internal War and the Search for Normative Order* (The Hague: Nijhoff, 1971).

283 See, Lauterpacht, H., *Recognition in International Law* (Oxford: OUP, 1948), 270.

284 2 Oppenheim, *op. cit.*, 660.

285 *E.g.* Wilson, W.W., 'Recognition of Insurgency and Belligerency', *AJIL*, 1937 (ASIL) 136.

belligerents. Only then would the Law of War, or whatever part thereof the State considered appropriate, become applicable to the situation.[286]

Explicit declarations are rare, one of the few examples being the declaration of the American Congress of 4 July 1861 that a State of war existed between the Union and 11 Southern States.[287] The Nigerian government's declaration of war against Biafra on 12 August 1967 is another example.[288] Perhaps also the declarations of blockade by Madrid in July 1936 of Spanish Morocco and the Canary Islands can be counted in this category but there are diverging views on the effect of this declaration.[289]

There can also be other forms of implicit recognition of insurgents.[290] Third States can also explicitly[291] or by implication[292] recognise insurgents in civil war as belligerents.

If recognition, explicit or implicit, is effective, the Law of War in its entirety would, according to the traditional theory, become applicable. Indeed, some claim that the whole dispute the automatically becomes 'international' and *therefore* the Law of War becomes operative.[293] This is particularly evident, it is claimed, as article 2(3) of the 1949 Geneva Conventions provides for the applicability of the Conventions to non-parties; this did not, some claimed, necessarily mean third States, but would also cover recognised belligerents in civil war.[294] Others argue that only Common article 3 becomes operative in civil war.[295]

Many cling in this way to the exclusive State paradigm, asserting that even 'recognised insurgents' are by no means subjects of international law: only States (and inter-governmental organisations) can have that quality according to the

286 Castrén, E., *Civil War* (Helsinki: Suomalainen Tiedeakatemia, *1966)*, 135, 139. *Cf.*, Castberg, F., 'Folkerettslige spörsmål omkring den spanske borgerkrig', *NordTIR*, 1938, 162: there was only a 'rebellion' against the lawful government, *ibid.*, 165; recognition of the 'government' of the insurgents would even violate international law, *ibid.*, 165.

287 *Cf.*, Zorgbibe, C., 'De la théorie classique de la reconnaissance de belligérence à l'article 3 des Conventions de Genève', in Centre Henri Rolin (ed.), *Droit humanitaire et conflits armés* (Brussels: Université libre de Bruxelles, 1970), 84.

288 *Ibid.*, *loc. cit.* By this declaration the Nigerian government must, implicitly, have recognised the Biafran soldiers as belligerents, according to the traditional rules of civil war.

289 *Cf.*, *ibid.*, 25.

290 Wilhelm, R.J., 'Problèmes relatifs à la protection de la personne humaine par le droit international dans des conflits internes ne présentant pas un caractère international', 137 *RCADI*, 1972, iii, 330; Castrén, *Civil War*, *op. cit.*, 86, 153.

291 See, for example, recognition by the United Kingdom of the belligerency of the American Confederate States in 1861, 51 BFSP 165; recognition by United Kingdom, France, Italy and the United States of belligerency of Czechoslovaks, Hobza, A., 'Questions de droit international concernant les religions', 29 *RCADI*, 1922, iv, 387.

292 See, for example, recognition by conduct by the United Kingdom in the Spanish Civil War, Smith, H.A., 'The problems of the Spanish Civil War', 18 *BYIL*, 1937, 22 *et seq.*

293 2 Oppenheim, *op. cit.*, 370–371.

294 *Ibid.*, 371.

295 This would only imply the application of some basic rules. On the meaning and ambit of article e, see below, Chapter 6, section B e.

traditionalists.[296] But it must be admitted that recognised belligerents, for example, in the Spanish Civil War (1936–9), necessarily had some rights and duties under international law.[297] Later, as we shall see, *all* combatants in *all* wars are subjected, in varying degree, to the Law of War.[298]

Recognition was a traditional requirement for the application of the Law of War in a civil war. Recognition thus had constitutive effects for entities which were not States, and which even after recognition were not States. Of course, recognition of belligerence must be distinguished from recognition of statehood or government.[299] Adherence by the insurgents to the Geneva Conventions or to other parts of the Law of War did not either imply that they had become, or were on the way to becoming, States.[300] On the other hand, recognition of insurgents by other States had a retroactive effect insofar as acts taken within their own territory were concerned. Numerous cases after the Russian Revolution in 1917 authorised, as it were, *ex post facto*, acts taken by the Revolutionary Government, from a date *before* other States had given actual recognition. Courts in these countries treated transactions as having certain legal effect in the light of such retroactivity.[301] The constitutive effects could be abolished, retroactively even, in case the insurgents did not succeed in their task.[302]

For example, the Nigerian government recognised Biafra as a belligerent[303] but since Biafra eventually lost its fight for self-determination, the constitutive elements of recognition were abrogated retroactively, or by an alternative analysis, the constitutive elements only operated for a limited function, that of belligerency.

A requirement of recognition means that the legal personality of insurgents fluctuates during the dispute, contrary to an international dispute where the two parties in fact and in law remain the same.[304]

Some distinguish between recognition of belligerency and recognition of insurgency. If hostilities inside a State reach such proportions that it cannot be regarded as one of 'mere' insurgency, the relationship between the parties

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296 See, CICR, *Rapport d'une commission d'experts* (Rapport Pinto), Geneva, 1962. For criticism of this traditional theory of subjects, see Detter, I., *Concept, op. cit., passim* and Detter, I., *The International Legal Order, op. cit., passim.*

297 *Cf.*, Zorgbibe, *De la théorie, op. cit.*, 93, 86.

298 See below, Chapter 5 iii.

299 2 Oppenheim 212 n.2.

300 See below, Chapter 6, section B e.

301 But retroactive effects would only be allowed for acts of the recognised entity in its own territory: *Lehigh Valley Railway Com. v Russia* (1927) 21 F 2d 396.

302 But monies collected for an unsuccessful revolutionary government do not necessarily devolve on a subsequent *de jure* government: *Irish Free State et Al. v Guaranty Safe Deposit Co. et Al.* (1927), 222 NYS 182. On the question on which constitutes a *de jure* or a *de facto* government is a question for the Courts: *Lehigh Valley Railway Co. v Russia* (1927), 21 F 2d 396.

303 See above in this section.

304 Siotis, J., *Le droit de la guerre et les conflits armés d'un caractère non-international* (Paris: Librairie générale du Droit et de Jurisprudence, 1958), 23: 'la personnalité juridique du partie insurgé change constemment à partir du moment où son existence est consacrée par le droit positif, tandis que celle des deux parties dans un conflit international reste toujours le même.'

to a dispute becomes like that between two disputing States.[305] In other words, recognition of belligerency 'internationalises' the dispute.[306] The consolidation of insurgents into 'belligerents' seemed a reasonable criterion for the entry into application of the Law of War,[307] but what was not clear was how there could be such a marked difference between the position of recognised insurgents and unrecognised insurgents when there was no duty to recognise them. Recognition was often withheld, not least as it often showed a 'sign of weakness' indicating that the government was inclined to give way to the claims by the insurgents; recognition was the first 'concession' to insurgents of perhaps many to come.[308]

It was long claimed that recognition of belligerency was indispensable for the application of the Law of War and that recognition of insurgents was indispensable for the application even of minimum humanitarian rules.[309]

The act of recognition places insurgents in a category distinct from other rebels, it is still a theory defended by many.[310] But Courts have not been too concerned with whether insurgents have been recognised or not when dealing with disputes between individuals. Even if no recognition of belligerency – or of statehood – had come forth, by the parent State or by another State, Courts may apply laws and regulations of insurgent governments insofar as they are 'just and equitable' and if the 'morality of the proceedings satisfies … a Court of Equity'.[311] Such pragmatic attitudes are far closer to a common sense approach to the application of rules of the Law of War.

Nowadays, it appears that at least some rules of the Law of War enter into effect automatically once there is a civil war, or indeed other form of internal conflict, of the relevant type and scale. It shall be investigated later whether the threshold of intensity required for such upgrading from dispute to war can be identified and to what extent the Law of War becomes applicable in such internal situations.

Some writers still consider civil war as being more comprehensive or more intense than other internal conflicts.[312] But 'civil war' is not term of art. It could possibly be defined as the traditional type of conflict when insurgents have been 'recognised' as belligerents.[313] What purpose does such a definition serve when such recognition rarely is forthcoming in modern practice? The term 'civil war' is

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305 McNair, *Legal Effects, op. cit.*, 32–33.

306 2 Oppenheim 370 n.1.

307 See below, Chapter 4, section B.

308 Greenspan, M., *The Modern Law of Land Warfare* (Berkeley and Los Angeles: University of California Press, 1959), 19.

309 McNair, *Legal Effects, op. cit.*, 32–33 on application of article 3 of the Geneva Conventions and below, Chapter 8, section A.

310 Castrén, E., *Civil War, op. cit.*, 135. *Cf.*, Rosas, A., *The Legal Status of Prisoners of War* (Helsinki: Suomalainen Tiedeatkatemia, 1976), 244. But *contra*, see Chen, TiChiang, *The International Law of Recognition* (London: Stevens, 1951), 303; Ross, A., *Laerebog i folkeret*, 4th edn (Copenhagen: Nyt Nrdisk Forlag, 1961), 141; Seyersted, F., *United Forces in the Law of Peace and War* (Leiden: Sijthoff, 1966); Blix, H., 'Contemporary aspects of recognition', 130 *RCADI*, 1970, ii, 615.

311 *Fred S. James & Co v Rossia Ins. Co. of America* (1928) 160 N.E. 364.

312 *E.g.* 1 Hyde 253.

313 See above.

even thought to only reflect occurrences in the past, above all referring to the American Civil War (1861–5) or the Spanish Civil War (1936–9). The term was used in the Nigerian–Biafran conflict (1967–70) but it is rarely used today except, possibly, in the Libyan uprising against Colonel Gaddafi's government in 2011. But apart from that isolated incidence, the terms 'internal conflicts' or 'uprising' have been given more prominence. But it may be underlined in this context that conceptually 'internal armed conflicts' and 'internal war' include, for the purposes of this work, also the 'traditional' type of civil war. Internal war is thus a wider term.

c Internal War

Lately it has, as mentioned above, become more common to speak of 'internal war' rather than 'civil war'. The latter expression still conveys a need for the elaborate rules on recognition, on clear consolidation and other characteristics that are not always present in modern conflicts.

The world has changed. There are few civil wars with explicit recognition of belligerency along the traditional lines. Do the rules of war then not apply in modern internal unrecognised conflicts? It is important to answer this question in some detail as the most serious violations of the Law of War are often committed in internal, not in international, wars.[314] There are also a large number of these internal wars, many of them affecting the Third World: of 147 armed conflicts after the Second World War over 90 involved developing countries.[315]

The parties to armed conflicts since 1945 in intra-State situations numbered at least 120 in the period from 1945 to 1976,[316] by 1985 there had been well over 150 such conflicts[317] and by 2012 there were too many to enumerate, flaring up especially in Africa.

One type of entity which, during the decolonisation process, appeared to be allowed to wage war was unrecognised but organised liberation movements or freedom fighting groups. The terms given to these groups vary and are influenced by political attitudes; by their own side (or if they win) they are likely to be called freedom fighters whereas the enemy side may be more inclined to refer to them as rebels, insurgents or terrorists.[318] The right of these bodies to be belligerents is evidenced in contemporary political reality. The present practice is in sharp contrast with the outmoded techniques for civil war and it is to be noted that, although

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314 Siotis, *Le droit de la guerre*, *op. cit.*, 13.

315 Lugano Report, *op. cit.*, 39.

316 Kunde, J., *Peace Research*, 1978, reprinted in Eide, A. and Thee, M., *Problems of Contemporary Militarism* (New York: St Martin's Press, 1980), 261.

317 Study of Secretary General on Conventional Disarmament, A/39/348, 1985. For a study of certain rebellions, see Russell, D.E.H., *Rebelllion, Revolution and Armed Force* (London: Academic Press, 1974); for United Nations attitudes to and actions in internal conflicts, see Schachter, O., 'The United Nations and internal conflict', in Moore, J.N. (ed.), *Law and Civil War in the Modern World* (Baltimore and London: Johns Hopkins University Press, 1974), 422ff.

318 *Cf.*, above, in this Chapter, section B iii c, and below, Chapter 4, section C ii iv.

textbooks still insist on the requirements of recognition of belligerency,[319] this now appears as obsolete formalities.

It is clearly useful to distinguish between 'internal' and 'international' wars. International armed conflicts are defined by one writer as a conflict 'between two or more States'.[320] Non-international armed conflicts are, by the same author, said to be 'protracted armed confrontation occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions)'.[321] But this view may not be compatible with what we can observe happened during the last few decades when there have been serious armed conflicts which are obviously both 'international' and involving other parties than States and amounting to what we call 'wars'.

Few claimed that the Korean War (1950–3) was internal. But so it appeared at the time to the Soviet Union as there was only one legitimate government and this was thought to justify that the international involvement was ignored.[322] Whatever may be said about the legality of the international enforcement action, or its nature as a UN action,[323] it would seem incontrovertible that the Korean conflict implied a war and a war of international dimension and not merely an internal affair.

The Vietnam War (1955–75) was also held to be 'internal' but this was possibly a view only held by the United States.[324] We may either call it, like the Korean War, an internal major war with outside participation or an international war fought within the territory of one particular State.[325] But it becomes artificial and constrained to view such major outbreaks as the Korean and Vietnam Wars as 'internal' wars, however carefully phrased. In many cases courts did not hesitate to name these disputes 'wars'.[326] Furthermore, with considerable outside involvement these conflicts were clearly 'international' wars. Some wars, like the Vietnam War, can even be said to have been wars fought by proxies but actually wars between 'sponsoring' outside States.

d Internationalised War

But the traditional distinction between inter-State wars and civil or internal wars no longer suffices. Some internal wars will 'count' as international wars; they are so to speak 'internationalised' internal wars, a heavy but realistic expression.

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319 See above.

320 Melzer, N., 'Cyber operation and *jus in bello*', UNIDIR, *Disarmament Forum*, 2011:4, at 5. The author cites ICRC 'How is the term "armed conflict" defined in international humanitarian law', ICRC, Geneva, 2008, 5. It may be relevant that the author was formerly, at the time the Opinion Paper was published, Legal Adviser to the ICRC.

321 *Ibid.*

322 Siotis, *Le droit de la guerre*, *op. cit.*, 29. *Cf.*, also, above.

323 See below, Chapter 2, section B vi.

324 See further below.

325 At least before the division of the country.

326 On international and internal wars see, above, in this Chapter, section B ii and below, Chapter 10, section C iii (2).

The question arises whether internal war in a State should be qualified as 'international' in case there is outside support from other States. If such support is given the conflict will inevitably intensify and there will be international repercussions. It is well known that the Spanish Civil War (1936–9) would not have escalated to its actual level unless Italian legionnaires and the German Condor division had assisted Franco and the Soviet Union, and numerous volunteers had come to the assistance of the government.

Some claim that, because of this outside involvement, the Spanish Civil War, and also the revolt in 1969 in East Pakistan, later Bangladesh, where India gave military support to the rebels, were 'international wars'.[327] The United States funded openly, but by what is termed 'covert aid', guerrillas in Afghanistan and '*Contras*' in Nicaragua.[328]

Writers have sought to establish criteria which will assist in the identification of an 'international' as opposed to a 'non-international dispute'. For example, it has been suggested that assistance given by another State to the government side would 'internationalise' a conflict.[329] Others suggest that any assistance, to either side, internationalises an armed conflict.[330] Thus, if another State intervenes in that conflict with its troops, the conflict will become 'international' or, alternatively, if some of the participants in the internal armed conflict act on behalf of that other State.[331] And some even visualise different sets of rules applying as between the government and the insurgents and between an intervening State and the insurgents, only the latter relationship bringing in international law.[332]

The question is complicated by the fact that most apparently 'internal wars' do, in fact, receive some kind of outside support. Insurgents usually need some outside support to obtain weapons and ammunition. The question then arises whether a distinction should be made between outside military support and outside financial support. There will always be considerably difficulty in proving what support has been given by outside sources.

It may be that certain types of conflicts, defined by a teleological criterion, *i.e.* what we call programmatic,[333] are to be considered as 'international'. This is what has been done according to a statement by the General Assembly in the case of 'liberation wars'.[334] Even if these types are now largely historical there will be others

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327 Wulff, T., *Handbok i folkrätt under krig, neutralitet och ockupation* (Stockholm: Liber Förlag, 1980), 74–75.

328 Below, in this Chapter, section D ii (c).

329 Zorgbibe, C., 'De la théorie', *op. cit.*, 50; *cf.*, Suy, E., in Centre Henri Rolin, *Droit humanitaire et conflits armés*, Colloque (Brussels: Université libre de Bruxelles, 1970), 53. *Cf.*, Wilhelm, R.J., 'Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne presentant pas un caractère international', 137 *RCADI*, 1957 358.

330 *E.g.*, Centre Henri Rolin, McBride S., 'Human rights in armed conflicts', in *Droit humanitaire et conflits armés*, *op. cit.*, 49; Farer, T., 'The humanitarian laws of war in civil strife – towards a definition of "international armed conflict"', in *ibid.*, 53.

331 *Prosecutor v Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, para. 84.

332 Meyrowitz, H., 'Le droit de la guerre dans le conflit vietnamien', 13 *AFDI*, 1967, 156.

333 See further below, in this Chapter, section D ii.

334 GA Res. 3103 (XXIII) 1973.

that might be 'internationalised' because of outside support.[335] Which conflicts will cease to be internal and merit to be 'internationalised' does not merely depend on any geographical implications. It is rather a question of intensity and degree of outside participation and ensuing spread of causes and effects of the war. The question may also be asked with regard to what type of intervention that will entail such 'internationalisation' but this question is impossible to answer *a priori*. As is often the case in international relations there is a question of scaling measures into differentiated types of acts and these types can then be used for different situations. In other words, various types of intervention can engender consequences which render an internal war 'international'.

The two sides to a conflict may have different views on whether or not the the conflict is international. The views of outside observers (or supporters and objectors) may differ as well, as, for example, in the Korean War when the Soviet Union claimed there was an internal war as there was only one legitimate government, and the Western powers took a different line.[336] A State may insist that a conflict is 'internal' in order to benefit from the protection under article 2(7) of the Charter that the affair falls within the *reserved domain*.[337] It may even be other States, or organisations, that take this view: as Slovenia and Croatia sought independence in 1990, there were some voices that claimed that their efforts were internal and should be dealt with by the federal government in Belgrade. One involved government side may even have two different attitudes with regard to the conflict, depending on whether they focus their attention on outside support or on the nationality of the rebels. For example, in the Yemen conflict of 1962–70 the royalists considered the conflict international in relation to Egyptian forces and internal vis-à-vis the rebels.[338]

But it is difficult to lay down objective criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulation of rules of the Law of War for the two types of conflict.[339]

ii Programmatic Wars

Wars can also be classified according to a teleological criterion, *i.e.* according to the purpose of the war. Such a criterion is not always congruent with the geographical extension of a war. Thus, one type of war for a 'purpose', or what we call 'programmatic' war, is the liberation war. Some such wars of national liberation

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335 On the effect of assistance, see below, Chapter 2, section A iii e.

336 *Cf.*, Siotis, J., *Le droit de la guerre*, *op. cit.*, 29. But the forces in the Korean War probably were 'collective' units of the participating States rather than UN forces, see Detter, I., *Law Making by International Organisations* (Stockholm: Norstedt, 1965), 60–61.

337 On the *reserved domain* see further below, Chapter 2 A iii on intervention.

338 Boals, K., 'The relation of international law to the internal war in Yemen', in Falk, R.A. (ed.), *The International Law of Civil War* (Baltimore: Johns Hopkins University Press, 1971), 306.

339 See below, Chapter 12 B iv c on treatment of detainees for a discussion on the *Hamdan Case* (2006) before the US Supreme Court where the Court went to extraordinary lengths to justify rules applying to internal wars to what is indisputably an international war with Al-Qaeda.

may be internal and perhaps this is most often the case. But sometimes liberation wars are not so localised, like for example the wars in which the Palestine Liberation Front (PLO) has been involved. It is not internal to any one State and has little but the broad basis of its program in common with other liberation movements.

Thus, the geographical classification of wars tells us little about their scope except in a purely territorial way. A 'civil' or 'internal' war may or may not be a liberation war. It certainly has a 'purpose' or it would not be waged; but one does not know, even by presumption, what that purpose may be.[340] But programmatic wars indicate the purpose for which they are waged.

Another important observation must be made. Inter-State wars might have earlier occasionally been programmatic in the days aggressive war was permitted under international law. Such wars would represent 'a continuation of foreign policy by other means' as Clausewitz suggested.[341] Such expressions were no doubt justified in the days when the military force of States was unrestrained. But the point is that programmatic wars are rare among States in modern times as States no longer are allowed to start a war, for example, to expand their territory. Yet, the wars in Afghanistan and Iraq could perhaps be said to be 'programmatic' in the sense that hostilities were intended to bring an end to the Islamic militant schemes.

Another programmatic type of war are the non-State wars. The non-State groups may not have a 'foreign policy', in its traditional form, to extend into war in the vein of Clausewitz. But yet guerrillas, rebels, insurgents and terrorist fight for a 'cause'[342] and are motivated to attain it. These groups are not likely to fall victim to 'accidental' wars, the wars into which States have drifted in the past by being overwhelmed by the complexity of predisposing coincidentals. The wars waged by the insurgents and guerrillas do appear as programmatic in the sense described and, because they lack the coherence to have foreign policy like States, it may be useful to adopt 'programmatic' as a new adjective to denote the specific type of certain of their wars.

a Liberation Wars

(1) General Characteristics

By a gradual development in international society, liberation wars now constitute a category distinct from civil war and other internal conflicts. Much of this development, *i.e.* the disentanglement from colonial ties, is now in the past. It was during the decades following the Second World War that most of the liberation wars took place, from India in 1947 onwards.

There has been a series of Resolutions of the General Assembly on the legal character of liberation wars stating that national liberation wars, for the 'struggle

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340 But note Higham, R. (ed.), *Civil Wars in the Twentieth Century* (Lexington: University Press of Kentucky, 1972), who in his introduction claims that civil wars are 'the work of right-wing reactionaries', thus imputing, without much foundation, a programmatic nature to civil wars.

341 Clausewitz, *Vom Kriege*, *op. cit.*, 605.

342 See above in this Chapter, section A.

against colonial and alien domination, and against racist regimes',[343] are 'to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions'.[344] Some Declarations of the General Assembly carry great weight although technically speaking they are devoid of binding force.[345] The view that liberation wars are international conflicts, a qualification which will lead to increased protection for those involved in such wars, has been adopted by Protocol I of 1977 to the Geneva Conventions in its much discussed article 1(4).

Article 1(4) of the Protocol I expressly states that the Protocol shall apply to 'armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination'.[346] The reference to national liberation war implies, by the cross-reference to article 2 of the Geneva Conventions, that liberation wars are to be put on a equal footing with war or other armed conflict between States.[347] However, Protocol I does not expressly say that liberation wars are 'international' although the conclusion of the reading of the articles is that liberation wars are 'equated' with full-scale international conflict *for the purpose of the application of the Protocol.* However, some delegates considered the effect of article 1(4) to be very much the same as of the above-mentioned Resolutions of the General Assembly and, since the Resolutions are not binding, article 1(4) would create 'new law'.[348]

To consider liberation wars as being of an 'international character' had become something of an 'idée fixe' of the Third World, but only with regard to wars fought against colonial regimes.[349] Yet, the fact that the word 'liberation' necessarily relates to something from which a entity wishes to 'liberate' itself, and that other entity can obviously only be the Mother State, it is clear that liberation wars are, by definition, 'international'.

By a simple unilateral declaration[350] a liberation movement can now adhere to Protocol I of 1977[351] to the Geneva Conventions of 1949 as well as to the

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343 See the wording *e.g.* in article 1(4) in Protocol I of 1977 and below, Chapter 6, section B e. Such criteria are probably not cumulative.

344 Resolution 3103 (XXVIII) of 1973; *cf.*, Resolution 2592 (XXIV) of 1960. Much of the wording of this Resolution was incorporated in article 1(4) of Protocol I of 1977; see below, Chapter 6, section B e. *Cf.*, earlier Resolutions of the General Assembly, *e.g.* on Independence of Colonies 1514 (XV) 1960; GA Res. 3379 (XXX), 1979 on Racial Discrimination 1965; (on separate personality) 2446 (XVIII) 1968; 2625 (XXV) 1970 on Friendly Relations; *cf.*, above, in this Chapter, section C i.

345 See Detter, I., *Law Making, op. cit.*, 207–213 and, in greater detail, see Detter, I., *International Legal Order, op. cit.*, Chapter IV.

346 The article then refers to the principles of the Charter of the United Nations and to the Resolution on Friendly Relations and Cooperations among States, see above note 257.

347 Article 1(4) read together with 1(3) of Protocol I and Common article 2 of the Geneva Conventions.

348 United Kingdom CDDH/1/SR.46; France, *ibid.*, 49.

349 Best, G., *Humanity in Warfare* (London: Weidenfeld & Nicolson, 1980), 321.

350 Under article 96(3).

351 Below, Chapter 6, section B d.

Conventional Weapons Conventions of 1981[352] In these important respects liberation movements are thus put on the very same footing as States.

The extended notion of international conflict, comprising armed conflicts involving liberation movements, has also been adopted in the Convention on Limitation of Certain Conventional Weapons which Cause Traumatic Effects.[353] Some claim that the cross-reference in this Convention to Protocol I may create problems for States which wish to ratify the 1981 Convention but which have not accepted the Protocol, as there are no provisions for reservations in the Convention.[354] The fact there are no provisions for reservations, however, does not necessarily mean that reservations cannot be made,[355] as long as the reservations are in line with the general objectives of the Convention.[356] Naturally, it is desirable for humanitarian conventions not to include reservations as such Conventions are designed to ensure homogenous application of a protective regime. Occasionally 'reservations' to such instruments do not constitute 'true' reservations in the sense that they restrict the application of a treaty, but contain political announcements, *e.g.* that the ratification of a treaty recognises that another State 'exists'[357] or that a treaty-making party lacks competence to conclude international treaties.[358] If reservations actually extend the protection afforded by the instrument then no objections can be made by those who wish to promote humanitarian law. For example, the Eastern bloc made 'reservations' to the Genocide Convention[359] and some of these reservation *extended* the application of the Convention to non-self-governing territories. These 'reservations' can be seen as a part of the trend, albeit not always implemented by their authors, to grant 'international' status to liberation movements in non-self-governing territories and subject them to the protection of international instruments.

(2) Political Affiliations of Liberation Wars

Most of the liberation wars have been relegated to history. But it is still of some interest to cast a glance back to see how some liberation movements are firmly linked to East or West during the time of bipolarity between the United States and the then Soviet Union.

For example, the 'Contras' in Nicaragua and the guerrillas in Afghanistan were openly supported by the United States.[360] The liberation AZAPO in South Africa

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352 Under article 7(b); see further below, Chapter 6, section B d.

353 Article 1, see below, Chapter 7, section A 2.

354 *Cf.*, Bretton, Ph., 'La Convention du 10 avril 1981 sur l'interdiction ou la limitation d'emploi de certaines armes classiques qui peuvent être considerées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination', 27 *AFDI*, 1981, 127.

355 *E.g.*, Detter, I., *Essays on the Law of Treaties* (London: Sweet & Maxwell, 1967), 62ff.

356 *Genocide Case*, Advisory Opinion, (1951) ICJ *Reports*, 25.

357 *E.g.*, reservations to the Protocols of 1977 by Oman, 29 March 1984; by Israel, 2 August 1984; by Syria, 14 November 1983.

358 *E.g.* the challenge of the competence of the United Nations to conclude treaties with respect to Namibia, see reservation by South Africa of 24 February 1984 to the Geneva Conventions and Protocols.

359 See 78 *UNTS* 278.

360 *Cf.*, above, this Chapter, section D i d.

was, as being 'anti-capitalistic', supported by the Eastern bloc when States there were still under communism.[361]

In earlier conflicts in Africa, China and the then Soviet Union supported different factions. China thus sided with ZANU – fighting against white rule in the then Rhodesia – against ZAPU, supported by the USSR; and China also supported SWANU – a radical socialist party in Namibia – against ANC on whose side stood the Soviet Union.[362] This is thus a situation of historical interest where a disagreement (if not a conflict) between the Soviet Union and China was vicariously fought out by others, invariably non-State actors.

One liberation movement may support another such movement in another geographical area, like, for example, AZAPO (the Azanian People's Organisation, based on the Black Consciousness Movement) in South Africa supported the PLO.[363] In such a case there is a certain solidarity shown between movements as if they share the same objectives and goals. Similar solidarity was at times shown when liberation movements attended international conferences, especially if such conferences negotiate treaties which will bear upon the rights of liberation movements.

After the fall of communism there has been a less clear pattern as to which State supports which movement but much is explained by the fact that liberation movements have largely fallen into desuetude: after South Africa and Zimbabwe won their fight for black rule, much of the previous factions have found themselves without much of an agenda.

(3) Participation of Liberation Movements in International Conferences

It is highly important to survey the participation of liberation movements at international conferences and the attitudes which, in due course, allowed them to adhere to treaties and conventions. This precedent and these rules could presumably be used later, *mutatis mutandis*, to allow terrorist movements, for example the Islamic militants and Al-Qaeda, to attend talks in order to understand that, they, like liberation movements, are also in their activities subjected to far-reaching duties under the Law of War. It is absurd if, as at the moment, belligerents and combatants of such organisations can be allowed to think they somehow have a right to remain outside the legal framework: they, too, have obligations under the Law of War.

Liberation movements, of which there are now very few, are occasionally able to attend international conferences on a similar footing to States, provided the conference is thought to 'concern' them. Thus the PLO is a non-State member of

361 *Sunday Times*, 13 January 1985.

362 Lacqueur, W., *Guerrilla: A Historical and Critical Study* (London: Weidenfeld & Nicolson, 1977), 373.

363 *Sunday Times*, 13 January 1985.

the Group of 77[364] and has taken part in General Assembly meetings and in sessions of many other organisations.[365]

When the Protocols to the 1949 Red Cross Conventions were negotiated in 1977, there were 11 liberation movements which took part in the Diplomatic Conference elaborating the Additional Protocols.[366] This participation caused numerous States to make 'declarations' as to the presence of these movements which were not 'States'. Some said that it was only because of the humanitarian character of the instruments to be drafted that it could be conceded that liberation movements could attend.[367] Others said that the participation might lead to 'greater respect for law and concern for basic principles of humanity in the conduct of the armed conflicts in which these movements are taking part',[368] thereby indicating that the improvement of humanitarian standards must also be respected by the liberation movements themselves.[369] Some Third World countries insisted that only 'recognised' liberation movements should be allowed to take part, in particular those which had been 'recognised' by respective regional organisations, such as the Organization for African Unity or the League of the Arab States.[370] In fact, failure to support such 'recognised' liberation movements may well, according to other Third World countries, be 'tantamount to encouraging slavery and racism'.[371] However, liberation movements had been admitted as observers on numerous occasions in the past, even before the General Assembly declared, in 1974, that there must be an opportunity for the liberation movements to express their views and to propose charges so as to ensure that new rules 'meet the needs of the time'.[372]

The Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law Applicable in Armed Conflict decided at its First Session in 1974 not to invite the Revolutionary Republic of South Vietnam and, in response to a questionnaire for attitudes of governments to be indicated, the ICRC decided not to amend the Rules of Procedure to allow for the participation. There was much criticism of this decision, especially as the Revolutionary government was a party to the Geneva Conventions at this time. Some delegates also underlined that the decision was contrary to the Paris Agreement and the Final Act of the International Conference on Vietnam.[373]

At the Lucerne Conference there were several liberation movements, for example the PLO, the Seychelles Peoples United Party (SPUP), the African National Congress (South Africa) (ANC); the Zimbabwe African Peoples' Union (ZAPU); the

364 Sauvant, K.P., *The Group of 77* (New York: Oceana, 1981), 3.

365 Lazarus, C., 'Le status des mouvements des libération nationale à l'ONU', 20 *AFDI*, 1974, 173.

366 However, only PLO and SWAPO took part in all the four sessions, see Bothe, B., Partsch, K.J., and Solf, W.A., *New Rules on Victims of War* (The Hague: Martinus Nijhoff, 1982), 8.

367 *E.g.* statement by Germany, CDDH/54, vol. 5, 251. *Cf.*, France, *ibid.*, 25.

368 United States, *ibid.*, 260; *cf.*, Spain, *ibid.*, 256.

369 See further below, under reciprocity, Chapter 12, section B ii.

370 Indonesia, CDDH/54, vol. 6, 62–63.

371 Madagascar, *ibid.*, 190.

372 PLO-Observer, A/C.6/37/SR.19,5,18.

373 *Lucerne Report*, *op. cit.*, 1975, 1ff.

Pan African Congress of Azania (South Africa) (PAC) and the South West African Peoples' Organisation of Namibia (SWAPO). These movements all appear in the list of 'experts' attending the Conference.[374]

During the Conference on the 1977 Protocols to the Geneva Conventions there was some question as to whether liberation movements would be allowed to attend. The General Assembly insisted in Resolution 3102 (XXVIII) that liberation movements be invited to attend. Although it is questionable whether the General Assembly has the power even to recommend who attends a State conference, the Rules of Procedure of the Conference were eventually amended to allow for the presence of liberation movements, although it was emphasised that only States would have the right to vote.[375] Liberation movements also attended the final Conference on Conventional Weapons of 1981,[376] not only as observers but as future potential parties to the Treaty, which, like Protocol I of 1977,[377] provided for possibility of accession by liberation movements.[378]

But the attendance of liberation movements was often accompanied by a series of protests from States who do not support their cause, similar to those declarations which are usually lodged to object to the attendance of a unrecognised State. Complaints can concern the mere form of address to a party invited to attend a Conference. An invitation by the ICRC to the Conference in Delhi in 1956 was addressed to the 'Government of Taiwan'. That country is clearly not associated with liberation movements but has had similar ambition to be accepted as a State at conferences. Taiwan protested and was strongly supported by the United States in its attempts to allow for its 'official name'. When the amendment had duly been carried out by a special resolution, thirty other delegates, including the Indian host representatives, walked out in protest.[379]

Attendance at conferences, or even adherence to treaties, does not mean that an entity is recognised as a 'State'. But by being allowed to accede to treaties, now specifically foreseen by the Law of War,[380] certain non-State groups are gradually being given very similar rights and duties as States with regard to treaty-making.

b Resistance or Partisan Wars

This is another form of war which is also primarily of historical interest. But there are some instances nowadays where one might expect similar developments.

374 *Ibid.*, 94–95. On the other hand, during the second session of the Conventional Arms Conference in Lugano in 1976, no liberation movement attended. The League of Arab States, which had not been at the Lucerne Conference, sent a representative. *Lugano Report, op. cit.*, 225.

375 CDDH/22, 1.3.1974, SR 7.

376 See further below, Chapter 7, section A ii.

377 Below, Chapter 6, section B i b.

378 Below, Chapter 6, section B d.

379 Joyce, J.A., *Red Cross International and the Strategy to Peace* (New York: Oceana, 1959), 210–211.

380 On express provisions to this effect in the Weaponry Convention, see below, Chapter 7, B ii.

A group of citizens may organise themselves to combat an invader from within an occupied territory. They may use guerrilla tactics,[381] and they sometimes call themselves guerrillas, but the war waged is programmatic insofar as it is an inherent objective of the war to oust the occupying power and to force that party to give up the territory.

Many resistance activities may fall short of war by the *de minimis* rule[382] by constituting merely sporadic and unilateral attacks. But other resistance, like the Partisan movement in Yugoslavia during the Second World War, led to full-scale prolonged hostilities.

'Partisans' has there, as elsewhere, a clear ring of being 'communists', opposing a 'fascist' invader. 'Resistance fighters', on the other hand, were more associated with the activities of the French during Nazi occupation.

Today one could foresee resistance activities in Palestine but also in Iraq and in Afghanistan.

c Revolutionary War

Another type of programmatic war is revolutionary war. Revolutionary war denotes that the purpose of the war is to overthrow the existing government and replace it by another, led by the rebels. Most often the revolutionary wars, now largely in the past, are associated with Marxist-Leninist teachings, and revolutionary warfare is therefore essentially a class war in military terms.[383]

On the other hand, the Spanish Civil War has occasionally been said to have been a 'revolutionary' war and there it was the pro-Franco anti-communists who sought to oust the communist government which, in turn, was assisted by the leftist International Brigades as well as by the Soviet Union and Mexico.

d Separatist Wars

Dissident groups may not wish to overturn the government, as in revolutionary warfare, but have a more limited aim, often with regard to the independence sought for a particular territory. In this latter type of conflict the groups acting against the government do not seek to challenge the authority of that government

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381 See above under section B iii c.

382 Above, section B iii d on the definition of war.

383 See, *e.g.*, Black, C.E. and Thornton, T., *Communism and Revolution* (Princeton: Princeton University Press, 1964); Thompson R., *Revolutionary War in World Strategy 1945–1969* (London: Seeker & Warburg, 1970); Johnson, C., *Autopsy on People's War* (Berkeley: California University Press, 1973); *idem*, *Revolution and the Social System* (Stanford: Stanford University Press, 1964); *idem*, *Revolutionary Change* (London: Little Brown & Co., 1966); Leiden, C. and Schnitt, K. (eds), *The Politics of Violence: Revolution in the Modern World* (New Jersey: Englewood Cliffs, 1968); Arnold, T., *Der revolutionäre Krieg* (Pfaffenhofen: Zebra Schriftenreihe, 1961); Delmas, C., *La guerre revolutionaire* (Paris: Que sais-je?, 1959); Tanham, G., *Communist Revolutionary Warfare* (New York: Praeger, 1961). Some have called typically revolutionary wars 'peasant wars', see Wolf, E., *Peasant Wars in the Twentieth Century* (London: Faber & Faber, 1971).

over the country as a whole but merely with regard to a portion to which they claim they have better rights.

Typical examples would be the wars fought by Croatia – and briefly by Slovenia – to disengage themselves from the Yugoslav Federation in 1991.

Such separatist, or secessionist, wars are thus fought to obtain sovereignty over a part of the territory but not to question the powers of the legitimate government in their totality.

e Pre-emptive War

Pre-emptive or preventive war takes an intermediate position as not being fully programmatic for the achievement of any positive aim but to preclude some other action being taken. Pre-emptive war has much in common with anticipatory breach[384] for it implies an assumption that another party is about to resort to war. A war is thus started in the belief that, because of acute danger, action provides the only safe route.[385]

Although the legitimate right to wage war against Iraq in 2003, is still questioned, it is possibly a war thought justified on the basis that the war would pre-empt further attacks by the dictator Saddam Hussein. But there are always considerable dangers with any pre-emptive[386] or indeed anticipatory[387] action as one cannot always exactly predict such future action on the part of another State.

The main justification for pre-emptive war was the fear of Iraq's possession of weapons of mass destruction (WMDs), especially nuclear weapons, but in the event none were found. Yet, there are many other States with large nuclear arsenals without there being any discussion of taking military action to control future behaviour of those States. But Iraq was considered to be a 'rogue' State (however that is defined?) and therefore likely to take volatile and unexpected military decisions.

iii Unequal Wars

Wars can also be classified according to the relative strength or standing of the belligerents or of the means at their disposal. The military strength of States, or other parties, is difficult to assess: as mentioned above, it might be that lack of sophisticated arms is compensated by a strong will to win and there have been many battles won by a party with fewer men, or fewer arms. Parties to a war can never be exactly equal.[388]

A spectacular example of inequality in a war between two States was the so-called 'Winter War' between Finland, a country with a population of some three

384 *Cf.*, below, Chapter 2, section B ii.

385 Stracey, J., *On the Prevention of War* (London: Macmillan, 1962), 78.

386 See below Chapter 2 B viii c on 'pre-emptive intervention'.

387 See below Chapter 2 B iii b on anticipatory self-defence.

388 On the distinction between political equality and forensic equality, see, Detter, I., 'The Problem of Unequal Treaties', 11 *ICLQ*, 1962, 1086; on unequal treaties, see, Detter, I., *Independent State, op. cit.*, 194–223.

million, and the Soviet Union, with its vast Red Army recruited from a country with 250 million people. The modest army of Finland, replenished with some volunteers from Sweden, managed to defend itself for three months while the USSR, having started its attack on 30 November 1939,[389] was expelled from the League of Nations for its unwarranted attack.[390]

But a war waged by a group which is not a State, against the traditional war waging machinery of the State, is possibly, by nature, an 'unequal' or an 'asymmetric' war. It is not only the resources that differ on the two sides and the fact that only the State is likely to have warships, aeroplanes or nuclear weapons. But the whole structure of international society based on the State as the accepted geographical and political unit will place the non-State party in a war in a particularly unequal situation, caused by its lack of standing in international society.

There are also other reasons for a war being or becoming 'asymmetric': in April 2012 General Jean-Pierre Palasset, commander of the task force Lafayette, confirmed that the new situation in Afghanistan was showing all the signs of having become an asymmetric war as more and more attacks are committed by ANA soldiers, thus members of the Afghan national army, turn their guns on their occidental former instructors; these attacks have recently multiplied. One reason for this development appears to be a gradual infiltration of the Taliban in the ANA.[391]

There are important trends to erode the differences between warfare between States and warfare involving non-State groups.[392] A particularly important development is to allow groups to adhere to treaties on the Law of War[393] as this is important to abolish the other unequal idiosyncrasy: that States are bound by obligations under the Law of War by treaties but groups, because of their inequality, are not.

iv Methodological War: Guerrilla War

Some wars can be classified according to the methods which they employ. Guerrilla war[394] is characterised by certain tactics not often used in other warfare, and is characterised by small units, great mobility and often rudimentary organisation. The natural environment often sets the limits and provides the facilities to operations of guerrillas, either as partisans in the hills, or as units in the jungle.

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389 30 November was the day King Charles XII of Sweden and Finland had died, precisely after a campaign against Czar Peter the Great of Russia where he had initially beaten Peter at the battle of Narva in 1700 with 8,000 men against 40,000 Russian soldiers. Voltaire called Charles XII and Peter the Great the two most remarkable men in history and wrote a biography about Charles, *L'Histoire de Charles XII, Roi de Suède* (Paris, 1731).

390 League of Nations, *Official Journal 1939*, 506, Council Resolution 14 December 1939, 540.

391 Gélie, P., 'Les alliés doutent de leurs supplétifs afghans', *Le Figaro*, 3 April 2012.

392 Above, in this Chapter, section C, on democratisation.

393 See in detail, below, Chapter 6, section B d.

394 The term is technically a tautology but has been adopted in common use: guerrilla means 'small war'; *cf.*, above, this Chapter, section D i b, on '*Kleinkriege*'; the persons fighting such a wars are 'guerrilleros', a word rarely used nowadays.

Guerrilla warfare[395] has often been thought to involve particularly perfidious methods of warfare. Observers comment that cruel practices invariably accompany guerrilla warfare.[396] Guerrillas have had to compensate for their lack of sophisticated weapons by instead devising and improvising methods to combat forces stronger and better equipped than themselves. But these methods, which perhaps originally were not that cruel or inhuman, soon made the State parties take counter-measures[397] to overpower guerrillas in their natural habitat, in the jungle or in the hills, and such measures often involved defoliage weapons[398] or other chemical[399] or biological weapons,[400] so that the type of warfare to combat the guerrillas escalated to proportions unknown even in the Second World War.

In their motivation some guerrillas were, at least earlier, influenced by Marxist-Leninist thinking or by Trotskyite factions and this sometimes influenced their warfare techniques.[401] Some guerrillas were associated with anticolonialist movements,[402] other with more limited activities.[403]

Certain types of guerrilla operations are confined to prewar situations: 'urban' guerrillas[404] thus carry out activities similar to those of (traditional) terrorists[405] but may, after successful rebellion, expand their activities to full-scale guerrilla warfare.[406]

Mao Tse Tung visualised guerrilla warfare as an intermediate position and a provisional way of deploying armed forces. The characteristics of guerrilla warfare are, he says, irregularity, *i.e.* decentralisation, mobility, disunity, absence, lack of uniformity, absence of strict discipline and simple methods of work.[407] But such

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395 Veuthey, D., *Guerrilla et droit humanitaire*, 2nd edn (Geneva: CICR, 1983); Barrett, P.W. and Norick, L., 'Legality of guerrilla forces under the laws of war', 43 *AJIL*, 1949, 563; Trainin, I.P., 'Questions of guerrilla warfare in the law of war', 40 *AJIL*, 1946, 534; Draper, G.I.A.D., 'The status of non-combatants and the question of guerrilla warfare', 45 *BYIL*, 1971, 173; Atala, C. and Groffier, F., *Terrorisme et guerrilla* (Ottawa: Editions Lemière, 1973).

396 Mayer-Tasch, P.C., *Guerrillakrieg und Völkerrecht* (BadenBaden: Nomos Verlagsgesellschaft, 1972), 21; Hahlweg, W., *Guerrilla: Krieg ohne Fronten* (Stuttgart: Kohlhammer, 1968), 47; *cf.*, Rigg, 'Catalogue of Vietcong violence' 42 *Military Law Review*, No.12, 1962, 23.

397 See, on counter-tactics, McCuen, J.J., *The Art of Counter-Revolutionary War* (Harrisburg: Stockpole Books, 1966).

398 *Cf.*, above, in this Chapter under section C ii and below, Chapter 7, section D iii.

399 *Ibid.*

400 *Cf.*, above, in this Chapter under section C ii and below, Chapter 7, section D ii.

401 Laqueur, W., *Guerrilla, op. cit.*, 326ff., 357ff., 374ff.; *cf.*, 341. On more or less adept attempts to justify partisan and guerrilla warfare by Marxist doctrine, see, Thomson, E., *Kriegsbegriff und Kriegsrecht der Sowjetunion* (Berlin: Berlin Verlag, 1979), 154ff.

402 Rousseau, *Conflits, op. cit.*, 78–79.

403 Niezing, J. (ed.), *Urban Guerrilla Studies on the Theory, Strategy and Practice of Political Violence in Modern Societies* (Rotterdam: Rotterdam University Press, 1974).

404 Moss, R., *Urban Guerrillas* (London: Temple Smith, 1972).

405 See above, this Chapter, section B iii c on terrorism.

406 Russell, D.E.H., *Rebellion; Revolution and Armed Force* (London and New York: Academic Press, 1974), 103.

407 People's Publishing House (ed.) 1 *Selected Works of Mao Tse Tung* (Peking, 1977), 243; the following writings, many of them included in the *Selected Works, op. cit.*, are particularly relevant: *Mao on People's War* (Peking, 1967); Mao Tse Tung, *Concentrate on Superior Force*

features must be eliminated to make the armed forces reach 'higher stages' when they must become more centralised, more unified, more disciplined and more thorough in their work, for the guerrilla features stemmed from the 'infancy' of the armed forces[408] and were no longer appropriate.

The other hallmark of guerrillas, mobility, will, on the other hand, often still be useful.[409] Other advice is limited to strategic exhortations like 'do not hit out in all directions',[410] recommendations on finding success by 'joining with minority nationalities',[411] or calls for keeping up the production in guerrilla zones during intervals between fighting.[412]

Che Guevara's writings, on the other hand, are of a more practical nature for the individual guerrilla fighter. Here there are clear instructions to guerrilla fighters how to survive in the bush, how to make improvised weapons and how to organise small groups to avoid detection by the enemy from the air. But, at the same time, there is some concern for innocent lives and special attention is drawn to the difference between terrorism and sabotage. Whereas the latter method can be useful to guerrillas the former 'often makes victims of innocent lives that would be valuable to the revolution'.[413] Terrorism, says Che Guevara, must only be used to 'put to death some noted leader of the oppressing forces'.[414]

SWAPO, a former liberation movement in Namibia and after independence in 1990, a political party in that country, made a statement at a Colloquium in Brussels in 1970 to the effect that

> 'One of the aspects of this war is the difference in attitude to military ethics between us and our enemy. The South African Government ... treat (guerrilla fighters) as ordinary prisoners ... Our guerrillas are under instruction not to attack the civilian population in any given area except in case of self-defence, not to attack churches and missionary establishments ... and not to attack or in any other way harm defenceless women and children ... With regards to the treatment of prisoners of war, SWAPO adheres strictly to the Geneva Conventions of 1949.'[415]

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to Destroy the Enemy Forces One by One (Peking, 1968); *idem*, *The Concept of Operation for the Huiai Hai Campaign* (Peking, 1969); *idem*, *The Concept of Operation on the Peiping Tientsin Campaign* (Peking, 1969); *idem*, *Problems of Strategy in China's Revolutionary War*, 2nd edn (Peking, 1965); *cf.*, Rejai, M. (ed.), *Mao on Revolution and War* (Garden City: Doubleday & Co., 1969); *cf.*, also Ch'en, J., *Mao Papers* (London and New York: OUP, 1970).

408 1 *Selected Works*, 243.

409 *Ibid.*, 200ff., and 248; Mao Tse Tung, 'Mobile warfare, guerrilla warfare and positional warfare', 2 *ibid.*, 170.

410 1 *Selected Works*, 35.

411 *Ibid.*

412 *Ibid.*, 247.

413 Guevara, C., *Guerrilla Warfare* (London: Pelican, 1969), 26; see the original version, *La guerra de guerrillos* (Havana 1960); *cf.*, *Pasajes de la guerra revolucionaria* (Havana, 1969); Ortiz, V. (transl.), *Reminiscences of the Cuban Revolutionary War* (London: Grove Press, 1968).

414 *Guerrilla Warfare*, *loc. cit.*

415 Centre Henri Rolin (ed.), *Droit humanitaire*, *op. cit.*, 251–252.

So guerrillas emphasise that they abide by the rules of the Law of War and it is their enemy who violates them.[416] As will be shown, guerrillas are clearly bound by the Law of War[417] and something might be gained by further dissemination of knowledge as to their obligation under this legal system.

The term 'guerrilla' may still be used mainly as an adjective to describe the methods used by some parties to wars. There is no doubt that guerrillas have developed their own tactics and style of combat, largely by improvisation using the means at their disposal. In this sense, their warfare is what might be called 'methodological', but there is no obvious political content in their warfare. The tactics, known throughout the history of warfare, were developed in modern days in the partisan warfare[418] in the Second World War, when small units sought the protection of the natural environment to give them advantage in combat. Later other guerrillas, in Latin America and in Vietnam, adopted similar techniques. But guerrilla warfare is not necessarily, although it often is, linked to communist aims. Similar techniques were adopted by the 'Contras' in Nicaragua and by the 'resistance movements' in Afghanistan.

The situations in which guerrilla wars are waged range from sustained attempts to fight an invading or occupying Power[419] to military activities to oust a colonial regime or a legitimate government.

v Classification of Modern Wars

Contemporary wars can thus be classified with regard to their combat area into *geographical* wars; with regard to their purpose into *programmatic* wars; with regard to the strength or standing of the parties into *unequal* wars and, finally, with regard to the methods employed, into *methodological* wars. Wars are either:

1. inter-State wars;
2. internal war where one party is the central government of a federal State and the other party is one of the constituent States;
3. internal war where one party is a State and the other a group of citizens;
4. other armed conflict where one party is a State or a group of States and other party is a non-State whose members are not the citizens of the enemy State, but militants;
5. other armed conflict where both parties are non-States;

In recent years we have had some major examples of category 1 in the Iran–Iraq War from 1980 to 1988. Later, there were the Gulf Wars. The First Gulf War was the US-led coalition against Iraq in 1990–1 and the Second Gulf War, more commonly known as the Iraq War, was also fought between US-led coalition forces against Saddam Hussein in 2003, a conflict which lasted until December 2011.

416 Below, Chapter 9, section B iii g, *in fine*.

417 See below, Chapter 12, section B ii d and c ii.

418 See *e.g.*, Loverdo, C., *Les macquis rouges des Balkans 1941–1945* (Paris: Stock, 1967).

419 Above, in this Chapter, section D ii b.

In category 2 there have been important events in Slovenia and Croatia which demonstrate that what starts off as internal war can rapidly develop into an inter-State war. Here, a federated State, in the event ruled by the government of Belgrade, resisted by armed force the efforts to achieve independence of Slovenia and Croatia, constituent republics of the federation, which had exercised their rights under the constitution to secede. As soon as these two States claimed independence and fulfilling the requirements for statehood under international law,[420] they emerged as independent States and the hostilities against them by Serbia must be viewed as constituting an international war.

Category 3 is the sort of war which is sparked off by oppression by a government of its own citizens which then develops into virtually a civil war. Examples here are the Libyan uprising in 2011 and the unrest in Egypt, both efforts to overturn the ruling government. This category, of internal war, can itself be subdivided into revolutionary war, which seeks to overthrow the ruling government, and separatist war, whereby insurgents seek to establish their own territorial State within only a part of the existing State.

Some wars in category 3 are thus revolutionary wars in the sense of a conflict whereby citizens seek to overthrow their own government. The prime example of this type of conflict is the Russian Revolution in 1917. Other wars of this type will be anarchical wars, waged to abolish the State as such but with no authority replacing it; this was the aim of the Baader-Meinhof terrorists in Germany.

By far the most complicated scenario of war-like situations nowadays are, however, the surreptitious attacks by terrorists against a State or against a group of States, thus the category mentioned under category 4 above. These are 'group wars' fought by non-States against States. Categories 3 and 4 form a special type of 'group war' insofar as these conflicts are unequal, fought as they are against the traditional war waging machinery, the State or the federal State; these wars are thus 'unequal group wars'.

420 See Detter, I., *International Legal Order*, *op. cit.*, Chapter I.

Chapter 2

Prohibition of War

A LIMITATION OF THE USE OF FORCE

i Rules Prohibiting War

Rules restraining war and the use of force in international society are usually coupled with a positive duty to solve disputes by peaceful means. Such positive duties preceded the complete prohibition of war. Hague Convention I of 1899 on Pacific Settlements of Disputes[1] and the similar Convention I of 1907[2] obliged the parties to seek a peaceful solution to their disputes before resorting to hostilities. The Treaties for the Advancement of Peace, the so-called Bryan Treaties of 1913–1914, prohibited declarations of war or the opening of hostilities until an arbitral commission had examined the merits of the dispute.[3]

By article 10 of the Covenant of the League of Nations members of the League pledged that they would 'respect and preserve, as against any external aggression; the territorial integrity and existing political independence' of other States. This implied a system of guarantees to which some of the Great Powers, like the United Kingdom, have taken exception in the drafting of the Covenant.[4] But the obscure article 10 was coupled with articles 12–15, which prescribed certain procedures for the pacific settlement of disputes. Above all, article 12 prescribed a cooling-off period of three months after an arbitral award attempting to regulate the dispute; but after that war could be commenced. War was thus not outlawed by the Covenant of the League of Nations.

The Covenant thus introduced a distinction between legal and illegal wars; the latter category comprised conflicts where the formal procedure laid down had not

1 26 *NRGT* 2 série, 920.

2 3 *NRGT* 3 série, 360.

3 See, for example, the Treaty with Italy, *AJIL*, 1916, Suppl., 288; 33 *AJIL*, 1939, Suppl., 86. Numerous treaties were concluded, see Brownlie, I., *Force, op. cit.*, 23 *et eq.*, 57.

4 Northedge, F.S., *The League of Nations; its Life and Times 1920–1926* (Leicester: Leicester University Press, 1986), 43.

been followed. However, not even aggression (however defined[5]), was completely forbidden by article 10 as that article was subordinate to some of the subsequent articles, in particular 15(7) which allowed certain wars to 'enforce legal rights'. Therefore, an invasion could take place in the context of a 'legal' war under article 15 and would, in that case, not be held to violate article 10.[6]

Article 12 of the Covenant thus restricted the right of the members of the organisation to resort to war. It is uncertain what legal effect, if any, such rules would have over a non-Member of the League, such as the United States and Japan. The League of Nations condemned the Italian aggression against Abyssinia in 1935[7] as well as the operations of Soviet forces in Finland in the Winter War in 1939,[8] as violations of article 12.

But article 12 only prohibited 'war' (before a certain time had elapsed), which gave rise to problems if there was any doubt whether hostilities amounted to such a state of affairs. The way 'war' was defined at the time[9] left considerable scope for belligerents to avoid disputes being classified as 'wars' by their own will, regardless of objective circumstances. Furthermore, once article 12 restrained the right to war there was another reason for not admitting that war existed in order for States to avoid being criticised for illegal action.

Until the Hague Convention II of 1907 on Limitation of the Employment of Force for the Recovery of Contract Debts[10] came into force, it had not been unusual for States to recover payment of money by armed force or to take reprisals against the indebted State. For example, when France failed to pay instalments on the spoliation claims under a Treaty of 4 July 1931, President Jackson stated on 1 December 1934 that the United States should insist upon prompt execution of the Treaty and in the case of refusal 'take redress into their own hands'.[11] Article 10 of the Covenant of the League of Nations restrained the use of force to a certain extent in a limited area. There was also some tentative regulation of the use of force in the Draft Treaty of Mutual Assistance of 1923,[12] the Geneva Protocol of 1924[13] and the Locarno Treaty of 1925.[14]

But the comprehensive regulation of war and the use of force was still to come. The Briand-Kellogg Act in 1928[15] finally outlawed not only 'aggressive war' but all types of war 'for the solution of international controversies' or as an instrument of

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5 See below, in this Chapter, under A ii, about the problems to define aggression.

6 *Cf.*, Miller, D.H., 1 *The Drafting of the Covenant* (New York: Putnam, 1928), 170. For other interpretations see Brownlie, I., *Force, op. cit.*, 63. On the other hand the Covenant did not outlaw war against a State which was abiding by an arbitral award, see article 13(4); on the contradiction between this article and article 12, see Northedge, *The League, op. cit.*, 56.

7 *LNOJ*, 1935, 1223–1226 and above, Chapter 1, B ii.

8 *LNOJ*, 1939, 539.

9 Above, Chapter 1, under B.

10 3 *NRGT* 3 série 414.

11 *Richardson's Messages*, III 97 106, and *ibid.*, 147, 152–161.

12 *LNJO*, 1923, Spec. Suppl. 16.

13 188 *LNTS* 53.

14 154 *LNTS* 290.

15 94 *LNTS* 57.

national policy'.[16] The prohibition of war was coupled with a corresponding duty to settle disputes by peaceful means.

One method of reinforcing the prohibition in the Briand-Kellogg Pact was by the doctrine and practice of non-recognition as put forward in the Stimson doctrine of 1932.[17] According to this statement on behalf of the United States situations created by force would not be recognised by the United States.[18]

Other landmarks in the prohibition of war and the use of force in the international society were a series of Latin American Treaties, *e.g.*, the Treaty to Avoid or Prevent Conflicts between the American States of 1929[19] and the Treaty of Non-Aggression and Conciliation of 1933, the Savedra-Lamas Pact.[20] Some of these treaties were not limited to only American States but were ratified by a number of European States as well.[21] A number of bilateral treaties of Friendship built up a further network of obligations to renounce war and the use of force.[22]

With the establishment of the United Nations the full prohibition of the use of force, and threat thereof, became entrenched in the Charter's article 2(4). The Inter-American Treaty of Reciprocal Assistance, the Rio Pact, of 1947[23] also reiterated the wide-reaching prohibition of the use of force and the threat of force.

Much has been written about the ambit of article 2(4) of the United Nations Charter;[24] there is above all an area of doubt as to whether the article covers economic force.[25] However, there is certainly no doubt that any form of armed force is forbidden under the Charter, if it is directed against the territorial integrity or political independence of any State *or* if it is 'inconsistent' with the purposes of the United Nations.[26] But there are numerous legitimising elements factors which undermine the general prohibition.[27] The Agreement on Prevention of Nuclear War

16 But some dismissed the Act as being 'without value' in international law, see Undén, O., 'Idén om krigets kriminalisering', *Uppsala Universitets Årsskrift*, 1929, 22.

17 See, in detail, Wright, Q., 'The Stimson Note of January 7, 1932', 26 *AJIL*, 1932, 22.

18 *Cf.*, the Chaco Declaration by the League of Nations Assembly of the same year, 1932, with similar contents, signed by 19 American States, and 6 *Hackworth* 45.

19 33 *LNTS* 26.

20 163 *LNTS* 393. This Treaty was replaced as between the American States by the Treaty of Bogotà of 1948 which established the Organisation of American States, 30 *UNTS* 55.

21 See the Savedra-Lamas Pact which was ratified by Bulgaria, Czechoslovakia, Romania, Spain and Yugoslavia, as well as by a series of Latin American States.

22 See, further, Brownlie, I., *Force*, *op. cit.*, 101–105.

23 21 *UNTS* 77.

24 See *e.g.* Waldock, C.M.H., 'The regulation of the use of force by individuals, States and international law', *RCADI*, 1952, ii, 455.

25 Doxey, M.P., *Economic Sanctions and International Enforcement* (Oxford, 1971). *Cf.*, Sciso, E., 'L'aggressione indiretta nella definizione dell'Assemblea Generale delle Nazioni Unite', *RivDI*, 1983, 253. On similar discussion bearing on the use of force, including economic force, and treaties, see Detter, I., *The Independent State*, *op. cit.*, 145–163; Leyton-Browne, D., *The Utility of International Economic Sanctions* (London, 1986).

26 Tunkin, G., *Sila i mezhdunarodnoe pravo* (Moscow, 1983).

27 See, below, in this Chapter, under B vi.

Between the United States and the Soviet Union in 1973,[28] a treaty concluded for 'unlimited duration',[29] provides in Article I that the

> 'Parties agree they will act in such a manner as to prevent the development of situations capable of causing a dangerous exacerbation of their relations, as to avoid military confrontation and as to exclude the outbreak of nuclear war between them and between either of the Parties and other countries'.

Article II provides that 'each Party will refrain from threat or use of force against the other Party, against Allies of the other Party and against other countries in circumstances which may endanger international peace and security'. Such a treaty, essentially reiterating obligations already existing under the Charter, possibly reinforces the duty to refrain from the use of force.

Specific acts of force are forbidden, acts that were earlier often referred to as 'acts of war'. The prohibition of aggression and intervention, highly relevant to the status or existence of war, will be examined briefly.

ii Rules Prohibiting Aggression

'Aggression' did not always have negative connotations. There was a time the concept also covered 'defensive aggression',[30] although this seems a contradiction in terms, now that aggression has such a pejorative ring. 'Defensive aggression' is, however, probably a euphemism for the term 'self-defence'.[31]

Some commentators claim that aggression is specific to the international society as municipal law never uses aggression as a basic concept or any other notions of 'that character'.[32] But the whole of municipal criminal law, in most legal systems, rests on restraints of force and violence between citizens. Such restraints regulate 'attacks' or 'assaults' by citizen on citizen, often to secure the interests of the weaker one, a system which is surely similar to the prohibition of a State attacking another State. But then it is not so clear, in the voluminous international discussions on a definition of aggression, that aggression merely implies 'attacks' although this surely would be the common sense approach.

Numerous attempts to define aggression have been made, not only by writers but, above all, by statesmen in declarations or conventions as well as by the General Assembly of the United Nations and, above all, the International Law Commission, which after seven decades of work on the topic, still has not produced an acceptable definition of aggression.

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28 917 *UNTS* 86.

29 Article VII.

30 Brownlie, I., *Force, op. cit.*, 351.

31 See below, in this Chapter, under B iii on 'self-defence' as a factor legitimising war and aggression.

32 Stone, J., *Aggression and World Order, Critique of United Nations Theories of Aggression* (London: Stevens, 1958), 119.

There have thus been considerable difficulties in defining aggression and one may wonder why this task, carried out as it has been in such intricate detail, has been thought so important. Some acts may well be 'typical' of aggression and such 'typical acts' may include armed attack, invasion, occupation, annexation, blockade; such acts would also constitute what was often previously called 'acts of war'.[33] But it is questionable when one can progress further than providing some illustrative examples, for a notion of which we, *a priori*, can only have a general notion but which, *in casu*, may be classed as illegal. There are the same difficulties, on the whole, as if we set out to define 'force'.

The first attempt of any significance may have been the Agreement for Pacific Settlement of Disputes, the Geneva Protocol, in 1924.[34] Later the more elaborate Soviet Declaration of Aggression followed in 1933.[35] There were other attempts to define aggression, for example, in the Convention for the Definition of Aggression the same year,[36] the Buenos Aires Convention of 1936,[37] the Saafabad Pact of 1937,[38] the Harvard Draft Convention on Rights and Duties of States,[39] and a series of bilateral agreements, for example treaties between the Soviet Union and Finland in 1932,[40] the Soviet Union and Poland in 1932[41] and the Soviet Union and China.[42] But the value of the definitions, often relying on enumerative examples,[43] may be limited.

The Security Council of the United Nations is empowered under article 39 of the Charter to identify an aggressor in the international society.[44] Such action presupposes a clear general notion of what aggression implies. If it is not generally agreed what acts constitute aggression, the Security Council is empowered to decide along more or less arbitrary lines. As the Security Council is composed of States, often acting in self-interest, this is often a political, rather than a legal, decision.

The attempts to define the notion of aggression in the United Nations date back to the early 1950's;[45] then it was thought important, for the application *inter alia* of

33 Aroneanu, E., *La définition de l'aggression, Expose objectif* (Paris: Les Editions Internationales, 1958), 85 *et seq.*

34 Westman, C.G., *Kring Genèveprotokollet* (Stockholm: Norstedt, 1924); Eagleton, C., *The Attempt to Define War* (Washington: Carnegie, 1933),599 *et seq.*; *cf.*, Erich, R., *Några folkrättsliga synpunkter hänförande sig till sanktionsproblemet* (Uppsala, 1936); Undén, O., 'Quelques observations sur la notion de guerre d'aggression', *RDILC*, 1931, 5.

35 League of Nations for Reductions and Limitations of Armaments, Series B, 2, 236.

36 147 *LNTS* 71.

37 6 Hudson 361.

38 190 *LNTS* 21, between Afghanistan, Iraq and Turkey.

39 33 *AJIL*, 1939 Suppl., 821.

40 157 *LNTS* 395.

41 136 *LNTS* 38.

42 181 *LNTS* 102.

43 See further Brownlie, I., *Force, op. cit.*, 359 *et seq.*

44 The General Assembly may acquire similar powers if the Security Council remains inactive and there is a threat to the peace, see the Uniting for Peace Resolution 377 (V) 1950; *cf.*, Detter, I., *Law Making, op. cit.*, 38 *et seq.*

45 See further Ferencz, B.B., *Defining International Aggression: The Search for World Peace, A Documentary History and Analysis* (New York: Oceana, 1975), for chronological data

article 39 of the Charter, an article which activates the right of the Security Council to take measures to preserve international peace and security, to have a definition of what aggression means. The matter of a definition is now, in 2013, of renewed importance as aggression has been included as a war crime and, for the application of the Statute of the International Criminal Court (ICC), it is essential to delimit the elements of that crime.

The Soviet Union proposed a Draft Resolution in 1950 in the First Committee,[46] which the General Assembly referred to the International Law Commission for comment.[47] The ILC produced no definition but after the Sixth Committee considered its Report, several States volunteered definitions, usually enumerative,[48] but occasionally attempting general definitions.[49]

General Assembly Resolution 599 (VI) of 1952 further emphasised the desirability of a definition.[50] A series of Special Committees was set up.[51] The fourth Special Committee[52] held seven sessions and produced a Report which it submitted to the General Assembly, proposing a definition of aggression. On the basis of this Report the Sixth Committee approved a Draft Resolution which it recommended the General Assembly to accept.

But a definition may, in the opinion of many States,[53] be inappropriate: it is still for the Security Council to determine *in casu* whether aggression has taken place.[54] Many have argued that the Charter is deliberately silent to allow leeway for the exercise of this discretionary power of the Security Council[55] and, it must be noted, the Resolution 3314 (XXIX) of 1974 indicates[56] that nothing within the adopted definition shall affect the scope of the powers of the United Nations organs under the Charter.

A definition of aggression is certainly riddled with difficulty. The United Kingdom delegation had pointed out that the 'desirability' of a definition depended on whether such a definition is at all possible.[57] But the great difficulty is not to phrase a definition but to apply that definition to fact.[58]

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and on the extensive literature.

46 USSR, A/C.1/608.

47 GA Res. 378 B (V) 1950.

48 USSR, A/C.6/l.208.

49 Bolivia, A/C.6./L.211.

50 On comments by the Sixth Committee, see Stone, J., *Aggression, op. cit.*, 54 *et seq.*

51 A Special Committee was set up by General Assembly Resolution 688 (VII) of 1952 and given the mandate to define aggression; a second Special Committee, established by General Assembly Resolution 895 (IX) in 1954 then took over; a third Special Committee was formed under General Assembly Resolution 1181 (XII) 1957; and finally a fourth Special Committee by General Assembly Resolution 2330 (XXII) in 1967.

52 For reference, see the previous note.

53 For example, for the United States, see statement by Truman, *Whiteman Digest*, 740.

54 *Cf.*, Sixth Committee views in 1952, A/C.6/L.206.

55 See Murphy, J.F., *The United Nations, op. cit.*, 85.

56 See the fourth Preamble paragraph.

57 A/AC.77/SR.7, 8.

58 For early comments along these lines see League of Nations, Commentary on the Definition of a Case of Aggression, *LNOJ*, Spec, Suppl. 16.

For years the International Law Commission tried to provide a definition of aggression, having been given a mandate by the General Assembly in 1950, that is to say over half a century ago. In 1951 the Special Rapporteur, Professor Spiropoulos, suggested that aggression would 'not be susceptible' to a definition and a legal definition would, in any event, not be practical but merely 'artificial'. A tentative definition could be

> 'Aggression is the use of force by a State or Government against another State or Government, in any manner, whatever the weapons used and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations'.[59]

But that definition dates back to 1951. The International Law Commission has not, over 60 years later, produced a final definition.

In 1974 the General Assembly took Resolution 3314 (XXIX), which had adopted the proposed wording. The Resolution provides a definition of aggression, based largely on a method enumerating certain acts, which together or by themselves, would amount to aggression.

The Resolution defines aggression as

> (Article 1) '... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition....'[60]

There is then an explanatory note stating that:

> 'in this definition the term 'State':
> (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
> (b) Includes the concept of a 'group of States' where appropriate.'

The Resolution goes on to provide:

> '(Article 2) 'The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.'

The text then goes on, in article 3, to exemplify certain typical acts 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

59 UN Doc. A/CN.4/L.13, in *Yearbook of the ILC 1951*, vol. 1, p. 116, fn. 1 ve.

60 Article 1.

> 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) the 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 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'.[61]

The Resolution thus suggests[62] that there is certain anticipatory force which is not in violation of the Charter provided the Security Council takes certain 'relevant circumstances' into account and finds that an action is devoid of features of aggression. Thus the first use of armed force by a State may be legitimised by the Security Council, a method which is of highly topical importance today.

Another controversial passage deals with assistance by 'armed bands, groups, irregulars or mercenaries which carry out acts of armed force' as it is highly uncertain as to what level of 'involvement' shall entail State responsibility under this heading.[63] The assistance in internal strife, to which this article clearly applies, is one of the most important areas for regulation[64] and it would have been desirable had the Resolution contained some more detailed criteria.

The Resolution of 1974 may have some value in drawing attention for example to the nature of acts of assistance to belligerents as some such acts will also be held to constitute aggression, for example by sending of armed bands.[65]

The value of the attempt of definition may be questioned. The State-centric view, which is entrenched in the Resolution, limits the scope of the definition considerably for only States can commit aggression. Wars waged by groups and aggression carried out by groups are not covered. Even if this limited ambit of the Resolution is justified in the view of many, we know that the Law of War also applies to groups and entities which are not States.

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61 Article 3.

62 Article 2.

63 Sciso, 'L'aggressione indiretta', *RivDI*, 1984, 253. *Cf.*, Rybakov, Y.N., *Voorozhennaya agressia, tiagchaishe mezhdunarodnnoe prestuplennye* (Moscow, 1980), 63 *et seq.*

64 Below, in this Chapter, section A iii b, c and d.

65 Below, in this Chapter, section A iii d.

The definition of aggression is particularly important as it is included as a 'crime' under the Statute of the International Criminal Court, the so-called Rome Statute.[66] Here, too, non-States are also excluded in the context of the crime of aggression which, on reflexion is absurd, considering that individuals may be indicted at the ICC for other crimes.

Article 5 of the Rome Statute lists the crime of aggression as one of the core crimes under the Court's jurisdiction. The other three crimes (genocide, crimes against humanity and war crimes) were defined – much guided by the definitions in the previous war crimes tribunals.[67] However, the Statute did not define the crime or set out conditions for exercise of its jurisdiction for this crime. There had been extensive negotiations in 1998 when the Statute was drafted about the need for a definition of the crime of aggression, but no agreement had been reached. The Rome Statute came into force in 2002, still lacking the vital definition of a crime over which it was to have jurisdiction.

In 2010 the Review Conference of Rome Statute, held in Kampala, Uganda, adopted by consensus, amendments to the Rome Statute including a definition of the crime of aggression and rules as to the exercise of jurisdiction over this crime.

Yet, even then the jurisdiction for aggression was not 'activated': only after 1 January 2017 will the Court be able to deal with any crime of aggression and that is also linked to a decision to made by States Parties to activate the jurisdiction.

On the other hand, the definition of 'aggression' may, like the definition of 'war', have to be interpreted differently in different situations. Thus, it was held by the House of Lords in England in *R v Jones*[68] in 2006 that 'aggression' is not a 'crime' in the meaning of the Criminal Law Act of 1967, nor an 'offence' under the Criminal Damage of 1971. The defendants had relied on s 3 of the Criminal Law Act as a defence to cause damage to property in a demonstration against the war in Iraq and argued that they were attempting to stop a 'crime' (aggression) that was being committed. But the Court held that 'crime' in s 3 meant 'a crime in domestic law' and was inapplicable to a foreign or international law.

With regard to a definition of aggression in international law, however, we now have another definition, the so-called 'Kampala version'. Here, under a revised Article 8 *bis* aggression is defined as:

> '1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of

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66 See, for example, Kress, C., 'The crime of aggression before the first review of the ICC Statute', *Leiden Journal of International Law*, 20 (2007), 851–865.

67 The International Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL); the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). See further below, Chapter 12, C ii (1) on the work of the Tribunals.

68 *R v Jones and others Ayliffe and others v Director of Public Prosecutions Swain v Director of Public Prosecutions* [2006] UKHL 16. On this case, see also below, under B iii b and Chapter 12.

> an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, 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 the 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 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.'[69]

It will indeed be some time before any 'person' will be indicted at the ICC for the crime of aggression as another decision will have to be taken in 2017 by the States Parties by the same majority as what is needed for revision of the Statute, *i.e.* by two-thirds majority. By contrast, the Kampala amendment was adopted by consensus.

There is another provision undermining the possibility of there ever being a case concerning aggression before the ICC adopted at the Kampala Review Conference under the new Article 15 *bis*: States Parties may opt out of the Court's jurisdiction by lodging a declaration of non-acceptance of jurisdiction with the Court's Registrar. Such a declaration can be made at any time. On the other hand, there is a wide right for the ICC Prosecutor to bring a case *proprio motu* (that is to say, by his own decision and without having a case referred to him). The Prosecutor can thus himself initiate an investigation into a crime of aggression. But he must first ascertain whether the Security Council has made a determination of the existence of an act of aggression, under article 39 of the UN Charter; if such a determination has been made the prosecutor can at once proceed his investigation. If no such determination has been made by the Security Council, the Prosecutor can still

69 Inserted by Resolution RC/Res.6 of 11 June 2010.

proceed, but only after a waiting period of six months, and after having sought the authorisation of the Pre-Trial Division of the Court.

Other cases may be referred to the Court by States or by the Security Council. But as mentioned above, a State can, at any time, refuse to accept the jurisdiction of the Court.

A most curious article has been included in the revised Rome Statute, a provision so nebulously drafted that it is difficult to know what situation the negotiators had in mind. Article 15(5) thus states that:

> 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.'

But what situation could that be? If, for the sake of argument, a statesman from another country goes in and, by a *coup d'état*, takes over the government of another State, that is not a State Party to the Rome Statute, and then attacks a third country, the Court would have jurisdiction? But why did the Review Conference waste time on such an utterly improbable situation? The only other reason for the application of this article would be a situation where a non-Party to the Statute is attacked by aggression and then, it appears, that the Court would lack such jurisdiction under article 15(5).

There is already somewhat of a problem in that a State Party can, at any time, denounce the jurisdiction of the Court and, under article 12, a non-Party of the Statute can, at any time, accept the jurisdiction of the Court. That appears to be a fairly floating system of jurisdiction.

It is difficult to see why, to save time, the negotiators of the Rome Statute could not just have adopted the GA Resolution from 1974, a document which is virtually identical to the one produced at Kampala in 2010. One slight difference may be perceived in that the Kampala version has added that an alleged crime of aggression must have been carried out 'by a person in a position effectively to exercise control over or to direct the political or military action of a State'. Will such a limited assertion of *who* has committed aggression necessarily lead to arguments as to the authority of that person in charge? Would it not be more reasonable to expect that decision to commit aggression would, in most cases in non-totalitarian States, have been taken by a collective body, such as the government, probably also involving another collective body of a representative assembly, such as the Congress (in the United States) or Houses of Parliament (in the United Kingdom)?

The effort of the drafters of the Kampala document may not be rewarded in the near future. It remains also to see whether States will actually agree to the potentially wide-ranging powers of the Court to start proceedings *proprio motu*. It must furthermore be remembered that the United States has refused to adhere to the ICC which obviously seriously undermines the importance and the impact of the Court.

In any event, the notion of aggression needs to be reconsidered in the light of contemporary warfare which often involves terrorist warfare movements whose

members are recognised by numerous international conventions as 'combatants'[70] and therefore, logically, as belligerents, even if some of them, mainly the terrorists who do not distinguish themselves from the population by wearing uniforms or insignia, will be treated as 'illegal combatants'.[71]

iii Prohibition of Certain Intervention

a The Relative Notion of Intervention

Intervention is a loose term which has been used in a number of ways. It may mean virtually any type of 'interference' in the affairs of another State, by acts ranging from those similar to aggression,[72] to milder acts by, for example, political[73] or economic pressure.[74] Sometimes the mere presence of warships offshore[75] or the refusal to recognise a government has been held to amount to 'unjustified intervention'.[76] Even the mere discussion of affairs in another State, for example, in the United Nations,[77] has been thought to constitute intervention.

The purpose of intervention is usually to make a State do something it would not otherwise do.[78] A State can be 'made' to do this forcibly or not, directly or not, or openly or not.[79] As intervention presupposes an act against the will of the State, the term cannot be used for UN action in a territory,[80] unless enforcement action is taken under Chapter VII in a State which opposes such action. As for aggression, it may not be suitable, or possible, to provide a definition of intervention, especially in view of ideological differences.[81] But perhaps certain 'intervening' acts can be discerned which infringe the sovereignty of States.

The basis for the protected area into which other States may not intervene is found in article 2(7) of the Charter of the United Nations which deals with what has

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70 See below, Chapter 3, C b ii.

71 See below, Chapter 4, B.

72 Above, in this Chapter, section A ii.

73 For example, the practice of propaganda, below, Chapter 8, section A iv d (2).

74 See, this Chapter, A ii and note 24. *Cf.*, Higgins, R., 'Intervention and international law', in Bull, H. (ed.), *Intervention in World Politics* (New York: OUP, 1984), 30.

75 Calvocoressi, P., *World Order and New States* (London: Chatto & Windus, 1962), 17.

76 Señor Guardia, Special Agent of President Tinoco of Costa Rica, protested in Washington in 1917 that the refusal of the United States to recognise the 'legitimate' government of Costa Rica would amount to 'unjustified intervention'. 1 *Hackworth* 235.

77 For protests regarding discussions of human rights, see Vincent, R.J., *Non-Intervention and International Legal Order* (Princeton: Princeton University Press, 1974), 15.

78 Hyde, C.C., *International Law* (Boston: Little Brown and Company, 1922), para. 69; *cf.*, Hoffman, S., 'The problem of intervention', in Bull, H., *Intervention*, *op. cit.*, 160.

79 Bull, H., *Intervention*, *op.cit.*, 1.

80 Luard, E., 'Collective intervention', in Bull, H., *Intervention*, *op. cit.*, 160. To such action the States have already given their '*abstract consent*', see Detter, I., *Law Making*, *op. cit.*, 322.

81 See Thomas, C., *New States, Sovereignty and Intervention* (London: St. Martin's Press, 1985), 9. Of course, Hoffman is right when he says that 'In its widest sense, to be sure, every act of State constitutes intervention', Hoffman, S., 'The problem of intervention', *op. cit.*, 8: For a wide concept of intervention, see, Rosenau, J.N., *International Politics and Foreign Policy* (New York, 1969), 161.

become known as the *'reserved domain'*[82] and which specifies that States have a certain sphere of 'domestic jurisdiction'.

(1) The Reserved Domain

Article 2(7) of the United Nations Charter provides that:

> 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

In this sphere of the so-called *reserved domain* the State has thus full power: conversely, this is the area in which other States may interfere or intervene.[83] The incidence of this reserved area is a direct consequence of sovereignty. The State has the right to this monopoly of power. Another State has the same right, on the basis that all States are equal and therefore, *par in parem non habet imperium*, that is to say, 'an equal does not have power over another equal', a useful maxim from Roman law. However, there are some limits to this power.

States bound by the Charter[84] have, to some extent, renounced their exclusive domestic jurisdiction in this *reserved domain*, in the case of threat to the peace and, in such rare cases, they must abide by possible enforcement action. The other situation when there are limits to the power of a State in its own *reserved domain* is if the government maltreats the citizens in some flagrant way. Then, outside intervention or interference may also be authorised and warranted.

Many commentators appear to focus on the object, or on the type of affair into which interference takes place. They thus classify as intervention any activity which affects the 'domestic affairs' of another State.[85] But the prohibition of intervention becomes meaningless if intervention is understood to consist in any form of involvement or interference.[86] Other writers concentrate more on the aspect

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82 *E.g.* Rajan, M.S., *United Nations and Domestic Jurisdiction*, 2nd edn (London, 1961).

83 *Cf.*, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of the Independence and Sovereignty, GA Res. 2131 (XX) 1966.

84 By virtue of their *'abstract consent'*, *i.e.* a form of consent given in advance when States first joined the United Nations, see, Detter, I., *Law Making*, *op. cit.*, 322 *et seq.* and below, in this Chapter, section B v.

85 For example, 'covert' intervention to influence the internal affairs of other nations. For a discussion of this definition (allegedly of the CIA), see *ASIL*, 1975, 192. The element 'domestic' will, of course; always be essential to an act of 'intervention', 10; 'Intervention' should be restricted to acts which try to affect not the external activities but the domestic affairs of a State.

86 Vincent, *Non-intervention and International Order*, *op. cit.*, 13. On the relevance of 'power' relationships in intervention situations, see Morgenthau, H.J., 'To intervene or not to intervene', 45 *Foreign Affairs* 1967, 425: on 'coercion' in intervention see Beloff, M., 'Reflections on intervention', *Journal of International Affairs*, 1968, 198; Strupp-Schlochauer, 2 *Wörterbuch*, 145. But some claim that the coercion must not amount to 'war' as intervention can take place only in peace-time: they claim that the requirement of peace is an 'element in the definition of intervention', Thomas and Thomas, *Non-intervention*, *op. cit.*, 73. Such restrictive

of coercion, that is the act of interference itself. But the two elements, coercion and involvement in domestic affairs, operate together. Some writers have thus suggested that any activity which 'interferes coercively in the domestic affairs of another State' constitutes intervention.[87] This definition, even though slightly circular, at least limits intervention to action taken by force.

Others have suggested that intervention is only permissible if another State has already 'illegally' intervened. Thus, John Stuart Mill wrote on internal disturbances and insurgency that

> 'Though it be a mistake to give freedom to a people who do not value the boon, it cannot but be right to insist that if they do value it, they shall not be hindered from the pursuit by foreign coercion.'[88]

Thus, if the Russians sought to stop the Hungarian insurgency by lending support to Austria, England would have been entitled to intervene too, to assist the Hungarian insurgents.[89] That would, said Mill, be construed as 'intervention to enforce non-intervention' and that was always 'lawful' although it was more questionable whether first action could be taken.[90]

But any extended right to 'counter-intervention' or subsequent intervention, in response to earlier interventionary action, is bound to escalate any conflict and must be viewed with extreme caution.

Many commentators have argued that intervention in an internal conflict is always unlawful. The Vietnam War was, for a considerable time,[91] classified as an 'internal conflict' and some considered that because of this nature, there was no right of other States to interfere by collective self-defence under general international law or under the Charter of the United Nations.[92]

Conversely, the conflict in former Yugoslavia was also, for a long time, regarded as 'internal', entitling other States, and organisations, to be 'passive' in order to preserve, as many wished, the *status quo ante*, that is to restore the situation as it used to be. In this scenario, some then argued that intervention was a *duty* and that States had an obligation to take action, especially by 'humanitarian intervention'.[93] That aid, in a war situation, especially in the form of food, may help an attacking side,

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terminology becomes awkward: there are many occasions in recent armed conflicts when there has been a hiatus in a 'war' situation and yet no 'peace'; certain acts of other States (or organisations) would still be perceived as 'intervention' at such times, for example, in Croatia, 1990–2 or in Bosnia, 1993–5.

87 Piradow, A.S. and Staruchenko, G.B., 'Das Prinzip der Nichteinmischung im modernen Völkerrecht', in *Gegenwartsprobleme des Völkerrecht* (Berlin: Deutscher Zentralverlag, 1962), 183.

88 Mill, J.S., 'A few words on non-intervention', *Fraser's Magazine*, 1859.

89 Mill is clearly speaking of the Hungarian uprising in 1848.

90 Mill on 'Intervention', *op. cit.*

91 Above, Chapter 1, section D d.

92 Moore, J.N., 'The lawfulness of assistance to the Republic of Vietnam', 61 *AJIL*, 1967, 1.

93 See below in this Chapter, section B vii on humanitarian intervention.

feed an invading army and effectively prolong a conflict. Such aid thus complicates the issue of a 'duty' of intervention.[94]

This work is concerned with the use of armed force and therefore we shall limit our attention to two main types of intervention, namely intervention by direct armed force and, secondly, intervention by offering assistance to another State, or to non-State groups in another State, in an armed conflict.

There is a clear conceptual connection between intervention and war. For if intervention is an act by force to make a State do what it would otherwise not do, war is a magnification of this situation when a State seeks to force an enemy to do its will.[95]

Intervention may have become a synonym for violence, force and egoism.[96] It is indeed intervention, and not the principle of non-intervention, that needs explanation.[97] But insofar as it involves direct military force there is no question that it has been outlawed and similar remarks may be made with respect to this type of intervention as were made in respect of war and the use of force in general. Instruments forbidding use of force often specifically mention intervention as a prohibited act.[98] Even in the case of instruments which do not specifically mention intervention, such acts can normally be subsumed under the prohibition of the use of force. Other instruments focus on intervention and introduce further prohibitions,[99] but, in turn, such agreements often also refer to a general prohibition of the use of force as well.

(2) Forms of Intervention

Intervention by direct military action is a specific method of employing armed force against another State. The alleged cases for permissible intervention of this type, humanitarian intervention and what in this book is called 'patronising intervention', will be discussed later.[100]

The second type of intervention, which implies the assistance to a State or group involved in a conflict, can be subdivided into two main groups: intervention which assists a State engaged in a traditional inter-State war and intervention which assists a State, or groups within that State, when there is a war of non-State character.

In the first case, assistance may often be given to a State under some defence pact or alliance treaty and such treaties will furnish sufficient title for the legitimate intervention by military troops or by financial or other aid. The treaties which

94 Kouchner, B., *Le devoir d'ingérence* (Paris: éds. Delanoë, 1993), *passim*.

95 Clausewitz, *Vom Kriege*, *op. cit.*, 75.

96 Massourides, P.A., *Le principle de non-intervention en droit international moderne* (Athens, 1968), 83.

97 Little, R., *Intervention, Involvement in Civil War* (London: M. Robertson, 1975), 32.

98 See in particular, The United Nations Charter, article 2(4) and 2(7).

99 For example, the Montevideo Convention on Rights and Duties of States 1933, 165 *LNTS* 19; the Buenos Aires Convention for the Maintenance, Preservation and Re-Establishment of Peace with Additional Protocol Relative to Non-Intervention, 1936, 188 *LNTS* 9; the Bogota Charter of OAS 1948, 30 *UNTS* 55.

100 See below under B viii b and e.

furnish the competence for such intervention can be replaced, *in casu*, by the more or less formal *ad hoc* consent of a State.[101]

In the second case, assistance may be given to a State, or to groups within that State, in an internal conflict. It is the last-mentioned type which creates the greatest difficulty in practice from the point of view of assessing legitimacy: when is it 'right' to assist a government to suppress groups seeking self-determination and when is it 'right' to assist insurgents who are rising against the legitimate government?

Apart from such types of intervention, a State may assist another State involved in a non-State conflict in a *third* State.

b Assisting the Government in Internal Conflicts

Intervention has been condemned as a form of aggression by the General Assembly if it leads to 'fomenting civil strife'.[102] Some writers have questioned whether it is ever permissible for a State to request or receive outside military assistance in internal conflicts.[103] But the section of the United Nations Definition on Aggression[104] forbids assistance in the form of bands, groups or irregulars who will carry out acts of armed force against another State. Thus, 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, that carry out acts of armed force against another State of such gravity as to amount to the acts listed above (such as invasion, bombardment, blockade) or its substantial involvement therein,'[105] will amount to aggression. Can one then, by an *e contrario* deduction, conclude that assistance in other forms to another government is permissible? In other words, even if it is not allowed to dispatch, for example, irregulars, can a State send official forces?

There are some indications that it may not be permissible to lend any assistance, by irregular or regular forces, to governments in such situations: some support for this contention may be found in the UN General Assembly Resolution on Friendly Relations of 1970[106] which forbids

> 'organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory, directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.

It has been claimed that this Resolution gives a wider scope to the prohibition of intervention and can be considered to be an 'authoritative' interpretation of article 2(4) of the Charter.[107] This may not be accurate, as the General Assembly does

101 On the relevance of consent, see my *Independent State*, *op. cit.*, 197.

102 GA Res. 380 (V) 1950.

103 1 Hyde 182, 253

104 Res. 3314 (XXIX) of 1974; above, in this Chapter, section A ii.

105 Article 3(g), for comments see 2 Ferencz, B.B., *Defining International Aggression* (New York: Oceana, 1975), 39; and Sciso, L'aggressione, *op. cit.*, 253.

106 Res. 2526 (XXV) 1970.

107 Above, in this Chapter, section A i.

not have the power to make such 'authoritative' interpretations.[108] Yet it may be correct to state that there is a presumption of illegality of intervention. As a State is sovereign it does have the right to exclusive power and jurisdiction in its own territory with the few exceptions of reduction of this competence in the case of flagrant and gross violations of human rights.[109]

But, in spite of presumptions of illegality in general, military assistance by regular forces may be offered to the government under the provisions of a treaty. For example the Havana Treaty of 1928 provides specifically that arms may be provided to a requesting government until belligerency is recognised.[110] The Batista government of Cuba complained when the United States ceased arms supplies and demanded further assistance under this Treaty.[111] The general provisions of the Rio Treaty of 1947 on Inter-American Reciprocal Assistance[112] also appear to have room for such assistance.

There may even be assistance provided by intervention in order to save the operations of a treaty. For example, the Customs Receivership Convention between the United States and the Dominican Republic of 1907[113] was jeopardised by a revolution in 1913. The Secretary of State of the United States, through the Minister in Santo Domingo, informed the new government that, above all, the Dominican Republic was not allowed to increase its debt by costs for a revolution under the aforementioned Convention without the consent of the United States. Subsequently, the United States sent 'advisers' to the Dominican Republic to bring about election of another president; a candidate was approved and recognised by the United States the following year.[114]

In addition, military assistance may also be given in individual cases under informal security arrangements with allied governments, even if there is no specific treaty on the matter. Some writers claim that, if such agreements with for example the United States are to remain 'credible', the United States must at least maintain a 'viable and perceivable *capability* to intervene'.[115]

A further possibility is that, for reasons of 'historical loyalty' an ex-colonial power intervenes to assist the government in a country where rebel forces appear to

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108 *UN Study on the Naval Arms Race*, 26 July 1985, 85.

109 See, Detter, I., *International Law and the Independent State*, 2nd edn, *op. cit.*, *passim*; Detter, I., *The International Legal Order*, 2nd edn, *op. cit.*, Chapter V; Detter, I., 'New forms of sovereignty and the Right to Protect (R2P)', *op. cit.*, available at www.thomasmoreinstitute.org.uk/node/386.

110 Above, Chapter I, section D i b. On recognition of belligerency in civil war, see below, Chapter 4, B.

111 Smith, E.E.T., *The Fourth Floor* (New York: Random House, 1962), 91.

112 Article 6; for reference see 21 *UNTS* 77.

113 1 *Malloy* 418.

114 1 *Hackworth* 240–241.

115 Picket, J.R., 'Airlift and military intervention', in Stern, E.P. (ed.), *The Limits of Military Intervention* (Beverly Hills: Sage, 1977).. Specific consent may also be given *in casu*, see below, in this Chapter under section B v on legitimising factors and *cf.*, Detter, I., *Law Making*, *op. cit.*, 64 and 74 on specific consent to United Nations operations in the Congo. *Cf.*, Doswald-Beck, L., 'The legal validity of military intervention with the invitation of the government', *BYIL*, 1985, 189.

take control. This is what happened in January 2013 when rebels were taking over large parts of Mali and France decided to intervene with military force. What may have provided reinforced motives for intervention might have been the reluctance of France to accept the set of values of some of the rebels: this pattern could be perceived in the French intervention in Mali by Operation Serval on 11 January 2013, ostensibly with some covert assistance of other Western States, to assist local forces and the newly elected government against fundamentalist Islamist rebels. In this case the French intervention was approved and ratified by the UN Security Council.[116]

Almost immediately a revenge attack followed, not in Mali, but in neighbouring Algeria, where hostages were taken at the gas plant at 'In Almenas' by a group led by the Algerian Mokthat Belmokhtar, a rebel leader close to AQMI. Soon afterwards this was followed by the kidnapping of a family of French tourists with four young children, in Cameroon, on the Nigerian border, possibly by the group Boko Haram also associated with Al-Qaeda.[117]

The pattern in recent State practice seems to be that, nowadays, an unacceptable regime may be toppled by outside intervention, such as the Taliban in Afghanistan, or Saddam Hussein in Iraq, A newly formed 'democratic' regime then 'requests' outside assistance to quell internal insurgents. The secondary intervention in this case then presents itself as assistance 'to the government'. The length of such an operations, however, may also cause tragic loss of life and is often conducted at considerable material expense: the operation in Afghanistan, commenced in 2001 as a reaction to the 9/11 attack,[118] is still going on in 2013.

It seems reasonable to accept that assistance to another government, in the case of internal strife, is always permissible if a government requests such assistance from another State, or if there is an obligation to furnish such help under a treaty or alliance pact. On the other hand, intervening States should retain that such intervention is highly exceptional and constitutes serious interference in the sovereign sphere of competence of another State.

c Assistance to Insurgents

There have been statements to the effect that assistance to insurgents is no longer illegal under international law. Recent practice appears to indicate that assistance to insurgents is now actually more frequent than assistance to the government in internal strife. On the other hand, such assistance to insurgents nowadays appears

116 The Security Council made a Statement on 10 January 2013, SC/10878, referring to its earlier Resolutions on the situation in Mali, SC Res. 2085 of 2012 and 2056 and 2071, also of 2012. The Security Council urged the rebel groups in Mali to cut off all ties to terrorist organisations, notably Al-Qaeda in Islamic Maghreb (AQIM) and associated groups; the Security Council also noted that some of the rebels belonged to the Movement of Unity and Jihad in Western Africa (MUJWA) which is on the Al-Qaeda sanctions list, more known in the region under its French abbreviation MUJAO, *Movement pour l'unicité et le djihad en Afrique de l'ouest.*

117 See below in this Chapter in the next section on Assistance to insurgents.

118 See above under B iv b and vii c (3) on the War on Terror and on genocidal *jihad*.

to have as a goal to install a new government; then, after a while, the assistance could again be classified as 'assistance to a government', not to the 'old' one but to a new 'democratic' government.[119]

Recent events show that many States have become almost eager to intervene to support rebels in internal disputes in other countries, especially in the aftermath of the so-called Arab Spring in 2011 (a 'Spring' which appears to have lasted well into 2013). It may be important to highlight also the dangers of such intervention that may spiral into further violence, spreading over the borders to an even wider region, intensifying the level of conflict by recurring attacks of revenge.

In earlier days, the United States emphasised that neutrality does not necessarily imply that arms exports to insurgents are prohibited; there may, in any event, be problems to ensure that legislation on the matter operates extraterritorially. If support to insurgents is furnished by the export of arms by individuals rather than by direct State support, it is also difficult to assess whether or not such help is 'legal'.

When the Mexican government asked the United States to prevent arms supplies from Texas to rebels in Mexico, the US government replied initially that the arms supplies were not illegal under US law. Subsequently a joint Resolution of Congress was passed to enable the president to prohibit arms exports if and when he identified, in any country, 'conditions of domestic violence ... which is promoted by the use of arms or munitions of war procured from the United States'.[120] It was emphasised by the Secretary of State, in a note to Mexico, that

> 'This action was taken not because of any obligation so to do resting upon the Government by reason of the rules and principles of international law, which obligations were already far more than met by the existing so-called neutral status of the United States, but solely from a sincere desire to promote the return of peace to Mexico and the welfare of a neighbouring nations.'[121]

On the other hand, assistance in the form of military support to insurgents was clearly outlawed by the instruments mentioned above, the General Assembly Resolution 3314 (XXIX) of 1974 as well as by the earlier Resolution 2625 (XXV) of 1975.[122] It may be that these Resolutions have become obsolete, also as they only speak of aggression and military intervention. Assistance is not usually given by overt military support but, more often, by financing guerrilla or resistance operations or revolutionary warfare. Figures and data are obviously not easily accessible in this sector but certain assistance has been given quite openly. Thus the State Department of the United States announced in 1984 that it had set aside 'aid' of some $280 million for Afghan guerrillas for 1985 and $21 million to support

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119 See above, in the previous section in this Chapter on assistance to the government, for example, in Afghanistan.

120 1 *Hackworth* 29–30.

121 *Ibid.*, 30.

122 But see below on humanitarian assistance to insurgents, under B vi.

Nicaraguan 'Contras'.[123] In spite of the openness of such support forces opposing their government, the United States classifies such support as 'covert aid'.[124]

The operations in Libya in 2011 involved both the problem of assistance to insurgents and the problem of intervention. Western powers intervened with military force to compel Colonel Gaddafi from bombing his own citizens. As soon as the rebels had risen to power, they were given further assistance to export oil, which somewhat obscured claims that the primary aim of the assistance had been strictly 'humanitarian'.[125] A further unintended consequence of assistance to the Libyan rebels was that a surplus of arms, provided by the allies to the rebels, ended up in the hands of the AQMI, (Al-Qaeda au Maghreb Islamique), thus the Al-Qaeda faction of Islamic Mahgreb. AQMI used these weapons for ruthless incursions and finally capturing the northern part of Mali.[126]

Assistance to insurgents need not necessarily be given in the form of arms or military expertise. The opposition in Syria in 2012, allying themselves against President Bashar al-Assad, were promised money instead of arms by Saudi Arabia, Qatar and other Gulf monarchies. The money is destined to defray the pay of soldiers who have joined the *Armée Syrienne Libre* (ASL) in the hope of deposing the Assad regime.[127]

But if other States intervene to 'assist' insurgents, it is imperative to know that the insurgents have the right to represent the majority of the citizens. This is not always clear. Syria is a case in point. The problem in the case of Syria is that any support to insurgents is complicated by the fact that there are numerous factions of rebels but no reliable umbrella organisation with which outside government would negotiate to save lives in the area; some of the factions are attached to the Al-Qaeda organisation which has made outside support or intervention difficult or impossible. What makes intervention to assist (or indeed to quell or control) insurgents in several regions is the complex structure of various cells and groups. It is the scattered pattern of such rebel groups in Syria that has made efforts of other States to 'discuss' with the rebels virtually impossible. The 'Syrian National Coalition' is not necessarily representative of all rebel groups. Above all, it is not even clear which of its sub-groups is affiliated to Al-Qaeda. Nor is it clear which of the various groups act as an umbrella of others and which are more or less independent.

In the region of north and central West Africa, the latest area for uprising and attacks by radicalised Islamists, there are competing factions, some of which are more or less affiliated to Al-Qaeda. There is the very active AQMI (*Al-Qaeda au Maghreb islamique*); another area dominated by Ansar Eddine, a Touareg radical rebel, close to Al-Qaeda; a further area controlled by Boko Haram, a Nigerian Islamic sect; another region where ultimate power belongs to MUJAO (*Movement pour*

123 *Sunday Times*, 30 December 1984.

124 *Ibid.*

125 See below under B vi and vii on humanitarian intervention and on R2P.

126 See further above in this Chapter .

127 Malbrunot, G., 'De l'argent à défaut d'armes pour les insurgés syriens', *Le Figaro*, 3 April 2012.

l'unicité et le djihad en Afrique de l'Ouest). This complex pattern makes intervention by other States highly precarious.

Insurgents may also support and furnish assistance to other rebels in another State. The uprising in Mali was partly facilitated by the surplus of arms sent to the Libyan rebels, weapons that after Colonel Gaddafi had been deposed, found their way to rebels in Mali. This conflict then spread to Cameroon, Nigeria, Chad and Niger where the rebel groups Boko Haram and Ansaru are operating with links with the Al-Qaeda network. On 19 February 2013 a French family of seven, with four children, were kidnapped in Cameroon on the Nigerian border, apparently by Nigerian jihadists, as a clear revenge for the French intervention in Mali. This was thus another unfortunate consequence of the French Operation Serval, undertaken to block further Islamist domination of the Touareg rebels in Mali and to assist the fragile new government.[128] But it would seem that, in this region, military force has led to further military force.

Assistance to insurgents must only be allowed in highly exceptional circumstances when there is flagrant violation of fundamental human rights. Such conditions probably did not exist in Iraq in 2003 where the pretext of a threat of weapons of mass destruction (WMDs) also turned out to be fictitious. But even if there are clear and massive violations of human rights, intervening States must exercise caution. Well-intentioned intervention to save human life may well lead to a conflict spreading over a larger area in the region or, as has often been the case, there are revenge attacks.

d Assistance to Groups in other Non-State Conflicts

With regard to assistance to non-State parties in liberation wars similar comments as those set out above may be made as with regard to assistance to insurgents and other belligerents in internal wars. In the case of a non-State party, physically present and organised with headquarters or military installations in the territory of another State, it would seem, however, that any assistance to that body would have to have the consent of the territorial State. The time of liberation wars belong essentially now to history with few exceptions, of which the one major one is that of the Palestine Liberation Organization (PLO).

The general rules set out above concerning aid to insurgents might also be relevant to assistance, for example to the PLO, engaged in a 'war' which is neither an inter-State war, nor an internal war.[129] For example, the situation in the Middle East is highly complex and it is at times unclear which State or group is a belligerent. But it is fairly settled that the PLO has been a belligerent, alone or in conjunction with other parties, and, as such, obliged to abide by the rules of the Law of War.

As has been shown above,[130] the PLO has been engaged in one of the few disputes that are still classified as liberation wars. On the other hand, the PLO

128 The 'Serval' Operation was thus undertaken as assistance to the government as per the previous section above, in this Chapter under b

129 *Cf.*, above, Chapter 1, D i c.

130 See above, Chapter 1, section D ii a (3).

itself is nowadays, in 2013, not considered as a belligerent terrorist movement, having been replaced by Hamas and Hezbollah in that sense, but has emerged as a quasi-State body, having been admitted as a Member to UNESCO (with, however, numerous protests from other States and a finally highly unclear status in international law). On the other hand, in view of the numerous protests of the admission of the Palestine to UNESCO it must be remembered that a number of mere 'territories' are members of the Universal Postal Union without any pretence of claiming to be 'States'.[131]

For the purposes of numerous Conventions, some wars are to be held to be 'international', but since the PLO has no territorial base, it cannot be considered a State, and the conflict is therefore, technically, a non-State war. On the other hand, it is not an internal war for it is not fought by citizens against their own government.

On the other hand, such rules with regard to other liberation movements are now largely of historical interest. Most of these either ceased to exist, like those in Biafra, or emerged as recognised States, like India, Pakistan, Bangladesh, Kenya, etc.[132]

e The Effect of Assistance to Either Party

At the root of the problem is that, if assistance from outside is stopped, the conflict may cease. There are obligations, for example, under the Havana Convention on Duties and Rights of States in the Event of Civil Strife, 1929[133] for States, bound by the Convention, to prevent persons on their territory, nationals or aliens, from crossing the border to start or promote civil strife. States have only occasionally agreed to refrain from assisting either side in internal wars.

One example of this rare practice was the Spanish Civil War. Specific Non-Intervention Agreements were concluded involving parallel instruments to diplomatic, consular and naval authorities in Spain. The parties to these agreements were the United Kingdom, the United States, as well a number of European Powers. The United Kingdom had taken the initiative in an agreement with Germany[134] and invited others to join.[135] United Kingdom and France exchanged notes on non-intervention and 27 other States made 'similar' declarations.[136]

Non-intervention, in these agreements and declarations, implied initially the prohibition of arms exports coupled with a system of information on implementation of this obligation. In 1936 a Non-Intervention Committee was created and, gradually, prohibitions were introduced for the recruitment of volunteers and other restrictive measures by further agreement between the members of the Committee. An Observation Scheme was started in 1937 round the frontiers of Spanish territory to verify that the Agreement was being observed.

131 See, Detter, I., *Law Making*, *op. cit.*, Chapter IV.

132 See Detter, I., *The Law of War*, 1st edn, 1988, Chapters, 2, 6 and 8; and Detter, I., *The Law of War*, 2nd edn, 2000, Chapters 2, 6 and 8.

133 33 *LNTS* 26.

134 65 BFSP 769.

135 Padelford, N., *International Law and Diplomacy in the Spanish Civil Strife* (New York, 1939), 54 *et seq*.

136 *Idem*, *op. cit.*, 57; *idem*, *AJIL*, 1937, 578.

Eight international agencies were established to supervise and administer the obligation of non-intervention.[137]

The Evacuation Plan of the Powers in 1938 received consent by both sides in the war; earlier there had been certain protests that observation officers usurped the sovereign rights of Spain.[138]

There are good reasons why this practice of non-intervention should be applied in other internal conflicts. The obligations to refrain from lending assistance in internal wars are not very different from the duties that flow from the status of neutrality in inter-State wars. In such wars third parties readily accept that they must be 'impartial'; they furthermore readily undertake to punish those of their nationals who in any way breach a blockade or carry contraband.[139]

Why should not similar duties accrue to third States and their nationals in the event of internal war? We have adopted a wider concept of war than other writers, mainly to avoid the artificialities of the ambiguous concept 'armed conflict'.[140] However, not *any* armed conflict or disturbance will constitute internal war and there are therefore ample guarantees that third States and their citizens will not be in any real doubt as to whether war exists. Insurance companies are not, as we shall see, guided by any technical difference between inter-State or internal war: the question is whether there is a 'war-risk area'.[141]

The consequences of accepting the wider notion of war, covering also internal war, is, for the position of third States quite exaggerated. What must be emphasised is that without outside assistance the strife might well die out. Even in Vietnam there was this possibility, before the US intervention.[142]

One almost certain consequence of 'help' in a conflict, especially of well-intended food aid and other 'humanitarian' aid, is that an armed conflict is prolonged. The change of UN policy in recent conflicts has not necessarily helped to solve and calm down armed conflicts.[143] Before 'humanitarian' involvement became added or even substituted the main aim of UN peace-keeping troops, such UN missions were given *clearly specified short-term goals, excluding any form of 'humanitarian' assistance.*

The change of previous strategy has probably not strengthened the respect for the United Nations activities in the world as UN Blue Helmets were evacuated from war zones in Croatia and in Bosnia as such areas were considered 'too dangerous'

137 Apart from the International Non-Intervention itself, these were the International Board for Non-Intervention, two Chief Administrators, the Group of Administrators and Deputies, the Corps of Observation officers, the Naval Patrol, the International Fund, and the Accounts Officer. The implementation of these tasks was funded (apart from the patrol) by a common pool of participating States. Padelford, N., *Spanish Civil Strife, op. cit.*, 79 *et seq.*

138 *Ibid.*, 113, 115.

139 2 Oppenheim 673 *et seq.*

140 Above, in Chapter 1, B iii.

141 Below, Chapter 10, C iii b.

142 Wright, Q., 'Legal aspects of the Vietnam situation', 60 *AJIL*, 1966, 750.

143 See the declared aims of Secretary General Boutros Boutros Ghali in *Agenda for Peace* (New York, 1992), A/47/277-S/24111; *Agenda for Peace*, 2nd edn, 1995, A/50/60-S/1995/1; *cf.*, UN, Dept. for Economic and Social Information and Policy Analysis, *An Inventory of Post-Conflict Peace-Building Activities* (New York, 1996), ST/ESA/246.

for the soldiers, leaving civilians to be overrun by attacking soldiers; the UN found it impossible to deliver food aid, which, after all, cannot have been the primary aim of UN action. As such food aid easily becomes diverted to benefit attacking armies, it is questionable whether it should not be ruled out as a form of inappropriate assistance, contrary to the main principle of non-intervention.

The asymmetry which always exists in a non-State conflict will be exaggerated if assistance to governments, but not to insurgents, is allowed. Assistance in any form given to States or to groups in internal disputes or other non-State wars may, on the other hand, internationalise the dispute and, in this way, give it other dimensions.[144] If this happens the once 'internal' dispute may be classified as 'international', with the repercussions this may have for the application of certain international conventions and other legal rules.

B LEGITIMISING FACTORS

The question whether an act implies illegal use of force, aggression or intervention is often a question of fact. There are limited opportunities for assessing a situation by an impartial entity and, even in cases where such examination is available by for example the International Court of Justice, political reasoning may override legal arguments. This situation is amply illustrated in the *Case of Nicaragua v the United States*.[145] The United States had previously accepted the Court's Jurisdiction by the Optional Clause of the Court's Statute[146] albeit with reservations.[147] But in the *Nicaragua Case* the United States decided not to continue its attendance before the Court. The ICJ found that the United States had violated international law in Nicaragua by intervening 'in its affairs', by supporting the 'Contras' in their rebellion against the Nicaraguan government and by mining the harbours.[148]

There are a number of factors that, at least in the opinion of the acting State, may legitimise forceful behaviour which, if it were not for these factors, would be illegal under international law.

144 One example may be the conflict in Kosovo in 1999. *Cf.*, Yoshihara, S., *Waging War to Make Peace, U.S. Intervention in Global Conflicts* (New York: Rowman & Littlefield, 2009), 117ff.

145 (1984) and (1986), ICJ *Reports*, 1984, and 1986.

146 On the Optional Clause, see Waldock, C.H.M., 'The decline of the Optional Clause', 32 *BYIL*, 1956, 244.

147 On the United States reservation, see Briggs, H., 'Reservations to the acceptance of compulsory jurisdiction of the International Court of Justice', 93 *RCADI*, 1958 229.

148 The United States had also breached international law by using force against Nicaragua, violating its sovereignty, and interrupting peaceful maritime commerce, and in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties of 1956. The United States later blocked enforcement of the judgment which awarded Nicaragua compensation but the subsequent Nicaragua government of Violeta Chamorro withdrew its request for compensation in 1992.

i Recovery

It has been said that article 2(4) of the United Nations Charter which forbids force would be inapplicable if a State 'recovers' territory under foreign 'illegal' domination. Arguments like these were used[149] by India with respect to Goa[150] and by Argentina in the case of the Falklands War.[151]

Borders are often disputed and the very notion of aggression or other types of force then become even more relative.[152] But some borders are more entrenched than others: for example, some borders are 'internationally recognised'. A Draft of the UN Resolution on Aggression[153] had suggested that any use of force to alter an 'internationally agreed line of demarcation' should be specifically prohibited.[154] This Draft was not adopted. However, there are indications that international borders that have obtained recognition either by express agreement or by long-standing practice are specially protected from alterations by force. For example, the General Assembly Resolution on Friendly Relations[155] also forbids the use of force or threat to violate international lines of demarcation.

On the other hand, the exceptional case must be allowed for: there could be a situation when borders have been wrongly assessed.[156]

ii Hot Pursuit

Raids will not constitute hostile acts which, even if intense,[157] amount to acts of war if they are carried out in hot pursuit. There are numerous historical examples to illustrate this rule which applies both to land, air and sea.[158] For example, General Jackson followed Indians into Spanish Florida when they had attacked American positions in Georgia[159] and Pancho Vilas was pursued into Mexico after he and his men had made incursions into American territory.[160]

Hot pursuit comes, as a legal category, often near self-defence or even anticipatory force. As one example of this may be mentioned the incident in 1919

149 *Cf.*, Schachter, O., 'General course in public international law', *RCADI*, 1982 v, 142, 178.

150 16 UNSCOR 987.

151 GA, A/37/PV, 51 (1982). Gavelle, J.F., 'The Falkland (Malvinas) Islands: an international law analysis of the dispute between Argentina and Great Britain', 107 *MilLRev*, 1985, 5 *et seq*.

152 Stone, J., 'Hope and loopholes in 1974 definition of aggression', *AJIL*, 1977, 226.

153 Resolution 3314 1974 and above, in this Chapter, under section A ii.

154 Article 4(2) of the Six-Power Draft, A/AC.134/L.17.

155 Resolution 2625 1970, and above in Chapter 1, section C ii. On the role of prescription as the main function of the otherwise vague notion 'customary law', see Detter, I., *Concept*, *op. cit.*, 60, 63, 104.

156 For a discussion, see *Temple of Vihar Case*, ICJ, *Reports*, 1962, 6.

157 On the intensity criterion, above, Chapter 1, section B iii b.

158 *Cf.*, Poulantzas, N., *The Right of Hot Pursuit in International Law* (Leiden: Sijthoff, 1969); not all agree that the maritime notion hot pursuit can be applied analogously to land and air situations; but the notion is derived from neighbour law and there is good ground to allow an extensive application especially in view of State practice. For the historical background see *Institut de Droit International*, 13 *Annuaire* 1894, 330; 34 *Annuaire* 1928, 759.

159 2 *Moore* para. 215.

160 2 *Hackworth* 291.

when the United States sent armed forces to put an end to the shooting from rebels in Ciudad Juarez into American territory.[161]

iii Self-Defence

a General Rules

As self-defence is authorised in article 51 of the UN Charter it follows that it will also constitute a legitimising factor for certain acts of which otherwise would be forbidden. There is a question whether article 51 limits the right of self-defence in two respects.

First, it appears to limit a wider right of self-defence under international law by referring to an 'armed attack'.[162] But 'armed attack' is probably now understood to be a wider concept.[163] It has been suggested that the right of self-defence may exist even in cases where there has been no previous use of force[164] although the normal functioning of self-defence is obviously to repel by force another act of force.[165]

Secondly, article 51 appears to restrict the right of self-defence under general international law by introducing a time element: States have only the right to resort to force until the Security Council has an opportunity to consider the matter. There was a question, for example, in the Falklands War when and if a time limit for action by the Security Council expires and when a State can take action on its own without awaiting decisions of the Security Council.[166] Some writers point out that the fact that the Security Council has a matter under its jurisdiction does not preclude the exercise of the right of self-defence under article 51. Consequently, Resolution 502 of the Security Council in the Falklands War was not necessary as authorisation for British action, as it is clear that a State retains the right to defend itself regardless of such formalistic criteria concerning the handling by UN organs. If States did not retain that freedom they would soon hesitate to refer any matter

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161 2 *Hackworth* 299.

162 Khare, S.C., *Use of Force under UN Charter* (New Delhi: Metropolitan Book Co., 1985), 83, 123. On earlier meaning of 'armed attack', see Brownlie, I., *Force*, *op. cit.*, 365–368.

163 *Cf.*, Detter, I., 'Foreign warships and immunity for espionage', *AJIL*, 1984, 72; *cf.*, Khare, S.C., *Force*, *op.cit.*, 85 *et seq*. *Cf.*, also above, Chapter 1 under 1 B vii a on 'war' and 'armed conflict'.

164 Taoka, R., *The Right of Self-Defence in International Law* (Osaka: Osaka University of Economics and Law, 1978), 173.

165 See, in detail, Bowett, D.W., *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), *passim* and on the rule *vim vi repellere omnia jure permittunt*, at 3; *cf.*, Kelsen, H., 'Unrecht und Unrechtsfolge im Völkerrecht', ZaöRVR, 1932, 270 and *idem*, *Law of the United Nations* (New York: Praeger, 1964), 269 *et seq.*; Waldock, C.W.M., 'The regulation of the use of force by modern states in international law', *RCADI*, 1952, ii, 455 *et seq*. On older law under the Covenant of the League of Nations, see, Giraud, E., 'La théorie de la légitime défense', *RCADI*, 1934, iii, 858; Gallus, 'Des amendements au Pacte de la Société des Nations en vue de le mettre en harmonie avec le Pacte de Paris', *RGDIP*, 1930, 30.

166 For the Falkland War, see below, in this Chapter under section B v, on the Consent of a State.

to the Security Council.[167] In some cases the right of self-defence may even come near that of necessity.[168]

In any event, self-defence in international law is always limited by the conditions of proportionality and immediacy: under a nineteenth-century formulation by the US Secretary of State in what is known as *The Caroline* incident, reaffirmed by the Nuremberg Tribunal after the Second World War, the necessity must be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[169]

As in the case of all situations involving what has been called here 'legitimising factors' much will turn on the facts. But the argument of self-defence has been used in numerous recent conflicts even when the nature of the action seemed unlikely to warrant such qualification and when it could perhaps even have been justified under another heading. Vietnam argued to the Security Council that its invasion of Kampuchea in 1978 was an 'action in self-defence after border skirmishes started by the Pol Pot clique'.[170]

But there are also strict limits as to what measure of force is permitted in self-defence. As the Court stated in the Nicaragua Case:

> 'there is a specific rule whereby self-defence would warrant only measures which are proportionate to the armed attack and necessary to respond to it, a rule well established in customary international law'.[171]

b Anticipatory Self-Defence

The special problem of anticipatory self-defence is notoriously difficult to tackle. It is a field riddled with relative concepts where proportion and questions of fact may, in certain cases, legitimise forceful action to pre-empt a concrete and overhanging threat of aggression. But since the notion has been resorted to in a number of conflicts as a cloak for drastic incursions, bombardments and attacks of alleged 'guerrilla strongholds' in the territory of other States, it must be emphasised that anticipatory force falls under the prohibition of force in article 2(4) of the Charter, entailing a *presumption* that it is illegal. A mere threat of attack does thus not warrant military action. On the other hand, a fairly wide right for States to protect their own territory and their own citizens (and other persons on their territory) must be held to exist.

It may be questioned under what circumstances, if any, a right to anticipatory action subsists. If it does exist in some form as a right, it also appears that it is a right which can be forfeited: a State which itself does not have 'clean hands' cannot take such actions. For example, the Security Council condemned South African raids

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167 See for a discussion, Murphy, J.F., *The United Nations*, *op. cit.*, 69–70.

168 Jennings, R.Y., 'The Caroline and McLeod Case', *AJIL*, 1938, 85.

169 *Ibid.*

170 SC Resolution 511(1982); 512 (1982). *Cf.*, below in this Chapter under section B vii on humanitarian intervention and Chapter 4, section C ii (2) (i) on the status of volunteers.

171 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ *Reports* 1986, 94, para. 176.

into Angola even though Angola had allowed SWAPO considerable freedom to use its territory for guerrilla attacks into Namibia.[172]

Anticipatory force has in recent years become more acceptable in practice and few appear to have raised the question whether its use advances the stability of the international legal order or whether its use is, indeed, legal and compatible with international law.

Israel has repeatedly attacked targets outside its territory which it considers as 'threatening'; in another scenario, NATO has repeatedly planned or announced pre-emptive armed attacks against Iran on the assumption that Iran is capable of using, or about to use, forbidden weapons. According to some, the Bush administration prepared the ground for an invasion in Iraq in 2003 by developing arguments of justification of anticipatory self-defence. There were other arguments: because of the new threats that the United States faced after 9/11, an invasion of Iraq was essential.[173] In the end the attempt of justification was obscured by the argument that action was taken as Saddam Hussein did not have the 'right' to have WMDs, that is to say weapons of mass destruction.[174] Part of the justification was thus the argument that Saddam Hussein had arsenals of WMDs, although this argument proved to be erroneous, at least with regard to the claim that Iraq had nuclear weapons.[175]

The legal justification in this case would have been self-defence, based on a right that has consistently been asserted by the United States and United Kingdom to establish and enforce safe zones for the Kurds in northern Iraq and the Shiites in southern Iraq pursuant to UN Security Council Resolution 688 (1991). In that Resolution, adopted in the aftermath of the Persian Gulf War, the Security Council found that the consequences of Iraqi repression of the civilian population in many parts of Iraq threatened international peace and security in the region, and demanded that Iraq end the repression. The Resolution expressly mentioned only the Kurds, but it was 'understood' at the time that the Shiite Muslims in the south were also included. It is fairly clear that it would have been preferable to refer to the need to protect basic human rights than the spurious argument of 'self-defence'.

The right of self-defence extended even to air strikes outside the Iraq zones, if the use of force in the exercise of the right was deemed necessary under the circumstances and proportionate to the use or threat of force.

Before the first Gulf War in 1990 the Security Council adopted Resolution 678, which provided legal authorisation for UN members to use all necessary means to restore international peace and security in the area. Resolutions 678 and 688 were never revoked. Security Council Resolution 687 declared a ceasefire but some argued that ceasefire was no longer in effect because the conditions concerning the

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172 SC Resolution 454 (1979).

173 *Dworkin, A.*, 'Iraq and the "Bush doctrine" of pre-emptive self-defence', in *Dworkin A.* (ed.), *Crimes of War Project* (ICC, 2002).

174 On the definition of WMDs see below, Chapter 7 C.

175 See below in this Chapter and on *R. v Jones*, in Chapter 12, and above, in this Chapter, under A ii, concerning the presumed illegality of the Iraq War. See also below Chapter 7 on the possibility of there having been other WMDs than nuclear weapons in Iraq.

right to inspect Iraq's weapons facilities were not fulfilled. The questionable legal justification in the second Gulf War in 2003 was, apart from the WMDs argument, that the Security Council Resolutions 678 and 688 had somehow 'survived' and would still operate to justify further military action. This argument is, to say the least, tenuous.

c Target Killing

It is not new to kill the leader or the main perpetrators of attacks in armed conflict or to eliminate those who plot an attack. For a long time this might even have been the main policy of colonial powers to pre-empt or suppress any rebellion in their colonies. However, recently the tactics of what is now often called 'target killings' have been used, primarily by States which are, in turn, targeted by terrorists, primarily the United States and Israel. From a theoretical point of view such killings may be conceived as a form of anticipatory self-defence.

It would be reasonable to assume that any form of killing away from a battlefield is illegal, and punishable within the jurisdiction of any State, unless the act is carried out by soldiers in some form of an armed conflict. In this sense, the scenario has changed and, after 9/11, normal rules have been suspended as it is considered that the War against Terror does constitute an effective war so that terrorist leaders may be eliminated without this being considered as 'ordinary' murder as in peace-time.

Many, or most, target killings have been carried out by drones or robots.[176] Over 200 US drone attacks have, in the first three years under the Obama administration, killed twice as many suspected Al-Qaeda and Taliban members than were ever imprisoned in Guantanamo Bay.[177]

The rate of target killings approved by President Obama has reached a level that has made some Senators now demand that a special court is established to review evidence before a suspect is placed on a 'kill list'. This could be done by a court, analogue to the Foreign Intelligence Surveillance Court that Congress set up in 1978. Senator Angus King of Maine said at the confirmation hearing of the new CIS Director John Brennan in February 2013 that it is hardly compatible with the traditions and the laws of the United States to have the executive as 'the prosecutor, the judge, the jury and the executioner'. A special court could safeguard the procedure by which a suspect can be named an 'enemy combatant'.[178]

Drone strikes against Al-Qaeda and Taliban leaders have been considered lawful under US and international law under the September 2001 Authorization to Use Military Force Act which empowers the president to 'all necessary and appropriate force' against nations, organisations or persons who planned, committed or aided the 9/11 attacks. It may be noted that the President of the United States may be competent to suggest what is compatible with the law of the land. It is clearly more questionable what effect his pronouncement on legality under international

176 See below, Chapter 7 B vi on drones and robots.

177 Bellinger, J.B. III, previous Legal Adviser to the Bush administration, 'Will drone strikes become Obama's Guantanamo?', *Washington Post*, 3 October 2011.

178 IHT, 15 February 2013, Leading article.

law may have. In this instance, however, there is a presumption that, in view of the unprecedented attacks by members of a campaign of genocidal *jihad*, attacks against the leaders of this campaign may be justified as self-defence, to preserve the 'hypothetical goal' of international society, which is to secure the survival of the international society and of mankind.[179]

On 3 November 2002 a CIA-controlled Predator unmanned aerial vehicle appeared over a car speeding along an isolated highway 100 miles east of Sanaa, the capital of Yemen. The Predator launched a laser-guided 'hellfire' missile which struck the target and destroyed the car, killing all passengers. American and Yemeni officials claimed that the car's occupants had been six members of Al-Qaeda, including Qaed Salim Sinan Al-Harethi, one of the terrorists the CIA believed to be responsible for the bombing of USS *Cole* in Yemen in 2000. One passenger in the car had been a US citizen, Kamal Derwish, an Arab-American who had recruited Americans for terrorist training at Al-Qaeda camps.

As a senior leader of Al-Qaeda, Qaed Salim Sinan Al-Harethi would certainly qualify as a combatant in a war with Al-Qaeda. Furthermore, the Aden-Abyan Islamic Army is an operational affiliate of Al-Qaeda, and members therefore qualify as combatants, and as combatants they are a lawful target.[180]

The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions condemned the operation repeatedly in annual reports as 'a clear case of extra-judicial killing'.[181]

However, it would appear that this target killing was compatible with rules on self-defence under international law. There were four obvious legal questions with regard to the killing.

First, was the target killing in sufficient temporal connection with the first attack? In other words, was the time lag between 2000 and 2002 too long to warrant the exercise of self-defence? It would seem that even though the killing followed two years after an attack it could be construed to pre-empt or prevent subsequent attacks by these terrorists. Two years would not seem to violate the rule that self-defence must be exercised in relative immediacy with the original attack.[182]

Secondly, was the target killing legal with regard to the fact that it was carried out *before* the above-mentioned emergency regulations came into effect after 9/11 in 2001? Again, it would seem that if the information about a further imminent attack by the targeted terrorists was correct, the US administration probably had the right under international law to eliminate this immediate threat.

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179 See, for my theory on this notion, Detter, I., *The Concept of International Law*, 2nd edn, *op. cit.*, 37 *et seq.* and Detter, I., *The International Legal Order*, 2nd edn, *op. cit.*, 152–153 and 252–253.

180 Dinstein, Y., *The Conduct of Hostilities Under the Law of Armed Conflict* (Cambridge: CUP, 2004), 94.

181 United Nations Commission on Human Rights (UNCHR) (2004), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Extrajudicial, Summary and Arbitrary Executions: Report of the Special Rapporteur Philip Alston*, E/CN.4/2005/7, 22 December 2004, 94.

182 Dinstein, Y., *War, Aggression and Self-Defence*, 4th edn (Cambridge: CUP, 2005), 210.

Thirdly, technically, the United States should have shown that the attack had been authorised by the territorial State. However, US authorities were understandably reluctant to do so. The consent – or at least the absence of protests – of the territorial State seems to have been presumed in this case, as it has been in subsequent cases.

Fourthly, as one of the passengers was a US citizen, the question arose whether the rights of that person to due process had been respected. An important question thus arose whether constitutional rights to life in the United States had been displaced in case of terrorist activities: under the Constitution a US citizen has the right to due process. This last point may be illustrated by a subsequent discussion in relation to a target killing of Anwar Al-Awlaki in 2011.

When Anwar Al-Awlaki, an Al-Qaeda cleric, was killed along with other Al-Qaeda operatives in Yemen in 2011, this was also a target killing carried out by drones. The situation of this target killing was also complex as Al-Awlaki was a US citizen and he was killed with another US citizen in Yemen. Apparently, here an Opinion by the Justice department was held to imply a valid guarantee of due process as this national had engaged in terrorist activities in another country.[183] Still, it may be unsatisfactory to consider a person guilty without a more formal trial.

The Israeli armed forces have used targeted killings on numerous occasions, to eliminate hostile terrorists. In 2004 Hamas leaders Ahmed Yassin and Abdul Aziz Rantisi were thus assassinated.

There were voices which opposed such tactics and a case was brought to the Israeli courts by *The Public Committee against Torture in Israel* and the *Palestinian Society for the Protection of Human Rights and the Environment*, asking for an order *nisi* and an interlocutory order that such killings were unlawful under international law, under Israeli law and under basic principles of human morality. The Petitioners claimed *inter alia* that the right of self-defence under article 51 of the UN Charter does not apply to the conflict with terrorists but only in the case of attack by another State. In a most comprehensive judgment,[184] the Court held that targeted killings may form 'a lawful part of armed conflict' although there must be verified information as to the identity of the relevant target person; if at all possible, the person should rather be arrested and tried; an attack must avoid innocent civilians and, if they are harmed, compensation must be paid in appropriate cases; and rules of proportionality must be strictly observed.

The Court also qualified the terrorist attacks on Israel as an international conflict where the Law of War applies. In that sense, one commentator suggested that the Court had actually narrowed down what it would be entitled to do in an armed conflict: a State has the right to kill combatants without offering them any 'trial'.[185] Again, as in the case of pronouncements of President Bush as to what is

183 *Ibid., loc. cit.*

184 *The Public Committee against Torture in Israel and Others v The Government of Israel and Others*, Supreme Court of Israel sitting as the High Court of Justice, Judgment, 11 December 2006, HCJ 769/02.

185 Dworkin, A., 'Israel's High Court on targeted killing: a model for the War on Terror?', *Crimes of War Project*, 15 December 2006, available at http://www.crimesofwar.org/onnews/

'legal' or 'illegal' under US and under international law,[186] the Israeli Court is clearly competent to state what is 'legal' under the law of that country but not necessarily as to what is 'legal' or 'illegal' under international law.

On the other hand, in a judgment of 15 February 2006, the German Federal Constitutional Court, the *Bundesverfassungsgericht*, declared a German law unconstitutional and void, as it would have entitled target killing by German authorities. §14.3 of the Aviation Security Act (*Luftsicherheitsgesetz – LuftSiG*) authorised the German armed forces to shoot down an aircraft that appeared to be used as a weapon threatening human lives. This Act had been adopted as a consequence of 9/11 to implement new rules to combat the new form of terrorism.[187]

The Court held that this Act is incompatible with the Constitutional Law, the *Grundgesetz*, and therefore void. The Court held there was, *inter alia*, a conflict between its provisions and those that guarantee the right to life under the *Grundgesetz*.[188] Thus, according to the German Federal Constitutional Court, target killing cannot be permitted.

The pretended 'right' to use target killing against terrorists must, as underlined in the above-mentioned Israeli Court Case, be exercised with extreme caution and only when there is no other way to pre-empt an attack by a terrorist. In particular, as Israel is still held to be the belligerent occupier of Palestine territories,[189] alternative methods would normally be available, such as arrest and trial of hostile terrorists within that limited occupied zone.[190] Furthermore, caution must be taken not to cause collateral harm to innocent civilians or soldiers not involved in terrorism. In due course, there might be other avenues to stifle terrorist attacks by removing attacks to limited battlefields where normal operations take place in a war situation.

news-highcourt.html.

186 *Cf.*, above, in this Chapter, under B iv on statement by President Bush.

187 For official documentation, Bunderministerium des Innern, 'Nach dem 11.September 2001: Maßnahmen gegen den Terror', Berlin, 2004. See also *Bericht der Bundesregierung zu den Auswirkungen des Terrorismusbekämpfungsgesetzes*, BT-Innenausschuß A-Drs15(4)218, available at http://www.cilip.de/terror/gesetze.htm.

188 Bundesverfassungsgericht (BVerfG) – Federal Constitutional Court), 59 *Neue Juristische Wochenschrift*, NJW, 751 (2006). For Comments, see, Baumann, K., 'Das Urteil des BVerfG zum Luftsicherheitseinsatz der Streitkräfte', 28 JURA, 2006, 447; Baldus, M., 'Gefahrenabwehr in Ausnahmelagen', 25 *Neue Zeitschrift für Verwaltungsrecht*, 2006, 532; Schenke, W.R., 'Die Verfassungswidrigkeit des § 14 III LuftSiG', 59 *NJW* 736, 2006, 736.

189 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ *Reports* 2004, paras. 90–101. Israel is also bound by the Fourth Geneva Convention in this area.

190 Milanović, M., 'Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case', 89 *International Review of the Red Cross*, 2007, 385.

iv Reprisals

Reprisals[191] provide, according to traditional notions, a legitimate ground for applying force against another State. This right presupposes a previous violation of the rights of a State followed by the refusal on the part of the violating State to make amends. The offended State is then entitled to take 'proportionate' reprisals.[192] As illustrated in the litigation concerning the frozen assets in 1980,[193] the right of reprisals subsists almost as a right to impose economic measures to force another State to comply with international law. When the American diplomats and other personnel had been taken into custody by Iran, the United States froze Iranian assets in all American banks to bring about the release of the hostages.

It is, however, questionable whether, after the establishment of the United Nations, the right to take reprisals still exists: the right of self-defence probably does not include the right of reprisals[194] and it may be that all claims should be channelled through the United Nations to be legitimate. On the other hand, if that organisation is slow to act, as it was in both the Iranian and the Falklands affairs, or if it is not objective and impartial as it proved to be in the Croatian and Bosnian conflicts, an at least temporary right of action may revert to the Member States.

v The Consent of a State

The traditional view is that no international conflict will exist because of an attack if the territorial government has given its consent to a particular act of force. Some even claim that the difference between intervention and war is precisely that an intervening State has the 'acquiescence' of the other State.[195] That is, of course, not necessarily true as there are numerous cases of interventions, where the 'other' State did not consent or acquiesce but, nevertheless, the situation never escalated into war.[196] But the consent of a State, if freely and properly given, can legitimise an intervention which otherwise would have been unlawful. Thus, the US assistance, for example, to suppress raids of bandits and revolutionaries in Texas between

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191 On the current confusion between reprisals against States and reprisals against individuals, see below, Chapter 8, section A iv c.

192 *Nauliaa Arbitration* (1928), 2 *RIAA* 1013; *Air Services Agreement Arbitration* (1963), 16 *RIAA* 5; *cf.*, Stone, J., *Legal Controls of International Conflict* (Sydney: Maitland, 1954), 2nd edn, New York, 1973; Hindmarsh, A.E., *Force in Peace* (Cambridge, MA: Harvard University Press, 1933).

193 This case, which was prepared in the High Court in London, concerned the blocking of Iranian assets in London following a Decree of President Carter on such assets in all American banks. The United Kingdom gave extraterritorial effect by international *comity* rather than by any international *obligation* (see Detter, I., *International Legal Order, op. cit.*, Ch. One) to this Decree and seven American banks were sued in London by Iran which sought to have the assets released. The case, hardly reported in the press or in academic journals, was settled out of court when the hostages were released by Iran.

194 Higgins, R., *The Development of International Law Through the Political Organs of the United Nations* (London: OUP, 1963), 217; *cf.*, Bowett, D., 'Reprisals involving recourse to armed force', 66 *AJIL*, 1972, 1.

195 Thomas and Thomas, *Non-Intervention, op. cit.*, 73.

196 On the threshold, above, Chapter 1, section B iii b.

1911 and 1914 was probably made lawful by the consent of the government of Mexico.[197]

Consent is certainly at the root of many rights States enjoy and, conversely, of many burdens a State may suffer in the international society. Different degrees of consent may even be required for certain situations where a State allows another State right to act in its territory.[198] Consent may thus deprive an action of its illegality by the rule *volenti non fit injuria*, or, in other words, if you willingly consent to enter into a situation, you cannot complain if you come to be injured. This maxim is also known as a voluntary assumption of risk.

Consent may be given *in casu* in the event of, for example, raids, but also in some general form in advance,[199] for example in a treaty allowing for intervention in certain circumstances. It may be added that one treaty which does allow for such right of intervention is the United Nations Charter itself whereby it authorises, for example, under article 41, organs of the organisation to intervene in the internal affairs of another State.

By using the theory of '*abstract consent*',[200] that is to say a kind of general consent given *in advance*, we may explain that the authorisation of the United Nations – which could have constituted a separate legitimising factor – can conveniently be subsumed under the present sub-heading: the parties to the Charter, and those who later have acceded to it, have agreed, beforehand and in the abstract, to certain action to be taken by the UN: actions include, for example, sanctions[201] which may involve military action, possibly with UN Forces; because of the 'abstract consent' such action cannot be held to be in contravention of any rules prohibiting force. There is an overriding presumption that the UN action is compatible with international law.

But individual States who apply force to another State have to accept a different presumption: that of deviating from a compelling rule prohibiting force unless they can show, *inter alia*, clear consent on part of the State they 'assist' by military force. Sometimes, formal consent by the government is not sufficient if that government, for example, has no 'popular support'.[202]

Thus, assistance lent to a 'puppet' government, or to a government controlled by the intervenor (or by some other State) will always be illegal. The rule on democratic consent demands that the 'people' wish for assistance. In theory, this is quite clear. In practice, there are often insurmountable problems in assessing the evidence on which legality depends. Soviet writers claim that the then Soviet

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197 2 *Hackworth* 282.

198 For my theory of a requirement of '*continuous consent*' for any territorial infringement, *e.g.* for military bases, see Detter, I., *Independent State, op. cit.*, 197 *et seq.*

199 For my theory of '*abstract consent*' as constructed in one earlier work by the author, to imply general authorisation by a previous authorising Treaty, see Detter, I., *Law Making, op. cit.*, 322 *et seq.*

200 See the previous note.

201 Under article 38, 41 and 42.

202 *Cf.*, above, Chapter 1, section C 1 on democratisation of international society and below, in this Chapter, section B viii under 'patronising intervention'; *cf.*, 1 *Hackworth*.

Union was requested in Afghanistan by the legitimate government[203] and the United States claimed that 'assistance' was sought by Nicaragua, if not by the government, by a faction that *should* have formed the government.[204] In both these situations the intervening State seems not to have discharged a duty of showing the international society that the intervention had popular support. In neither case had the intervenor rebutted the strong presumption that, on the face of it at least, he committed a violation of the rule of international law which protects territorial integrity.

It has been argued that outside support of the Russian Federation of Socialist Republics (RFSR), later the USSR, in Mongolia and in Manchuria in the 1920s to suppress contra-revolutionaries was, in 1929, held legitimate as it had obtained the consent of the Soviet Union.[205] A similar situation was that of British assistance by bombardment following attacks of armed bands on Aden,[206] although in this case the assistance was given in a more obvious self-interest.

But the situation is more complex if one considers the effect of consent, or lack thereof, in the case of assistance given or offered to insurgents.[207] This is an area where problems bearing on intervention, recognition and the effect of consent of the legitimate government converge.

It could validly be argued that the requirement of consent of the legitimate government is irrelevant and, *per se*, a legal and factual impossibility in respect of any act offered to assist insurgents. It has been claimed that matters radically change after recognition of insurgents[208] or when other States may become parties to the war.[209] But it has also been demonstrated[210] that this is probably not correct in view of contemporary State practice, rejecting the formalistic notion of war in favour of a functional criterion whether substantial hostilities actually are taking place.[211]

vi Conflicts with *Jus Cogens*

One could conceivably view the NATO action against Serbia and Montenegro in 1999 as 'reprisals'.[212] It could also be subsumed under a discussion later in this work on humanitarian intervention or the 'responsibility to protect' (R2P).[213] But the action had a three-fold purpose: to reprimand the Belgrade regime for the suppression of the Albanians in Kosovo, to assist the Kosovars, but also, and more importantly, to force Yugoslavia to cease such action against the ethnic Albanian

203 Rybakov, Y.N., *Agresia, op. cit.*, 147.

204 *Nicaragua v. United States Case* (1984) and (1986); ICJ *Reports*, 1984 and 1986.

205 Brownlie, I., 'Armed bands', *op. cit.*, 732. On assistance to government in internal disputes, see above, in this Chapter, A iii b.

206 *Idem.*, 725.

207 On assistance to insurgents in general, see above in this Chapter, B iii.

208 See above, Chapter 1, section D i b.

209 See 2 Oppenheim 660.

210 See above, Chapter 1, B ii.

211 See above, Chapter 1, B iii d.

212 See above, in this Chapter under iv.

213 See below, in this Chapter under viii b.

population of Kosovo. The legitimising ground for such intervention was thus that Yugoslavia had violated a mandatory and peremptory norm of international law, thus a rules of *jus cogens*,[214] regarding the duty of States to refrain from genocide and gross violation of human rights. It may be that protecting individuals from genocide provides a new ground for legitimising intervention and the use of force against a State. The United Nations should normally authorise such action but as the UN was slow to act,[215] there is argument to support the action by NATO, as the lives of so many individuals were at stake.

Further actions against Libya in 2011[216] and various discussions about suffering of citizens elsewhere should perhaps also be seen in the light of the duty of States to uphold peremptory rules of international law.

On the other hand, international law does not condone any self-assessed violation of *jus cogens* to interfere in the internal affairs of another State. It is, indeed, uncertain what the contents and limits of *jus cogens* may be;[217] but there is certainly widespread support that it must, at least, include the prohibition of genocide.

vii Non-Responsibility

A State has a duty to suppress injurious acts against foreign States and a particular duty to prevent any hostile military expeditions. This is an old rule in international law.[218] For a long time a distinction has existed with regard to the fitting out of military expeditions and the venture of individuals. The former, but not the latter, was prohibited by Hague Convention V in 1907[219] and by many preceding national legislative Acts.[220]

There were many borderline cases between fitting out expeditions and the expeditions of volunteers, like, for example, in the Spanish Civil War when volunteers left *en masse*. Other cases difficult to categorise were the expeditions of volunteers of the People's Republic of China in Korea.[221] Some raised the argument that volunteers, for whom a State is not responsible under international law, could never be allowed to act in a situation when the United Nations was taking 'enforcement action'. But the situation was complicated by a number of uncertain issues above all concerning whether there was really a UN 'enforcement action' in

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214 See, Detter, I., *International Legal Order, op. cit.*, 174ff.

215 See above, in this Chapter under self-defence, section B iii.

216 See below, in this Chapter under vii and under viii d.

217 See below, in Chapter 5 C and Detter, I., *International Legal Order, op. cit.*, 174ff.

218 Curtis, R.E., 'The law of hostile military expeditions as applied by the United States', *AJIL*, 1914, 1.

219 For reference see, above, Chapter 1, note 120.

220 *E.g.* the UK 1870 Foreign Enlistment Act, 33 & 34 Vict.c.90, applied in *R. v Sandoval* (1887), 56 LTR 526 and in *R. v Jameson* (1896) 2 QB 425.

221 GAOR, 5th sess., Ist Committee, 1950, 401.

Korea. There were clear indications that it might have been a collective security action of certain States, as there was no actual UN authorisation for the action.[222]

States have often sought to justify the use of force against another territory by claiming that attacks or incursions were carried out by certain units of volunteers for which the State was not 'responsible'.[223] Sometimes a State would claim that it had simply 'no knowledge' of the expedition.[224] In recent practice this line was taken by Vietnam to justify, in conjunction with other arguments,[225] their invasion of Kampuchea in 1978.[226]

Today, when the use of force and aggression have been outlawed the duty to prevent any military incursions by persons into foreign is enhanced. Whereas formerly the only duty of this kind existed vis-à-vis 'friendly' nations,'[227] it is now extended to all nations and, it may be assumed, imposes a demand for even greater control by the State even of activities of volunteers.[228]

viii Justified Intervention

a Excesses in the Reserved Domain

In principle, the territorial State has full power within the reserved domain.[229] But sovereignty is not unlimited even in this field. It may be useful to clarify that the exercise of sovereignty of a State is, in any event, strictly limited by the mere fact that the State belongs to the society of nations. Furthermore, its sovereignty and authority to govern is essentially based on the grant to do so by the citizens of that State.

Certain limitations to a State's sovereignty in its own territory are caused by rules concerning basic human rights which a State is under duty to respect under general international law, even outside the framework of treaties. The right of jurisdiction of a territorial sovereign does thus not imply any unlimited right to enact rules, take executive or administrative decisions, or adjudicate within the *reserved domain*.

There are numerous exceptions to the full power of a State in its territory even before any treaty is signed to limit its authority. For example, a State is bound to grant diplomats and consuls certain privileges when they reside in its territory.[230] A State may also have to tolerate certain transit rights of a neighbouring land-locked

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222 Bastid, S., *Cours de droit international public* (Paris, 1951–2), 340; *cf.*, Detter, I., *Law Making*, *op. cit.*, 60.

223 *Cf.*, above, Chapter 1 section B iii c and this Chapter section A iii.

224 See, *St. Alban's Claim, 4 Moore 4042*, on a secret mission sent from Canada to the United States.

225 Below, in the next section on humanitarian intervention.

226 *Cf.*, Murphy, J.F., *The United Nations*, *op. cit.*, 61; *cf.*, SC resolutions 611 (1982) and 512 (1982).

227 *Cf.*, *The Alabama, United States v United Kingdom, 7 Moore, 1059*; but even then there was a question of special duties under a Treaty, the Treaty of Washington of 8 May 1871.

228 *Cf.*, below, Chapter 4 section C ii (2) on the status of volunteers in war.

229 On the 'reserved domain' see above, in this Chapter, under A iii a (1).

230 See Detter, I., *The Independent State*, *op. cit.*, 174–176, 198, 304–305; and Detter, I., *Concept*, *op. cit.*, at 46–49.

State, lest the 'freedom of the seas' will lose all meaning.[231] States may not divert rivers to the exclusion or damage to downstream riverains[232] nor cause pollution to another State.[233] Furthermore, a State is obliged to respect the most basic rules of human rights and humanitarian rules to all persons present in its territory; these rules may most conveniently be phrased in a negative way: thus, the right to *avoid* genocide, *avoid* slavery, *avoid* torture and *avoid* apartheid.[234] As soon as a State ceases to respect such rights there is often international condemnation and, at times, international sanctions.

The *reserved domain* where the territorial State is the sovereign does not only – in principle – exclude acts of other States but in this area the power of the sovereign State is also restrained. The article 2(7) is certainly understood to be more circumscribed than when the Charter was drafted in 1945. Clearly, even then, in the aftermath of the atrocities of the Second World War, it was understood that States were precluded by rules of international law to, for example, infringe certain fundamental rules of international law

For example, limitations imposed on a State's internal sovereignty by general rules on immunity of diplomats, or other persons or entities endowed with immunity under international law, is mandatory. Such restrictions of jurisdiction therefore operates whether or not a State has acceded to relevant conventions on the immunities. For example, even if a State has not ratified the Vienna Convention on Immunities of Diplomats of 1969, it may not infringe the liberty of diplomatic agents duly accredited in its territory.

The Iranian hostage crisis, resulting in a case before the International Court of Justice[235] and the ensuing *Frozen Assets Case* in the High Court of London[236] show that a State is not able to rid itself at will from obligations to respect general rules of international law.

Some of the most important exceptions to the power of a State within the reserved domain concern human rights and rules of humanitarian law. A State is thus obliged to respect basic human rights and basic rules of humanitarian law in their own territory.

Such *basic human rights* may be very modest and very few but still most important and they *prevail* over whatever a State chooses to legislate. As mentioned above, such rules concerning human rights can be summed up as being the right to avoid genocide, the right to avoid torture and slavery and the right to avoid apartheid.[237] It is gradually clear that also the important right of expression must qualify among these *basic rights*, as the right to criticise State structures are excluded from comment.[238]

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231 *Ibid., loc. cit.*

232 For example, the *Lake Lanoux Arbitration (France v Spain)*, 24 ILR 101 (1957).

233 *Trail Smelter Arbitration (United States v Canada)*, 3 RIIA 1905 (1938).

234 See Detter, I., *International Legal Order*, *op. cit.*, 288 *et seq.*

235 (1979) and (1980) ICJ *Reports*, 1970 and 1980.

236 Settled and unreported.

237 See, further, above in this Chapter on *jus cogens*, section B, vi.

238 Limitations of this fundamental right of expression can only be allowed for pornography, and other publications which offend public morals, along similar lines as those

Formulated in this modest way, it is not even suggested, with regard to genocide, that a State has to refrain from imposing the death penalty, although there is a marked trend towards an international convention on this matter. The formulation merely suggests that – as in philosophical terms – quality changes with quantity. There is thus a difference between inflicting the death of one, or several, citizens and the extermination of a group.

Most States, except the most totalitarian regimes, now accept in their practice and in their doctrine, certain limitations of a State's internal sovereignty. This indicates that certain basic human rights are *inherent* in the international legal system as States have accepted[239] an *international minimum standard of behaviour* which States, or their internal power organs, officials and authorities must show individuals present in their territory.

This state of affairs is essential to the right of others to *intervene* in the internal affairs of another State. This question of legitimate interference or intervention to stop a government abusing its own citizens is highly topical: it was for this reason that the intervention in Libya took place in the spring of 2011 and it is for this reason that there are calls for intervention in Syria in 2013 as the government there too maltreats and attacks its own citizens. It must be emphasised that this right of intervention is only activated in the case of *serious* violations of human rights, as exceptions to the sovereign rights of a State in its internal affairs may only be made in aggravated circumstances.

It then becomes clear that the concept of the *reserved domain*, the notion of sovereignty and the practice of intervention are intimately linked. But certain States have a particularly wide conception of sovereignty. Russia inherited this interpretation of sovereign power from the Soviet Union, which, as a communist State, even held that discussions about its internal affairs could not be tolerated in a forum like, for example, the United Nations. China, a communist State, has also adopted this exaggerated idea of its sovereignty. Because of the views of Russia and China of extensive sovereignty and an untouchable *reserved domain* the Security Council was blocked in the matter of Syria in 2012 by a double veto of both Russia and China, the staunchest supporters of a wide notion of sovereignty and of the *reserved domain*. On the other hand, it must be stressed that sovereignty is the basic pillar of international society and any limitation of the power of the State must be made with considerable caution.

b Assistance to Insurgents

Assistance to insurgents appears to be clearly outlawed by numerous Resolutions by the General Assembly, apparently reflecting general international law.[240] But things seem to have rapidly changed in this area. During the Arab Spring in 2011, when a number of civilians in North Africa protested, with occasional military force,

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laid down in the case law of the European Court of Human Rights, see its *Reports of Judgments*.

239 Even the ex-USSR explicitly accepted this rule shortly before the demise of communism, see above.

240 See above, in this Chapter, under A iii c.

against their governments, other States appear to immediately have taken the side of the insurgents. Far from coming to the rescue of the beleaguered governments, other States assisted, first by words and statements, but in due course, by action with or without the United Nations. For example, the above-mentioned uprising in Libya led to an intervention, all in aid of the insurgents; the government was deposed and the rebels installed their own new government. Other States relied here on Resolutions of the General Assembly condemning Colonel Gaddafi's treatment of his own citizens and in particular the bombing of his own civilians. States accepted that some Resolutions of the General Assembly reflect general international law on these issues.[241] Later, the Resolution 1973 on 18 March 2011 was obviously essential for military intervention by Allied Forces.[242]

The call from other quarters to intervene in Syria was as it had come to light, in this day of rapid data transfer, that the government had attacked its own civilians who were protesting in the streets and several had been killed. A similar situation had happened a few months earlier in Libya where Colonel Gaddafi was known to have bombed his own civilian citizens. In that case a joint coalition did intervene, with the authorisation of the Security Council, where the Resolution was adopted when Russia and China did not veto but abstained.[243] A no-fly zone was established to protect the civilians from being bombed by their own government. The Security Council expressed grave concern at the escalation of violence in Libya and the heavy civilian casualties. It condemned 'the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions' and said that the attacks against civilians 'may amount to crimes against humanity' and pose a 'threat to international peace and security'. For this reason, the Security acted under Chapter VII of the Charter which makes its Resolution binding. A no-fly zone was established, as well as an arms embargo, and Libyan assets were frozen. After heavy fighting, the government was deposed and Gaddafi finally killed on 20 October 2011.

Assistance to insurgents has lately been held to be justified as 'humanitarian intervention', a practice which, as will be shown, is riddled with political complications.

c Humanitarian Intervention

(1) Traditional Views

In 1977 a provision was inserted in article 70 (1) and (2) of the Protocol I to the Geneva Conventions, stipulating that the offer to provide humanitarian assistance would not be considered as 'intervention' or a 'hostile act'. The Resolution 43/131 of the UN General Assembly of 1988 also speaks of the right to provide humanitarian assistance to victims of natural disasters and another Resolution of 1990, 45/100, authorises corridors for humanitarian urgencies. But Resolutions of

241 On the effect of General Assembly Resolutions, see Detter, I., *International Legal Order, op. cit.*, 212–251.

242 See above, in this Chapter.

243 SCRes 1973 18 March 2011.

the General Assembly are not binding and the right to intervene for humanitarian reasons does not have any legal justification derived from such Resolutions. The fact remains that no State can intervene in another without the express consent of the territorial State.

'Real' humanitarian assistance does not constitute an unjustified intervention as it is based on legitimising elements. In other words, such intervention is, occasionally, legal.[244] However, States have often claimed that an intervention was carried out for humanitarian purposes and that therefore their actions are compatible with international law. Even in the most implausible situations such defences have been put forward. There was little to substantiate any such legitimising circumstances in the Grenada Invasion,[245] apart from the fact that even if there had been, there was lack of proportion between the need and the size and intensity of action.

It is difficult to find a 'pure case' of humanitarian intervention. In the complex situation of military intervention, however, it may be that humanitarian motives can be pleaded in mitigation.[246]

Humanitarian intervention provided the basis of legitimacy for Tanzania's invasion of Uganda in 1979. This action could hardly be construed as self-defence, in spite of some such claims, in response to armed border incursions by Amin troops, as the response in that case had been grossly disproportionate.[247] But the incident raises an interesting question: does the attacking State itself have to state that it takes humanitarian intervention? Tanzania had not done so and yet, because of the nature of Amin's rule in Uganda, there were no voices raised against the invasion.

Humanitarian intervention must be allowed rarely and with caution. It may often just be pleaded as a pretext for war.[248]In the past there was much misuse of this title for unlawful intervention and a cloak for a number of unrelated activities. On the other hand, there must be cases where the unilateral use of force is 'less wrong than to turn aside'. One possible such case might have been the Vietnamese invasion of Kampuchea (Cambodia) against the Pol Pot reign of terror.[249]

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244 There is vast literature on humanitarian intervention. For an authoritative work, see, Murphy, S.D., *Humanitarian Intervention: The UN in an Evolving World Order* (Philadelphia: Univ. of Philadelphia Press, 1996)

245 See, on the Grenada Invasion, Gilmore, W., *The Grenada Invasion* (London: Mansell Publishing Co., 1984).

246 Schweisfurth, T., 'Operation to rescue nationals in third States involving the use of force in relation to the protection of human rights', 23 *GYIL*, 1980, 159; Behuniak, T.E., 'The law of humanitarian intervention by armed force, a legal survey', *Military Law Review*, 1978, 157; Simma, B., 'Zur bilateralen Durchsetzung verträglich verankerte Menschenrechte', in Schreuer, C. (ed.), *Autorität und internationale Ordnung* (Duncker & Humblot, 1979), 129; Fairley, H.S., 'State actors, humanitarian intervention and international law: re-opening Pandora's box', 10 *Georgia Journal of International and Comparative Law*, 1980, 29; Franck, T. and Rodley, N., 'After Bangladesh: the law of humanitarian intervention by military force', *AJIL*, 1973, 275; Brownlie, I., 'Humanitarian intervention', in Moore, J.N. (ed.) *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press, 1974), 217.

247 On proportionality in self-defence, see above, in this Chapter, section B iv.

248 *Cf.* Goodman, R., 'Humanitarian intervention and pretexts for war;, 100 *AJIL* 2006 107.

249 Murphy, J.F., *The United Nations*, *op. cit.*, 63–64.

(2) The Right to Protect (R2P)

As 'humanitarian intervention' is considered such a politically loaded expression, a new variant has recently become popular: a form of intervention which actually means virtually the same as 'humanitarian intervention' but which appears more acceptable as it is camouflaged as 'the Right to Protect', with the acronym R2P.[250]

The renaming of 'humanitarian intervention' as the Right to Protect was first discussed in the context of the Biafran War in 1967–70. In 1971 the 'Doctors without Borders', or the *'Médecins sans Frontières'* was founded by Dr Bernard Kouchner, with the aim to providing medical assistance in war zones.[251] As the new term caught on, there was, however, also much criticism by those who considered the name-change a surreptitious way of widening illegitimate way to intervene in other States by not referring to the actions as 'interventions'. The initial term had been the 'duty to intervene' in Kouchner's first book, then it became the 'right to intervene' and only finally 'the responsibility to protect'. [252] A research unit for 'International Commission for Intervention and the Responsibility to Protect' was founded, with a mandate to study and recommend the limits of sovereignty and the mechanisms of R2P.

However, around the year 2000, the non-aligned 'Group of '77', of developing nations, indicated that they were not, as had been assumed, grateful for such interventions in their internal affairs, viewed as threats to their newly won independence and their sovereignty. On the other hand, some 160 states did endorse the R2P doctrine at the 2005 United Nations Summit, including China. As has been pointed out above, China does adhere to the doctrine of absolute sovereignty and it was therefore somewhat surprising that that State agreed that collective action could be allowed if there were massive infringements of human rights. The Final Act of the Summit provides that:

> 'collective action (may be taken) in a timely and decisive manner through the Security Council, if peaceful means are inadequate to guarantee stopping genocide and crimes against humanity.'

The UN Security Council expressly referred to the R2P doctrine when it authorised the no-fly zone to force government forces to stop bombing of civilians in Libya. But the Bishop of Tripoli forcefully begged those who intervened in Libya under the R2P doctrine to 'stop the humanitarian massacre' – as many innocent people also died in the operation to enforce the no-fly zone. A binding Resolution of the Security Council is required for the R2P doctrine to become operative. Even so, R2P appears to be a fluid and nebulous concept that could be dangerous to the international legal system.

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250 See Detter, I., 'New forms of sovereignty', *op. cit.*, available at http://www.thomasmoreinstitute.org.uk/node/386.

251 Kouchner, B. and Bettati, M., *Le devoir d'ingérence* (Paris: Denoël, 1987); *cf.*, Bettati, M., *Le droit d'ingérence* (Paris: Odile Jacob, 1996).

252 *'Le devoir d'ingérence',* then *'Le droit d'ingérence'* and finally, *'La responsibilité de protéger',* see above for the full title of the books.

d Pre-emptive Intervention

In recent we may discern a new model of intervention. This became apparent, first in the NATO action against Yugoslavia in 1999,[253] where one of the declared aims was to make that country cease repression of ethnic Albanians in Kosovo, a province of Serbia. The intervention was thus undertaken in order to prevent the situation from becoming even worse and was intended to mitigate the effect of the brutal policies the Belgrade government had been adopting with regard to ethnic Albanians in their territory.

e Punitive Intervention

There also appears to be a punitive form of intervention in some situations where States or organisations have intervened in a State. In the Gulf War, the coalition forces in *Operation Desert Storm* forced Iraq to withdraw from Kuwait by air and ground campaigns, but there was *also* a displayed intention to punish Iraq for the illegal invasion of another State and for its repression of certain minorities, especially the Kurds.[254] This punitive element might be particularly evident in strategies which no longer sought the withdrawal of Iraqi forces but which had as their objective the limiting of Iraq's military power in general terms. The same can be said about NATO's bombardment against Yugoslavia in 1999[255] where the punitive element was brought into force a definite settlement in the region.

f Patronising Intervention

There is a type of intervention, practised by major powers, which could perhaps be conveniently termed *'patronising intervention'*. This is the type of intervention which is most affected by political attitudes and particularly by the doctrine of spheres of influence which, contrary to what many claim, is not at all outmoded in state practice. Although not always carried out by military means, this type of intervention is often accompanied by forceful action which the acting State claims is legitimate albeit having its roots in an exaggerated view of what may legally follow from a geographical/political concept like the 'sphere of influence'.

This is thus not a new type of intervention.[256] It may be new to call it patronising; such a term would seem to sum up best the action when States intervene to bring about 'what is best' for another country. Sometimes a State may refer to its action

253 The exhortation was directed mainly against Serbia as Montenegro had been much less involved in the repressive policies of Belgrade.

254 *E.g.*, SC Res. 688 (1991).

255 See above in this Chapter, under B iv, viii b and c as well as Chapter 12 C e.

256 *Cf.*, The Monroe Doctrine 're-applied' for Cuba, Wright, Q., 'The Cuban quarantine', 57 *AJIL*, 1963, 546; McDougal, M.S., 'The Cuban quarantine and self-defence', *op. cit.*, 597; Giraud, *RGDI*, 1963, 503; and on the 'Eisenhower doctrine', announced 9 March 1957, on the Lebanon, see, for a critique, Delivanis, J., *La legitime défense en droit international moderne* (Paris: LGDJ, 1971), 131–132; for the Truman and Nixon doctrines on a firm stand by the United States against 'communist aggression' and on Soviet views in response to 'imperialist aggression', see Albert, C., *Du droit de se faire justice dans la société internationale depuis 1945* (Paris: LGDJ,

as being legitimised because of 'State security', 'State interests' or some other such vague terms which at least in international law does not confer any legitimising effect although, in the political world, it may explain the desirability of an action. During the time of a world divided between communist countries and 'Western' style States, ideological motivations views played a significant part in the use of 'patronising intervention' intended to 'convert' a targeted country. After the fall of communism, however, there is still evidence of continuing practice of 'patronising intervention'.

Sometimes, a State may refer to self-defence or collective self-defence[257] although the whole tenure of the action would be more readily explained by a concept like 'patronising intervention'. When asked whether States have a right to 'destabilise' a constitutionally elected government of another country, President Gerald Ford stated in 1974 that 'It is a recognised fact that historically as well as presently such actions are taken in the best interests of the countries concerned'.[258]

The most striking case in recent times is the action of the United States to mine the ports of Nicaragua and to take other 'para-military' action against that State.[259] The United States claimed that 'United States actions were in the exercise of the right, indeed the duty, to engage in collective self-defence with the other Central American States in response to Nicaragua's acts'.[260] The International Court of Justice decided by an injunction in 1984 that the United States should cease such activities,[261] but the United States claimed that it was entitled to pursue certain other measures. The United States then decided to withdraw from the Court proceedings and discontinued its acceptance of the Optional Clause.[262] However, even if a State claims to be entitled to take action by force in the interest of another State, such interference violates, not only the rule prohibiting force, but also the right of self-determination.[263]

Another example of patronising intervention in recent times is the intervention of numerous international bodies and major powers in 1991 insisting that it would be 'best' for the constituting States of the Socialist Federation of Yugoslavia if the (communist) Federation was kept together, whatever wishes Slovenia and Croatia had expressed to distance themselves from communism by achieving their own independence.[264]

Claims that a leader has not been democratically elected may also sometimes be used to legitimise intervention. The coup in Mali against President Amadou

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1985), 321, 336, 363 *et seq.*; for the Brezhnev doctrine see *e.g.*, Frenzke, D., *Die Rechtsnatur des Sowjetblocks* (Berlin: Berlin-Verlag, 1981), 204.

257 *Cf.*, above, in this Chapter, B iii.

258 Statement 16 September 1974; Falk, R., 'An alternative to covert intervention', *Proceedings ASIL*, 1975, 195. *Cf.*, Fatouros, 'Remarks on covert intervention and international law', *op. cit.*, 192.

259 *Cf.*, above, in this Chapter, under A ii c.

260 ICJ, *Verbatim Record*, CR/84/17,74.

261 ICJ, *Reports*, 1984, 169 on interim measures.

262 ICJ, *Reports*, 1986, 15 and *cf.*, *supra*, in this Chapter, section B v.

263 See Detter, I., *The Independent State*, *op. cit.*, 3 *et seq.*

264 See below in the next section in this Chapter.

Toumani Touré on 22 March 2012 installed Captain Amadou Haya Sanogo as Head of the Junta. The West African Economic Community, the *Communauté économique des Etats d'Afrique de l'Ouest* (Cédéao) ordered a total embargo against the junta in power in Bamako. The President of the Ivory Coast, Alassane Quattara, announced at the Meeting of the Cédéao in Dakar that the embargo would not be lifted until the constitutional order, '*l'ordre constitutionnel*', had be restored. This raises serious questions about the proof that should be provided as to the lack of democratic procedures in elections in another country and doubts about the respect for another country's sovereignty. Unless there are signs of serious violations of fundamental human rights,[265] such sanctions must be viewed as illegitimate interference in the internal affairs of another State.

ix Self-Determination: Revival of Just War Theories

There is no shortage of commentaries on the medieval and post-medieval theories of '*just war*'.[266] This century, and in particular during the last few decades, there has been a noticeable revival of just war theories not only to justify wars for the pursuit of just causes in religious terms[267] but to find legal justification for 'liberation' wars against 'domineering' larger or stronger States.

Even early writers who condemned inter-State wars, still saw justification of wars of international liberation, insisting that they must be more 'just' and legitimate than any international wars.[268] According to Marxist writers a war against 'suppressors' and 'enslavers' will always be lawful within a capitalist society.[269] Thus, use of force to attain 'self-determination' is permissible[270] and, in this vein, it is sometimes claimed that liberation wars by 'dominated' small or new States do not violate any legal rules.

The rule of self-determination has been used as a justification for measures of coercion. It has been argued that it could not be 'wrong' or 'illegal' to start wars for national liberation on the basis of such a rule of self-determination. Some Soviet writers held that 'nations' who are not States can resort to national liberation wars.[271] Other Soviet writers denied that nations whose 'personality' is just emerging can participate in inter-State relations.[272] In this way, the 'new' concept of liberation wars as 'international'[273] is logically difficult to reconcile with the

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265 See above, in this Chapter under B viii b on humanitarian intervention and R2P.

266 Keen, M., *The Laws of War in the Later Middle Ages* (Oxford: Routledge & K. Paul, 1965), 63 *et seq.*; Russell, F.H., *The Just War in the Middle Ages* (Cambridge: CUP, 1975); Johnson, J.T., *Just War and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981).

267 For example, the activities of Hezbollah soldiers in the Lebanon; and *cf.*, on '*jihad*' in the Muslim world, Rechis, A., 'L'Islam et le droit des gens', *RCADI*, 1937, ii, 375; *cf.*, also below, Chapter 5, section C i on alleged *jus ad bellum*.

268 Rougier, A., *Les guerres civiles et le droit des gens* (Paris: L. Larose, 1903), 160.

269 *Cf.*, Lenin; 8 *Works*, Berlin ed., 1958, 568.

270 Tunkin, *Sila*, *op. cit.*, 40.

271 Ushakov, N.A., *Soviet Yearbook of International Law*, 1964–5, 74.

272 Lukachuk, 2 *Meshdunaronogo pravo*, Kiev, 1968, 9.

273 See above, Chapter 1, section I D d.

view that liberation movements are cut off from any inter-State relations. But then liberation wars are not necessarily on such inter-State footing but concern, more immediately, the attainment of self-determination.

The urge to defend liberation movements and their goals has led to condemnation of 'repressive' force applied by the lawful government against any such movements.[274] The few who sought to apply the principle of self-determination without any corollary of a 'right to fight' at the Conference on Conventional Weapons, made their suggestions in vain.[275]

There has been an increasing body of opinion suggesting that war waged by liberation movements would have special features and constitute 'just wars'. At least according to views put forward by the Third World itself 'emancipation wars' would have this standing.[276]

At the Diplomatic Conference elaborating the 1977 Protocols it was also suggested, for example by the Chinese delegation, that national liberation wars are just and should therefore be 'supported' by all countries that uphold justice.[277] But some representatives rebutted this idea as an 'archaic' concept.[278] Some insisted that the right to wage wars need not follow from the rule of self-determination. Germany objected at the 1980 Conference on Conventional Weapons that it would be inappropriate to include a reference in the Preamble to the 'right to fight for national liberation' but suggested that instead a reference to the right of self-determination be adopted.[279]

Even if the Third World occasionally attempts to revive the obsolete theories of the *just war* which may be conceptually and practically unacceptable in these days when all war has been outlawed, it must be emphasised that such theories lack any legal basis. Yet, even if a war is 'just' in the eyes of some developing countries the warfare must still be subjected to stringent laws of warfare and humanitarian rules. In this sense, the Law of War will uplift any armed conflict to a higher 'civilised' standard, whether or not it is claimed that the conflict or war is 'just' as the Law of War 'civilises, in equal measure, both the just and the unjust'.[280]

Those who instigate liberation wars may violate the *jus ad bellum* which exists no more[281] but States must still not exempt belligerents of liberation movements from the *jus in bello*. For there is often a temptation for States '*s'opposant à un violateur du jus ad bellum de vouloir soumettre ce belligerant illégal à un régime discriminatoire*

274 Ronzitti, N., 'Resort to force and wars of national liberation', in Cassese A.,(ed.), *Current Problems of International Law* (Milan: Giuffré, 1975), 320.

275 A/CONF.95/8, Annex II, Appendix B and C (Germany).

276 *E.g.*, Meyrowitz, H., *Le principe d'égalité des belligerants devant le droit de la guerre* (Paris: Pédone, 1970), 100. *Cf.*, Weber, H., *Der Vietnam Konflikt – Bellum Legale? Die Rechtspflichten der Staaten under dem Gewaltgebot der UN-Charta* (Frankfurt: A. Metzner, 1970); Johnson, J.T., *Can Modern War be Just?* (New Haven and London: Yale University Press, 1984); Walzer, M., *Just and Unjust Wars* (London: Allen Lane, 1978).

277 CDDH/SR.12, vol. 5, 120.

278 *Ibid.*, 123.

279 A/CONF.95/8, Annex II, Appendixes B and C.

280 *Cf.*, Blutschli, J.C., *Das moderne Kriegsrecht der zivilisierten Staaten*, 2nd edn, 1874, para. 519: '*Das Kriegsrecht zivilisiert den gerechten und den unrechten Krieg ganz gleichmässig*'.

281 Below, Chapter 5, section C i.

sur le plan du jus in bello.'[282] Just war theories are defunct and liberation movements must seek other means to attain statehood for their people. The normal legitimising factor is then the rule of self-determination which undoubtedly furnishes a legal title for resisting (but not for starting to employ) use of force in contemporary international society. Naturally, it is difficult to determine when and who 'starts' to use force. But, if it is a 'clear' question of 'second' use, it may be legitimised under modern international law, not as self-defence but under the heading of self-determination. This may be illustrated by the war waged by Slovenia and Croatia to attain independence after the massive attacks of the Federal Yugoslav Army in 1991 to quench their quest for self-determination.

Once an armed conflict has developed, there must be safeguards to ensure that certain minimum rules of the Law of War are respected by all sides in a conflict. Liberation movements and seceding States are undoubtedly bound by the Law of War.

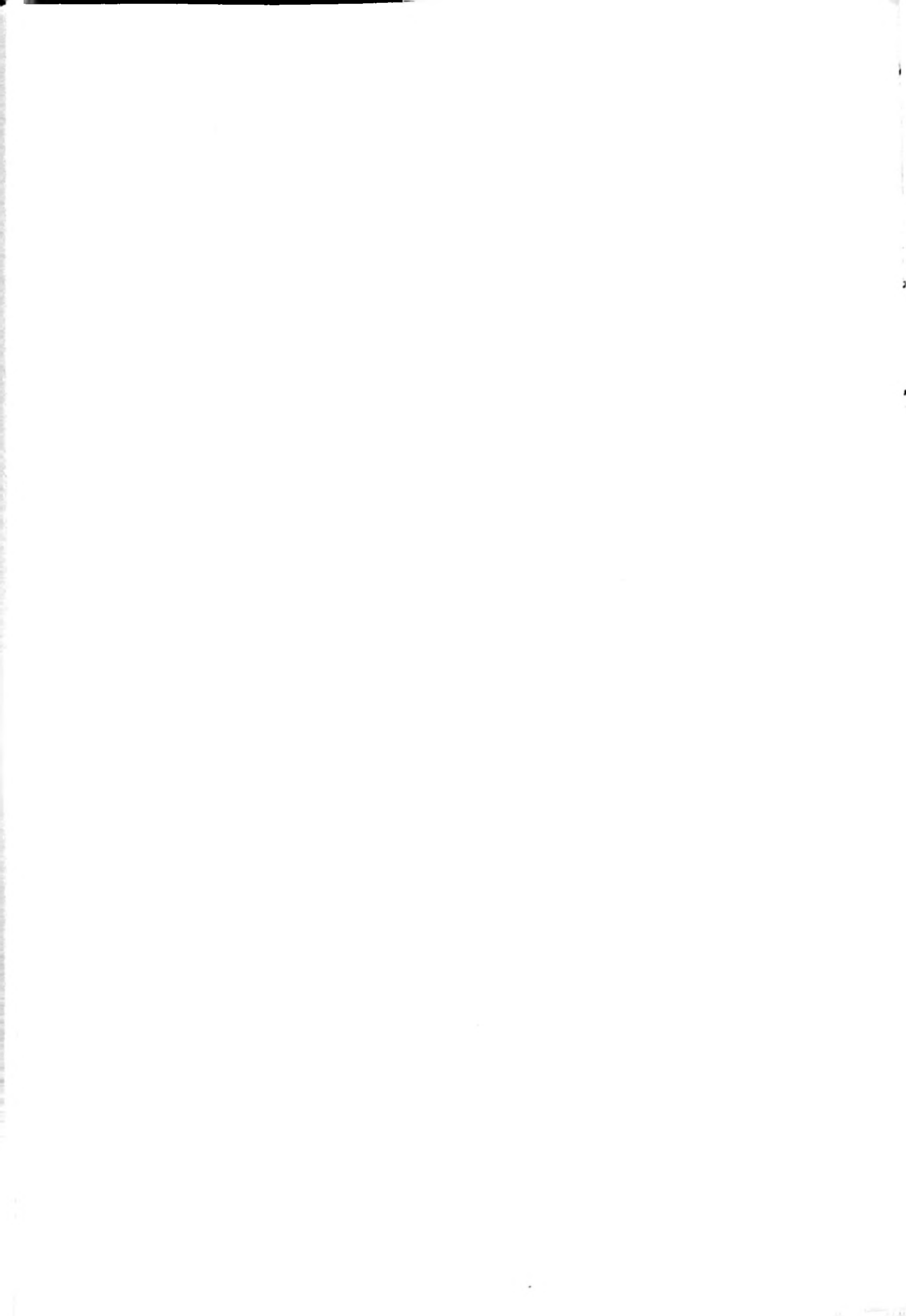
The rules of self-determination are particularly relevant to questions of legality of resistance, of partisan or guerrilla war, especially when a country is occupied by a foreign State. There is necessarily a conflict between the 'rights' of an occupying power and the 'rights' of resistance. Some have claimed that resistance against an occupying force is illegal by an *e contrario* conclusion of what follows from the right of a *levée en masse*,[283] whereas others consider all population to have asserted a right to resistance if occupation is not 'effective',[284] although it is not clear who is to assess the 'effectiveness'. Certain cases also indicate that a right to rise against an occupier exists, at least against an occupier who himself does not respect the Law of War.[285]

282 Meyrowitz, *Le principe*, *op. cit.*, 401.

283 Carsberg, F., *Soldater, partisaner og franktirörer* (Oslo, 1954), 16; Andersen, J., 'Var hjemmefrontens kamp folkerettsstridig?', *Festskrift J.H. Andersen* (Oslo, 1948), 6; Baxter, R.R., 'The duty of obedience to the belligerent occupant', 27 *BYIL*, 1950, 266.

284 Bauer, F., *Krigsförbrytarna inför domstol* (Stockholm: Natur och Kultur, 1944); Brandweiner, H., 'Das Partisanenproblem und die Genfer Konventionenen vom 12. August 1949', 72 *Juristische Blätter*, 1950, 263, speaking of a *jus insurrectionis*.

285 *The Flesch Case* (1948) Norwegian Supreme Court, *Retstidene*, 1948, 80.



Chapter 3
Prevention of War

A DOUBLE NATURE OF RELEVANT FACTORS

Treaties on restraining force and/or providing for pacific settlements of disputes may contain complementary obligations which lessen the danger of actual war.

Apart from such conventional[1] obligations, certain factors also increase the likelihood of war, such as, for example, the need for increased territory, the need to bond disputing factions in a country to focus on an outside 'enemy' and even a cynical ambition to accelerate the economy of the war industry. Conversely, favourable social conditions may entrench security and prevent war.

It is a formidable task to indicate the causes of war,[2] as these are often found in complex inter-relationships of immediate goal-settings, structural imbalances and coincidentals. For example, social conditions may give rise to conflicts and become the origin of a dispute.[3] The quest for independence may give rise to secessionist wars, like the war waged by Slovenia and Croatia, and later by Bosnia and Herzegovina, against the Federal Army of Yugoslavia.[4] Religious antagonism may lead to further attacks by the *jihad* terrorists; and the sponsorship of such movements by governments may give rise to further interventionist wars.

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1 'Conventional' is here used to denote that the source of obligation derives from a convention; this adjective is common in the terminology of international law but must, of course, be distinguished from 'conventional' (implying 'traditional') warfare as opposed to guerrilla warfare; see above Chapter 1, section D iv; and from 'conventional' (meaning nonnuclear) weapons as opposed to nuclear weapons; below, Chapter 7, section A ii.

2 The leading work is Howard, M., *The Causes of War and Other Essays* (London: Templer Smith, 1983). *Cf.*, Blainey, G., *The Causes of War* (London: Macmillan, 1973); Stoessinger, J.G., *Why Nations Go to War*, 3rd edn (New York: St. Martin's Press, 1982); for works on causes of specific wars, see Koch, H.W., (ed.), *The Origins of the First World War*, 2nd edn (London: Longman, 1984); Robertson, E. (ed.), *The Origins of the Second World War* (London: Macmillan, 1971); Gainsbourough, J.R., *The Arab-Israeli Conflict – A Politico-Legal Analysis* (London: Macmillan, 1986), 129 *et seq.*, on the causes of the Six Day War.

3 See above, Chapter 1, section D ii c on revolutionary war.

4 See above, Chapter 1, section D d on separatist war.

The present work will indicate but a few reasons for waging war, and conversely, for factors that encourage States to refrain from resorting to force.

B UNDERMINING FACTORS

Experts in the field of sociology and psychology analyse other reasons for tensions and conflict in the international society.[5]

In the syllabus for students of Peace Studies at Columbia University there is even literature of aggressive behaviour of animals.[6] Many circumstances that contribute to increased risk of conflict are largely unquantifiable: such factors concern, for example, militarisation,[7] and nationalistic tendencies, as well as, nowadays, the development of ambitious terrorist groups. There are problems even in identifying exact causes of a specific war and it is still more difficult to suggest general causes of war.[8] Naturally, territorial ambitions, claims to '*Lebensraum*' or to territory which has been wrongfully lost,[9] always play a part. Ideological aspirations, sometimes disguised as measures necessary to 'national security' to protect a socio-economic system, are increasingly important. Economic ambitions are also relevant although economic factors are thought to be relatively unimportant by some commentators.[10] Again, religious ambitions may also contribute to rivalry and friction. As we now know, mere hatred of Western values may incite armed attacks by terrorist groups.

The risk of war is increased and prolonged if there is general 'hostility' towards another country, either on a neighbour scale, in terms of political affiliations or in terms of North–South economic discrepancy. Among neighbours there may be even a divergence of 'culture' which makes States, like brothers, more hostile to those that are near than to those much further away. Between free countries and the few remaining communist States after 1990, there was an entrenched ideological gap where mutual suspicion and prejudice play a considerable part in exacerbating tension. An example of the last two mentioned categories may have been Croatia's difficulties with its neighbouring State, Yugoslavia, the

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5 See numerous studies by SIPRI, the Stockholm for Peace Research Institute.

6 The course adopt for 'biosocio-psychological' bases of war, Hamburg's article on 'Aggressive behavior of chimpanzees and baboons in natural habitat', 8 *Journal of Psychiatric Research* 385.

7 Eide, A. and Thee, M., *Problems of Contemporary Militarism* (London: Croom Helm, 1980).

8 Factors are also often interpreted differently by different commentators, occasionally protagonists of political ideologies, which may dim the real causes of conflict.

9 See above, Chapter 2, section B i. Chronology is important: it was not necessarily 'wrong' or contrary to international law to reclaim lost territory before the general prohibition of the use of force in the Charter of the United Nations; this is why the retaking of the Falkland Islands in the 1982 by Argentina was condemned contrary to the taking by the British in the sixteenth century, re-established as claims to sovereignty in the seventeenth and nineteenth century.

10 Wright, Q., *Study on War*, 2nd edn (Chicago: University of Chicago Press, 1965), 1293; this was also Hitler's view, *Mein Kampf* (Berlin: Zentralverlag der NSDAP, 1939), 199.

former Socialist Federation, which was one of the world's last States to be ruled by a communist government. Albeit highly divergent with regard to religion and cultural traditions, a similar example with enhanced and almost chronic tension is possibly Israel and her neighbouring Arab States, and the Palestine, aspiring for full statehood.

i Lack of Condemnation

In addition to other causes of war, the lack of condemnation may furnish a further reason to start hostilities. States may resort to force, or continue to use force, if there is no outright condemnation by other States. Declarations by the United Nations are no substitute for clear positions taken by individual States in this respect. One example of lack of condemnation, virtually condoning an invasion in another country, was the military operation of Tanzania to remove the dictator General Idi Amin in Uganda. Another example is the similar incursion in Cambodia or Kampuchea by Vietnamese military forces, again to remove a tyrant, the ruler Pol Pot. These examples may serve to illustrate that such operations, which could easily have developed further into full-scale wars, were carried out in the silence of the world where there was no or little condemnation.

In the aforementioned examples one might rightly assume that the motive was the concern for the welfare of citizens and implied efforts to preserve their human rights. On other occasions, more mundane interests may be apparent. When, on 22 September 1980, Iraq started invading Iran, both the United Kingdom and France remained 'neutral' and did not speak up against the war. The reason for this silence was heavy investment by both the United Kingdom and France in both the belligerent countries and this was thought to be a sensitive question.[11] As a result, the Security Council – whose action would anyway not have been any substitute for pronouncements by States – did little.[12]

Again, in 1991 when the Yugoslav Federal Army bombed the Dalmatian coast of Croatia, including the city of Dubrovnik which had long been listed on UNESCO's list of the world's cultural heritage and which, in any event, was an undefended 'open town',[13] there was no outright condemnation by any State or organisation. Nor was there any clear condemnation[14] of the behaviour of the Yugoslav army when 293 patients were dragged out of the Vukovar Hospital in Croatia on 19 November 1991 to be shot and put in a communal grave.[15] Here, the reason for silence might have been tacit preference for the attacking power for political and historical reasons.

Conversely, the fierce condemnation in many quarters of the 2003 invasion of Iraq by the United States, the United Kingdom and Allied forces, has probably had as a consequence that States now hesitate to intervene in a sovereign country

11 *Cf.*, Murphy, J.F., *The United Nations*, *op. cit.*, 65.

12 But see the Draft Resolution on control of the Shatt el Arab waterway, *ibid.*, 65.

13 See below, Chapter 8, section A ii b.

14 But some Paris students repainted the signs of the Metro station Stalingrad in Paris to read 'Vukovar'.

15 Later, long after Croatia had achieved independence, the grave was excavated at Ovčara and some form of 'condemnation' followed. See, *Vjesnik*, 19 November 1998, 1.

unless there are compelling humanitarian reasons or there is some irrefutable evidence of an imminent threat to another State.[16] But such action in Iraq 2003 was certainly not warranted for such reasons. Nor could it be held to be 'legal' under some previous Security Council Resolutions that some authorities claimed had some extended validity to operate years after the Security Council had adopted them. Undoubtedly, this war was for carried out for numerous other more or less unknown motives.[17]

ii Failure of the International Judicial System

Another important cause of war is the failure of the international judicial system.

It was clear in the *Iranian Hostage Case*[18] in 1979 that the United States considered the International Court of Justice to have a function to deal with politically sensitive issues. But the United States argued in the *Nicaragua Case*[19] a few years later, in 1986, that the Court is not able to consider political matters reserved for the Security Council. In the *Iranian Hostage Case* it was evident that Iran thought little of the Court, not presenting itself before it, and ignoring the Interim Order. In the *Nicaragua Case* the situation was reversed: it was obvious that the United States, when it comes to own national interests, did not have much respect either for the Court's authority, abandoning the proceedings midway.

It may be relevant that in the *Nicaragua Case* it was the United States that was accused of having violated international law by using force against Nicaragua whereas in the *Hostage Case*, the United States turned to the Court to condemn Iran for violations of the privileges and immunity of the US diplomatic staff in Tehran. It is also relevant to underline that the United States – but not many other States – have appended a reservation to the Statute of the Court, exempting disputes with regard to matters which are 'essentially within the domestic jurisdiction of the United States of America'; not only that, but matters which have such character 'as determined by the United States of America'. This means that the United States can, under this reservation, exclude virtually any question from the competence of the ICJ.

Obviously the ICJ is competent to consider question bearing on the use of force as shown in the *Corfu Channel Case*[20] and in numerous subsequent cases. This may even these days be its principal function. And the *Expenses Case*[21] indicates that the Court can also consider 'political' issues.

But rules restraining force will naturally be undermined if a State considers that the International Court lacks the competence to consider the legality of coercive measures, potentially involving war, or giving rise to actual war.

16 See above, under Intervention, Chapter 2, B vi and vii.

17 *Cf.*, above, Chapter 2 B viii b on humanitarian intervention and R2P.

18 *United States v Iran*, ICJ *Reports*, 1979, 7 and 1980, 3.

19 *Nicaragua v United States (Jurisdiction)*, ICJ, *Verbatim Records* 84/18, 64; *cf.*, *Nicaragua v United States (Merits)*, ICJ, *Reports*, 1986.

20 ICJ *Reports*, 1949, 4.

21 ICJ *Reports*, 1962, 246.

In some cases when a judgment or an Advisory Opinion would have been valuable to guide States in their future disputes, the International Court of Justice has often found that it has no jurisdiction. This was the case in the NATO bombing case after intervention in Kosovo.[22] Evading the question of legality of the use of force, the ICJ based its judgment on the complicated problems relating to the State identity of the Applicant; but, behind this, there may have been some hesitation on the part of the Court to deal with politically sensitive issues.

Similar hesitation with regard to politically sensitive issues may be noted in an Advisory Opinion of considerable importance concerned the legality of the use of nuclear weapons, an issue where the Court could have made a substantial contribution to international law and to the Law of War, but chose not to do so, again by delivering a highly ambiguous Opinion.[23]

C STABILISING FACTORS

It is, of course, impossible to provide any detailed indication of factors which preserve peace. This is not because this work is not the appropriate place for any lengthy analysis but rather that such factors escape identification, except by large patterns, as it is not the factors individually that are important as much as their juxtaposition with other factors. Any development which links States together is likely to contribute to peace if acts are carried out universally. In other words, worldwide attempts to promote, for example, trade or cultural exchanges is likely to lessen the danger of war. Restrictions of trade in arms will also reduce the possibility of war.[24] On regional levels there is always a danger of bloc-building and eventual antagonising of groups. But, generally speaking, certain formations will assist in the peace-keeping effort.

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22 ICJ *Reports*, 2004, 279, *Case Concerning Legality of Use of Force (Serbia & Montenegro v Belgium)*. Similar cases were commenced against Canada, France, Germany, Netherlands, Portugal, Spain, the United Kingdom and the United States. The United States again stayed out of the proceedings altogether, using its reservation not to appear as a Respondent in the case. The Case concerned the legality of the NATO bombing of Serbia. Judgment in all cases was given on 15 December 2004.

23 *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ *Reports*, 1996, 66.

24 See, *e.g.*, Martinez, J.C., 'Le droit international et le commerce des armes', in Colloque de Montpellier, *Le droit international et les armes* (Paris: Pédone, 1982), 93 *et seq.*

i Alliances

Alliances, according to traditional theory, stabilise the balance of power,[25] restrain violence between the members of that particular pact[26] but may, on the other hand, contribute to tension vis-à-vis another powerful alliance. Such polarisation may be mitigated by special negotiations between such blocs, like, for example, multilateral negotiations on nuclear disarmament[27] or other talks specifically between military alliances, like the previous Mutual Balanced Forces Reduction Talks between NATO and the then Warsaw Pact States.[28]

ii Coordination of Foreign Policy

The harmonisation of foreign policy may be inherent in alliances. Beyond the realm of military alliances, there is also considerable scope for coordination as a result of similar political ideologies. Occasionally such similarities are only evident when confronted with another major bloc, inspired by different ideas. Thus, in spite of diverging foreign policies in Western Europe, such policies are sufficiently homogeneous to form the subject matter of a Treaty on Coordinated Foreign Policy, concluded on 3 December 1985 within the framework of the EU (at the time the EEC).[29]

The EU has, under the Treaty of Lisbon which came into force in 2009, introduced a unified system of Common Foreign and Security Policy (CFSP). The Treaty of Lisbon created a High Representative of the Union for Foreign Affairs and Security Policy, currently Baroness Ashton of the UK, whose mandate to establish a European diplomatic corps has been much criticised. It would seem that efforts to establish a joint foreign policy of European States, all with diverse interests, is too unwieldy a task to be undertaken with any hope of immediate success.

But then again, even if European States have made some efforts to coordinate their foreign policy relevant to war and aggression, one may ask towards which bloc the EU is aiming its policies: neither Russia nor China appear much in focus whereas EU relations with the United States concern mainly trade or financial matters.

The traditional privilege of States to organise their external relations and the prerogative of sending and receiving envoys may be a more efficient way to coordinate foreign policy.

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25 *Cf.*, Claude, I., *Power and International Relations* (New York: Random House, 1962); Wight, M., 'The balance of power', in Butterfield, H. and Wight, M. (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen & Unwin, 1966); Wolfers, A., *Discord and Collaborators, Essays on International Politics* (Baltimore: Johns Hopkins University Press, 1962).

26 Verosta, S., *Theorie und Realität von Bundnissen, 1897–1914* (Vienna: Europa Verlag, 1971); Barendon, P., *System der politische Staatsverträge seit 1918*, 1937, 211; De Orue y Arregui, J.R., 'Le régionalisme dans l'organisation internationale', 53 *RCADI*, 1935, iii, 1. But note the rift in NATO when Greece and Turkey supported different communities in the hostilities of 1974.

27 See below in this Chapter, section C iii b (1).

28 Below in this Chapter, section C iii a (1).

29 EEC, *News Release*, 3 December 1985.

iii Disarmament

It is important to assess briefly the role of disarmament in the context of stabilisation.[30]

A sharp, albeit often unwarranted, distinction is often made between arms limitation or arms control, disarmament and the Law of War. By arms limitation or arms control one normally understands any measure of restraint of testing, manufacturing, possessing or deploying a specific type of weapon. Disarmament, on the other hand, implies the reduction in, or renunciation of, a type of weapon.

But 'arms limitation' may obviously imply far-going rules which inevitably entail the 'reduction' or 'renunciation', at least with regard to certain types, or certain types of uses, of weapons. Conversely, disarmament may involve specified control of use of a weapon, as in the En-Mod Convention.[31] Treaties of either of these categories have been thought so irrelevant to the Law of War that they are not even included in the ordinary collection of texts on the Law of War.[32] Yet, there is little difference in structure and function between, for example, the En-Mod Convention and the Geneva Gas Protocol, or between the Biological Weapons Convention and the 1868 St. Petersburg Declaration. It appears unjustified to group texts of clear relevance to the conduct of modern war in different groups. All texts concerning disarmament are of essential importance to the Law of War.

Advances on disarmament depend on negotiations as well as on other factors such as budgetary restraints. If there is no agreement, there may be factual restraints, at least for certain types of weapons.[33]

a Early Attempts

There were some early efforts of disarmament, like the Treaty between Argentina and Chile in 1902 whereby the parties undertook to cancel orders for construction of warships and notify each other of any new constructions. The Washington Conference on the Limitation of Armaments in 1921–1922 introduced some restrictions on large warships in the final Treaty.[34] Some measures were quantitative and constituted 'the most direct means of limiting and reducing the competitive

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30 There is a vast literature on disarmament. See, for some important studies, Sims, N., *Approach to Disarmament*, 2nd edn (Quaker Peace and Service, 1979); Freedman, L., *Arms Control in Europe* (London: RIIA, 1981); for UN Studies, see, *The Relationship between Disarmament and International Security*, 1982, E.82, ix. 4; UN, *Study on All Aspects of Regional Disarmament*, 1981, A/35/416. *Cf.*, UN, *Comprehensive Study on Confidence Building Measures*, 1982, A/36/474.

31 See below, Chapter 7, section E ii.

32 Roberts, A. and Guelff, R. (eds), *Documents on the Laws of War*, 3rd edn (Oxford: OUP, 2000).

33 The United States Congress deleted allocations for further chemical weapons from the defence budget of 1983 and, in spite of certain pressure from the Reagan administration, did not re-allocate funds. For a commentary, see Sims, N., 'Chemical weapons, control or chaos', *Faraday Discussion Paper No. 1*, London, 1964, 14.

34 Treaty of Washington of 6 February 1922, below, Chapter 8, section B iii.

accumulation of arms'.[35] Others were qualitative and gave rise to further problems as technological improvements were difficult to verify.[36]

Other restrictions, again, in other treaties[37] implied 'geographic' or 'mission restraints'. Others concerned the limitation of certain types of naval deployment, for example prohibiting permanent stationing of arms on the high seas.[38] Furthermore, the London treaty of 1930 introduced similar restrictions on warships.[39]

Plans by the Soviet Union for a Complete Disarmament Treaty (CDT) were presented to the Geneva Conference in 1962. The United States responded to this proposal by plans for staged elimination. The 10th Special Session of the General Assembly in 1978 (SSD) was devoted to the disarmament question. The first session on disarmament set out a 'disarmament strategy',[40] discussed further in a second session in 1982.

b The Contemporary Position

After the fall of communism, the scene of disarmament has radically changed. Although this may seen later in history as a highly dangerous period, before new re-groupment of States in new alliances, disarmament has been demoted to a side-issue. The Geneva Disarmament Conference, once a prestigious posting for special full-time ambassadors with considerable staff, has been reduced in importance by Ambassadors of numerous States to the UN, doubling up as delegates to the Conference. The meagre output of documents also witness the lack of activities in the Conference.

On the other hand, certain issues of disarmament have been brought to attention of the general public by private initiatives, as, for example, the landmine problem, highlighted by Diana, Princess of Wales, and, largely through public pressure, resulting in a new Convention. Other questions of disarmament, like, for example, the actual use of chemical and biological weapons by Saddam Hussein, the leader of Iraq, has led to swift action by the United States and the United Kingdom. Not only has such action been retaliatory, as in the Gulf War, but also anticipatory: when Iraq was bombed in 1998, chemical and biological weapons (CBWs) were probably neither used nor available, but States *feared* that such weapons would be used.

The work of the *ad hoc* Committee on the Comprehensive Programme of Disarmament (CPD) was suspended in 1990. The mandate of the CPD was considered too wide in ambit and too ambitious. Therefore it was thought that

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35 There was a freeze on the manufacturing, on numbers and on the introduction of new systems; UN *Study on the Naval Arms Race*, *op. cit.*, 141.

36 *Ibid.*, 142.

37 For example, the Rush Bagot Treaty of 1817; the Montreux Convention 1936 in the demilitarisation of areas; *cf.*, *ibid.*, 143.

38 *Ibid.*, 144; *cf.* the 1982 Law of the Sea Convention, below, Chapter 6, section A iv.

39 Treaty of 22 April 1930.

40 GA Res. 5-10/2, 3 *United Nations Disarmament Yearbook*, 1978. UN measures 'collateral' to general disarmament, see Hotlieb, A., *Disarmament and International Law* (Toronto, 1965), 44 *et seq.*

sectorial attempts would be more viable. In this vein, there have been efforts from 2010 onwards to revive the Disarmament Conference.[41]

There is little hope of achieving anything but partial disarmament in certain specific areas. Talks have been carried out at different levels between the major powers at intermittent meetings; on a multilateral level at the Disarmament Conference in Geneva; and, again, on a multilateral basis, but limited to confidence building measures, in Stockholm and Vienna. The Stockholm Conference on Security Building Measures and Disarmament in Europe (CDE), established under the Helsinki Accords in 1975, finally led to the adoption of a 'Document', but in the other fora, talks continue. The Act is often thought to lack legal obligation[42] but the British Foreign Office regards at least one provision as 'binding'.[43] That is the stipulation that military manoeuvres involving more than 25,000 men shall be notified.[44]

Efforts to revive the 'disarmament machinery' were made in 2010 by the UN research tank UNIDIR which published an important agenda report.[45]

(1) Nuclear Disarmament

Nuclear weapons attracted early attention in the disarmament negotiations after the Second World War.[46] There has also been, and still is, much discussion on the legality of such weapons.[47] A presumption of illegality of nuclear weapons is clearly conducive to further advances in nuclear disarmament.

Public fears of hazards from nuclear pollution were probably one of the reasons for the Partial Test Ban Treaty (PTB)[48] in 1963.[49] The important factor of public opinion probably made France make a unilateral declaration to cease testing nuclear weapons after having been taken to the International Court of Justice by Australia and New Zealand.[50]

Certain preventive treaties have been concluded between the former superpowers in the form of bilateral treaties. Some such agreements are the ABM

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41 See Zaleksi, J., 'New forms of WMD, transparency in armaments, and a comprehensive programme of disarmament: obsolete or ignored?', Background Paper, UNIDIR and the Geneva Forum, 6 May 2011.

42 See my *Concept, op. cit.*, 103.

43 FCO, *Defence and Disarmament Issues*, No. 17, July 1985, p.a.

44 The provision does not apply to the 'westermost' 250 kilometres of the area of the former Soviet Union.

45 *Disarmament: A Fresh Approach*, UNIDIR *Disarmament Forum*, September 2010.

46 Note efforts by the Commission for Conventional Disarmament 1946–1952; The Disarmament Commission (for both nuclear and conventional weapons) 1953–1957, with an important five-Power Sub-Committee; the Ten Nations Disarmament Committee (TNDC), expanded into an 18-Power Committee (ENDC) in 1962; the Committee of the Conference of Disarmament (CCD), an even larger body, 1969–1979, in turn transformed and amplified into the Conference on Disarmament (CD) in 1979.

47 Below, Chapter 7, section b ii.

48 480 *UNTS* 43.

49 *Brandt Commission Papers*, 1981, 373.

50 *Nuclear Test Cases*, ICJ, *Reports*, 1974, 253.

Treaty of 1972,[51] the SALT (Strategic Arms Limitation) Interim Agreement,[52] the Agreement on Basic Relations,[53] the Agreement on Basic Principles of Negotiation on the Further Limitation of Strategic Offensive Arms,[54] the Agreement on Prevention of Nuclear War,[55] the Threshold Test-Ban Treaty (TTBT),[56] and the Treaty on Underground Nuclear Explosions.[57] A series of bilateral agreements on warning systems were also concluded between the United States and the USSR.[58]

Other relevant treaties were negotiated on a bilateral basis between the United States and the USSR but resulted in multilateral instruments. This was the case of the Non-Proliferation Treaty of 1968.[59] This Treaty imposes restrictions on non-nuclear States not to acquire nuclear weapons; but there are no further restrictions on the nuclear super-powers, the United States and on the former Soviet Union, or on other States that have nuclear weapons. The Treaty obliges States to negotiate in 'good faith' for further disarmament; for some time during the arms race between the United States and the USSR, they not only failed to do this but actually built up further arms arsenals. But after the fall of communism there have been advances in reduction of nuclear weapons.

Under START I the United States and the Russian Federation reported their reductions in 2002 and stated that they had faithfully complied with the mandatory provisions of the Treaty.[60] The other former successor States of the Soviet Union were also in compliance with START I under special provisions.[61]

There were further negotiations between the United States and Russia for other strategic reductions. Russia agreed to ban MIRVed ICBMs which was seen as a major advance in arms limitation. Finally, START II was signed on 3 January 1993. However, Russia had problems meeting the deadline for implementation initially set as 2003 because of economic problems. The deadline was extended to 2007 by a Protocol signed in 1997 but Russia insisted that before START II entered into force, the ABM Treaty would be renewed. The US sought to amend the ABM Treaty to allow it to

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51 1978, 11 *ILM* 784. The Anti-Ballistic Missile Agreement restricts missile defences to two sites (later one site) with 100 missiles allowed at each site.

52 1972, Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Weapons, 11 *ILM* 897. The Agreement limits the number of ICBM and SLBM launchers; it lapsed in 1977 but was extended by mutual consent.

53 1972, 11 *ILM* 756.

54 1973, 12 *ILM* 897.

55 1973, 12 *ILM* 903.

56 1974, Treaty on the Limitation of Underground Nuclear tests, 13 *ILM* 906.

57 1976, 15 *ILM* 891.

58 Memorandum on a Direct Communication Link, 1963, 2 *ILM* 793 (the Hot Line Agreement); Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, 1971, 10 *ILM* 1173; and the Agreement on the Prevention of Incidents on and over the High Seas, 1972, 11 *ILM* 778.

59 729 *UNTS* 161.

60 Willett, S., *Cost of Disarmament; Disarming the Costs: Nuclear Arms Control and Nuclear Rearmament*, UNIDIR/2003/25.

61 Under the 1992 Lisbon Protocol signed between the United States and the four successor states that possessed weapons covered by START I, namely Russia, Belarus, Kazakhstan and Ukraine, all nuclear warheads of the former Soviet Union were to be withdrawn to Russia.

deploy ballistic missile defence systems, a proposal Russia could not accept. The US withdrew from the ABM Treaty on 14 June 2002 and, as a consequence, Russia also announced its withdrawal from START II.

In 1997 Russia and the United States agreed to commence START III negotiations, which were to include a reduction in deployed strategic warheads. START III was, contrary to START I and II, to provide for the destruction of tactical nuclear warheads (TNWS), that had not been included in the previous arms reductions talks which had concentrated on larger weapons. But because the START III negotiations were linked to the entry into force of START II, formal negotiations on tactical nuclear weapons never took place. However, a number of TNWs were eliminated although verification never took place.

The Intermediate-Range Nuclear Forces Treaty (INF) was concluded between the United States and the USSR in 1987. The treaty eliminated nuclear and conventional ground-launched ballistic and cruise missiles with intermediate range which is defined as between 500 and 5,500 km (300–3,400 miles). By the Treaty's deadline of 1 June 1991, a total of 2,692 such weapons had been destroyed, 846 by the United States and 1,846 by the then Soviet Union. Under the treaty both nations were allowed to inspect each other's military installations. Each nation was permitted to render inoperative and retain 15 missiles, 15 launch canisters and 15 launchers for static display. But China is not bound by any similar obligations. In due course, this became of some concern to Russia and, in 2007, President Putin declared that the INF treaty was no longer in Russia's interest. Apart from the concern that China was outside the framework of the treaty, there was also some irritation that the United States planned to install Ground-Based Midcourse Defense Missile Systems, first in Poland and then in the Czech Republic, although this project was later abandoned in favour of an Aegis-class missile defence system based in Romania.

Russia and the United States agreed in 2001 to a less formal and more open-ended agreement on strategic weapons reductions. Presidents Putin and Bush announced in a joint statement that: 'We have agreed that the current levels of our nuclear forces do not reflect the strategic realities of today. Therefore, we have confirmed our respective commitments to implement substantial reductions in strategic offensive weapons.'[62] As a result of these new negotiations, the Strategic Offensive Reduction Treaty (SORT) was signed in Moscow on 24 May 2002.

Inter-governmental meetings have stressed the importance of preventing terrorists from acquiring weapons of mass destruction, especially nuclear weapons. The G8 Summit held in Kananaskis, Canada, in June 2002, laid down principles to prevent terrorists from acquiring and using weapons of mass destruction, following the attacks of 11 September 2001. The Kananaskis Summit provided a mechanism for the G8 countries to pool efforts to combat the proliferation of weapons of mass destruction, especially to terrorists.

In a similar vein, tactical nuclear weapons (TNWs) became a focus of special interest after 9/11 as there were concerns that terrorists would acquire such

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62 *Joint Statement in the New US-Russian Relationship*, 13 November 2001; www.whitehouse.gov/news/releases/2001/11/20011113-html.

weapons. There is currently no legal regime on TNWs; such weapons are not covered by the arms reductions discussions and treaties.[63]

The Sea-Bed Treaty of 1971 also introduced certain limitations for the emplacement of nuclear weapons[64] but its ambit of application is not quite clear.[65] Other relevant treaties are, for example, the Outer Space Treaty of 1967,[66] the Antarctic Treaty of 1959,[67] the Treaty of Tlatelolco of 1967,[68] the Treaty of Rarotonga of 1985,[69] the Treaty of Bangkok of 1995,[70] the Treaty of Pelindaba[71] and the Treaty of Semipalatinsk of 2006.[72] The En-Mod Convention[73] prohibits the use of nuclear weapons for modification of the environment.

The numerous relevant multilateral treaties play an important part in strengthening the operation of the bilateral treaty network between the United States and the former Soviet Union.[74] After the fall of communism and the disintegration of the USSR, these multilateral conventions are of enhanced importance. On the other hand, we are now facing unilateral nuclear re-armament. One reason for this surprising development is the concern about nuclear attacks by certain rogue States, in particular Iran, Iraq and North Korea.[75]

A Convention on the Physical Protection of Nuclear Material of 1980 – negotiated since 1974 and elaborated by IAEA – is an early treaty to ensure security in nuclear matters. The Convention is specifically designed to prevent theft or unauthorised use of nuclear material. An important amendment in 2005 provides that the Convention will also cover domestic use, storage and transport of nuclear material and will apply to nuclear facilities used for peaceful purposes. The amendment also requires States to designate a competent authority responsible for implementation of the key physical protection provisions.

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63 Susiluoto, T., 'The challenged regime on tactical nuclear weapons: debate on legal aspects', UNIDIR, art.1752, 57. There are some suggestions that there would be certain binding unilateral declarations by the United States and by Russia but, although unilateral declarations may bind a State, see Detter, I., *The International Legal Order*, *op. cit.*, 192–196, there is insufficient evidence that unilateral declarations on TNWs would have such legal effect. One could argue that Russia intended to be bound by its statement as that government lodged a declaration to this effect with the UN as A/46/592.S/23161, 23 October 1991. The United States did not proceed to such registration.

64 *UKTS* 1973 13; TIAS 7337; *cf.*, endorsement by the UN General Assembly Resolution 2660 (XXV) 1970.

65 See below, Chapter 7, section A iii, on naval mines.

66 610 *UNTS* 205 and below, Chapter 6, section A v.

67 402 *UNTS* 71 and below, Chapter 6, section A iv.

68 634 *UNTS* 326 and below, Chapter 6, section A v.

69 1985 *ILM* and below, Chapter 6, section A v.

70 Entered into force in 1996: UN Department for Disarmament Affairs (UNDDA).

71 Not yet in force: UN Department for Disarmament Affairs (UNDDA).

72 Between Kazahkstan and neighbouring States; not yet in force.

73 Below, Chapter 7, section E.

74 See Draft Comprehensive Programme on Disarmament, 1986, CD/731, 131; *cf.*, Arms Race in Outer Space, *ibid.*, at 107; and on Nuclear Weapons, *ibid.*, at 18.

75 Willett, S., *Cost of Disarmament; Disarming the Costs: Nuclear Arms Control and Nuclear Rearmament*, UNIDIR/2003, 45.

The 9/11 attacks had an impact on further work to ensure nuclear security. The International Convention for the Suppression of Acts of Nuclear Terrorism was concluded in 2005. The Convention had actually been discussed since early 1990s but after 9/11 work accelerated and, in 2005, the Convention was opened for signature; it entered into force in 2007. By 2011, 77 States had ratified the agreement. The key obligation of the Convention is to establish legal responsibility under national laws for acts of nuclear terrorism and to create an international legal framework to ensure prosecution of such activities. The Convention creates an obligation to undertake certain measures aimed at preventing acts of nuclear terrorism, which extends obligations on physical protection beyond materials in peaceful use, covered by the Physical Protection Convention.

The legal instruments regulating nuclear security are now the above-mentioned Conventions, UN Security Council resolutions 1373 and 1540, and the Global Initiative to Combat Nuclear Terrorism. An agreement seeking to prevent nuclear material falling into the hands of terrorists, the Convention on Nuclear Material, is being negotiated for urgent adoption.[76] Serious problems about the use of nuclear weapons arose in 2013 when North Korea performed its third test of nuclear missiles. It also became apparent that this country was prepared to sell missiles and nuclear technology to other unstable regimes or even to terrorists.[77]

(2) Conventional Disarmament

Some progress has been made by the outlawing of conventional weapons by the 1980 Convention.[78] There was a major development in 2002 when the Convention was revised to cover also use in internal conflicts. At the Second Review Conference of the States Parties to the Convention, which took place in Geneva in 2001, the States Parties decided to address the issue of the scope of application of the Convention and its annexed Protocols. As originally adopted, the Convention applied only to situations of international armed conflict. Realising the fact that most conflicts today occur within the borders of a State, the States Parties agreed to amend the Convention, so that it also applies to situations of non-international armed conflict. The amendment to article 1 entered into effect in 2004. This is a landmark development as it extends disarmament mechanism to internal conflicts.

Other weapons, the use of which conflicts with the basic principles of the Law of War,[79] may be tainted by illegality. Such a state of affairs may prompt the adoption of further agreements, which may confirm such illegality.[80]

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76 IAEA, Nuclear Verification and Security of Material; Physical Protection Objectives and Fundamental Principles, document GOV/2001/41, 2001; Podvig, P., *Global Nuclear Security: Building Greater Accountability and Cooperation*, UNDIR, 2011; de Lourdes Vez Carmona, M., 'The international regime on the physical protection of nuclear material and the amendment to the Convention on the Physical Protection of Nuclear Material', 76 *Nuclear Law Bulletin*, 2005, 37 *et seq.*

77 See below in Chapter 7 on Nuclear weapons, section C b.

78 Below Chapter 7, section A ii.

79 Below, Chapter 7, *passim.*

80 On the creation of rules by 'recognition' or 'adoption', in agreements or otherwise, see my work on *The Concept of International Law*, 2nd edn, *op. cit.*, 110 *et seq.*

Attention has also been focused on massive scientific research and development research (R&D), which could be directed to either civil or military application. Attempts are being made to prohibit weapons at the research stage so that the use of prohibited weapons will be made even more unlikely.[81]

Important advances have also been made in the field of small weapons. West Africa has been a testing ground to see if restrictions and disarmament of small and/or light weapons would lessen tensions or, at least, diminish risks to human life if conflicts break out. One initiative drew on ideas on development, peace and security for the people of West Africa of the Economic Community of West African States (ECOWAS) and the Program for Coordination and Assistance for Security and Development (PCASED).[82] But the civil war in the Ivory Coast (or *Côte d'Ivoire*) which started in 2002 continued, on and off, well into 2011. So did the serious armed conflict in Nigeria between government forces and the Muslim Boko Hara, said to be affiliated to Al-Qaeda, a conflict that had begun in 2009.

Another important initiative has been the efforts of UNIDIR to encourage collection of weapons. This is structured through community-based voluntary programmes in exchange for aid to development projects (known as Weapons for Development or WfD projects). These projects are coupled with participatory, monitoring and evaluation (PM&E) schemes.[83] This has resulted in popular micro-disarmament policies, in Albania, Cambodia and Mali (although there were some setbacks in Mali in 2012 by the AQMI invasion).[84]

It is difficult to quantify the result of restrictions on small or light weapons and of weapons collection, but, on balance, such limitations and such efforts are bound to have a life-saving effect.

(3) Verification Problems

Verification, in itself a vast problem which has given rise to a considerable literature,[85] is usually seen as a slowing down problem factor in disarmament. Naturally, States are reluctant to allow, for example, on-site inspections by national or international bodies to verify the compliance with agreement on disarmament or arms control, although there were signs from 1986 onwards of increased willingness to allow such procedures.[86] International inspection to verify a specific site requires a negotiated agreement. Within the existing treaties such as CFE, INF

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81 See United Nations, *Study by the Secretary General on Conventional Disarmament* (New York, 1985), A/39/348, 25.

82 *Combating the Proliferation of Small Arms and Light Weapons in West Africa; Handbook for the Training of Armed and Security Forces*, pdf 1-91-9045, UNIDIR/2005/7.

83 UNIDIR, *Disarmament Forum*, no. 4, 2002, 63 *et. seq.*

84 See above, Chapter 2 A iii, on assistance to insurgents.

85 *E.g.*, Tsipis, K., Hafemeister, D.W. and Janeway, P. (eds), *Arms Control Verification, the Technologies that Make it Possible* (Oxford: OUP, 1986); Bellany, I. and Blacker, C.D. (eds), *The Verification of Arms Control Agreements* (London: Cass & Co., 1983); *cf.*, McKnight, A., *Atomic Safeguards: A Study in International Verification* (New York: UNTAR, 1971); Krass, A.S., *Verification: How Much is Enough?* (London: SIPRI, 1983).

86 *E.g.*, *Statement by President Gorbachev*, 15 January 1987, TASS Release on Chemical Weapons, below, Chapter 7, section D iii c.

and START, inspections are part of the comprehensive verification regime, On 27 January 1992 President Yeltsin announced that Russian nuclear ballistic missiles would no longer be directed against US military and civilian targets. For such pledges to be meaningful to each side, verification needed to be carried out, and for this a formal treaty framework was required. By 1998 it was clear that forceful action by military means could be taken against a State under obligation not to use certain weapons.[87]

Sophisticated reconnaissance defence systems fill some role, at least for some weapons. There have, at least since the mid 1980s, been some extensive photo reconnaissance programmes in operation,[88] electronic reconnaissance[89] and early warning satellites.[90] And certain arms control agreements are now coupled with rudimentary verification rules.[91]

Confidence building measures (CBMs) are still important in view of a possible comprehensive nuclear weapons convention and form an important complement to verification mechanisms.[92]

(4) Diffusion of Tensions by Talks

Negotiations, either within the framework of the United Nations, or outside in other forms, contribute to diffusion of tensions between States, especially between blocs. The United Nations provides a useful forum for discussion even in cases when specific conventions are being negotiated but the entrenchment of lengthy negotiations in a permanent body of the United Nations, for specific purposes, tend to enhance the diffusion of tensions. This has, for example, been the effect of the negotiations in the Conference of Disarmament (CD) as well as in its predecessors CCD and ECDC.[93] CD has important feedbacks to and from the General Assembly and transfers its functions, complete with national delegations, to the sessions of the General Assembly every October.[94]

Other important talks, which have been of particular relevance for the diffusion of tension, are the discussions within the Conference for European Security

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87 The declared aim of the bomb raids against Iraq in December 1998 was said to be in response of the refusal of Saddam Hussein to allow UN weapons inspectors to verify the existence of certain biological and chemical weapons sites.

88 Extensive programmes exist in the United States, USSR and Japan; France operates its SAMRO (*Satellite Militaire de Reconnaissance Optique*) based on the civilian Spot (*Système Probatoire d'observation de la terre*) system.

89 Like the US ELINT Cosmos satellites, normally launched from the 'Big Bird' photo-reconnaissance satellite, which monitor missile test signals; or US EORSAT (Ocean Surveillance Satellites) and USSR RORSAT (Robot Ocean Surveillance Satellites).

90 Like the US Test Ruby infrared sensors.

91 See below, Chapter 7.

92 Scheffran, J., 'Verification and security in a nuclear-weapons-free world: elements and framework of a Nuclear Weapons Convention', UNIDIR, art. 3007, *Disarmament Forum*, 2010, 53.

93 See above, in this Chapter.

94 But, as mentioned earlier in this Chapter, the role of CD was drastically reduced in the 1990s.

(CSCE) under the Helsinki Accords of 1975.[95] During the time of the bipolar world, negotiations between the East and West in Europe were held to be of some importance for the diffusion of tension. This was especially the case of Negotiations on Mutual Reductions of Forces and Armaments and Associated Measures in Central Europe in Vienna, between NATO and the then Warsaw Pact States. The 'associated measures' provided for in these talks were so-called 'confidence and security building measures' and verification. Problems are sometimes caused by lack of data regarding the actual strength and number of forces and arms on the opposite side as well as by problems on verification.

Measures were thus discussed which would reduce these uncertainties. To the Western Powers there was more interest to commence talks on reduction of forces rather than armaments but both matters were included in the 'talks'. The talks were usually referred to as discussions on Mutual and Balanced Forced Reductions (MBFR) which was a Western acronym and not the official name; the former USSR had preferred the term 'equal' reductions.

These talks, perhaps now largely of historical interest, showed little progress but may provide a model for future negotiations on disarmament and security. Talks of this kind attempt to discuss reduction of the size of armed forces and conventional armaments and contribute to maintenance of peace by their very protraction.

But the State-centric paradigm often leaves out the non-State actors, especially in the field of discussion on nuclear weapons. Just as much as the admission of Palestine to UNESCO does not necessarily imply recognition of its statehood, talks do not afford any recognition to parties in political discussions.[96] Participation in talks does not lead to either acceptance of any statehood status, nor any particular legal status at all. With some caution and with some conditions, it might even be possible to discuss, without prejudice, with terrorist groups like the Taliban. States should be open to all formulae which might be conducive to save lives.

(5) Restraint of Arms Trade

Restricting trade in weapons will also have a clear effect on the number of parties of war-waging capability. Furthermore, such restraint would also make it more difficult for terrorists to acquire weapons.

On 2 December 1939 Franklin Roosevelt, President of the United States, condemned bombing of civilians from the air.[97] He added that he hoped than American manufacturers and exporters of aeroplanes, aeronautical equipment and materials 'would bear this in mind before negotiating contracts for export of such articles to nations obviously guilty of unprovoked bombing'.[98] Restraint of the arms trade reduces the likelihood of certain local armed disputes. Conversely, the

95 *Cf.*, subsequent discussions at follow-up meetings. There were attempts to revive the Act during the outbreak of war between the Yugoslav Federal Army and Slovenia and Croatia in 1991 and there were attempts by Britain to instigate talks, without much success, under the Helsinki Accords.

96 See below on terrorists status in law, Chapter 9 B iv.

97 6 *Hackworth* 267.

98 *Ibid.*

more ready access States or other parties have to arms supplies, the more likely it is that they will resort to them in time of conflict. Against this many argue that States have a definite interest in purchasing arms for legitimate defence interests and it is not for other States to comment on their purchases. Much is needed for defence purposes and it is impossible to distinguish between what is purchased for legitimate defence purposes and what exceeds such needs.

There is also concern about the potential conversion of use of nuclear material[99] and nuclear technologies from peaceful activities to military use and also about overall standards in nuclear trade. In spite of IAEA efforts to promote safeguards for nuclear activities, materials which could be transformed into non-peaceful use are often exported without much control. The NPT Review Conference in 1983 urged countries exporting nuclear material or technology to demand that the importing State ensured adequate safeguards of operation. But Argentina accepted an offer for a nuclear reactor from Germany with no safeguard conditions rather than a cheaper offer from Canada demanding full safeguards for the nuclear industry.[100]

After the demise of the Soviet Union nuclear weapons and fissile material found their way to numerous Third World countries and, indeed, to groups of non-State actors as well through arms deals without any or with few safety concerns.[101] Apart from nuclear weapons being acquired by rogue nations, there is also an aggravated concern such weapons will fall into the hands of terrorists.

As far as other types of weapons are concerned, it may be noted that some biological and chemical weapons[102] are not very expensive to produce and some relatively poor countries can produce such weapons themselves, avoiding the international arms trade.[103] The hazards of the mere possession of such weapons were amply demonstrated in the disarming attacks that the United States and the United Kingdom considered necessary against Iraq at the end of 1998.

Trade in conventional arms presents different problems from trade in nuclear material, or in biological and chemical weapons. It is probably only in conventional weapons that States have a clearly legitimate interest in purchasing arms for defence interests.

Conventional weapons still form the bulk of the international arms trade. Here, there is often a dichotomy between the interests of arms manufacturers, together with the economic interests of their home State in the developed world, and the obvious hazards of Third World countries importing large quantities of such

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99 On the legality of nuclear weapons, see below, Chapter 7, section B.

100 *New Scientist*, 3 October 1985, 26.

101 Some developing States may also become self-sufficient in the production of nuclear weapons. For new enrichment methods facilitating nuclear arms production, see Krass, A.S., Boskma, P., Elzen, B. and Smit, W.A., *Uranium Enrichment and Nuclear Weapon Proliferation* (London: SIPRI, 1986).

102 On the prohibition of such weapons by international conventions, see, below, Chapter 7, section D.

103 Many such sites are still largely unsupervised by international organisations; the plant for such weapons in Titograd in Yugoslavia never attracted any UN attention during the war between Yugoslavia and the seceding States, Croatia and Slovenia in 1991 and Bosnia-Herzegovina in 1993.

weapons. Developed countries have vested interest to sell weapons 'to secure employment' and are often disproportionately pleased to announce that they have secured large orders for their arms industry. When arms are sold to the Third World, industrialised States are thus often content that such arms sales will bring in foreign exchange and enhance employment. SIPRI surveys transfers to the Third World of 'major' weapons, for example aircraft, missiles, armoured vehicles and ships.[104] But there is a clear connection between the arms trade and the risk of armed conflict in areas to which the arms have been imported.[105] France, the United Kingdom, Russia and Sweden have all been accused in recent years of fomenting strife in countries like Rwanda, Serbia and Angola by the supply of arms.[106] As for costs, it may be that a country as a whole is 'poor' in terms of the living conditions of its population, like, for example, Angola, but that the government has access to vast deposits of natural resources, like diamonds or oil, which facilitate large purchases of sophisticated and costly conventional arms. Not only States, but also many political factions and movements, have no financial problems to purchase large quantities of conventional arms.

What should be observed is also the danger of overspill of arms, sold or often given by States to support insurgents. Weapons given by the allies to Libyan rebels in 2011 ended up in the hands of the members of *Al-Qaeda au Maghreb Islamique* (AQMI), allied to the *Mouvement de libération de l'Azawad* (MNLA) and to the smaller faction *Ansar Dine.*[107]

International society has an interest in ensuring that the arms trade does not expand into furnishing too many breakaway groups with ready access to arms. However, there is, as yet, little State control of the arms trade and one might say that there is even strong State support for such trade. Even when sanctions are imposed for all goods to a particular country, as in the case of Rhodesia, arms find their way there, often through several third parties ostensibly indicated on the letters of credit and bills of lading and other title documents. Or, as in South Africa during its apartheid phase, sanctions merely encourage a country to start its own weapons production, gradually even exporting arms and thereby even expanding the international arms trade.

A similar development took place when the EU imposed an embargo on arms sales to China after the Tiananmen Square tragedy in 1989. Washington strongly

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104 But it became impossible to follow the dispersal of, for example, the ex-Soviet weapons arsenal after the demise of the USSR in 1991.

105 *Cf.*, the activities of the US Arms Control and Disarmament Agency (ACDA). For trade in conventional weapons see Turner, J., *Arms in the '80s* (Stockholm: SIPRI, 1986), and Yakemchouk, R., 'Le transit international des armes de guerre', *RGDIP*, 1979, 350. But other problems arise as arms production in developing countries increase; many States will not then rely on arms imports, see Brzoska, M. and Ohlson, T., *Arms Production in the Third World* (London: SIPRI, 1985).

106 Or, as in the case of Sweden, 'servicing' arms systems, like the Bofors land-to-air gun on Velebit mountain above Split, 'modified' for the Yugoslav Federal Army in 1991 by two engineers to land-to-land use, which would necessarily be targeted against the civilians below; the engineers were arrested but subsequently released without trial as Croatia achieved independence and regained full control over the Split area.

107 *Cf.*, above, Chapter 2 B viii.

opposed the EU's plan to replace the Chinese embargo with a code of conduct on arms sales.[108] The House of Representatives supported a non-binding declaration in 2012, urging Europeans to 'reconsider this unwise course of action', as it did not correspond with transatlantic cooperation on security.

There were some early attempts to provide for international regulation of the trade in conventional arms at the end of the nineteenth century.[109] Later, there have been efforts to arrive at international treaties restricting access to arms at least in certain regions[110] or imposing other conditions for the acquisition of arms.[111] The Secretary General was asked by the General Assembly in 2006 to establish an expert group to investigate the possibility of an Arms Trade Treaty (ATT).[112] The Group reported in 2008 and several important conferences on the arms trade have taken place since then.[113] Further important talks on an Arms Trade Treaty followed, after an UNIDIR initiative.[114] There are now continuing talks to finalise a Treaty on Arms Trade.[115]

Given the interests that States have to purchase arms for their own self-defence and for their defence industries to export arms to other States, the success of such a treaty is not a foregone conclusion. Furthermore, even if once concluded there are elements which would cause concern as to its actual implementation.

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108 *Cf.*, EU guide for export of military material, http://register.consilium.europa.eu/pdf/fr/09/st09/st09241.fr09.pdf.

109 *E.g.*, the 1890 Brussels Act prohibited imports of certain firearms into certain areas of Africa; the 1906 Act of Algeciras prohibited the import of firearms into Morocco; the 1919 St. Germain Draft Convention on Control of Arms Trade, the 1925 Geneva Draft Convention on Arms Trade, and the 1929 Draft Convention in International Supervision of Arms Manufacturing laid down rules for export licences for arms and other restraining rules; none of the latter Draft Conventions came into force.

110 Some collective undertakings, for example the Ayacucho Agreement of 1974, concern the limitation of arms and provide for an end to the acquisition of arms for offensive purposes on a regional basis. But the agreement concerns only arms supply exceeding what is needed for defence purposes and poses, as such, many problems of identification.

111 On suggestions that arms transfers should be conditional on training in the Law of War, see discussion on the Lieber Group in *ASIL*, 'The responsibility for training foreign military personnel', *ASIL*, 1984, 1.

112 General Assembly, *Towards an Arms Trade Treaty*, UN document A/RES/61/89, 18 December 2006, para. 1. A/63/334, 26 August 2008; see also, Wallacher, H. and da Silva, C., *Progressing towards an Arms Trade Treaty*, PRIO Papers, Oslo, 2008; Saferworld, *The Arms Trade Treaty and Military Equipment: The Case for a Comprehensive Scope*, 2009, available at http://www.saferworld.org.uk/publications.php/312/making_it_work; Parker, S., *Analysis of States' Views on an Arms Trade Treaty*, UNIDIR, October 2007.

113 Draft Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms, 16 July 2009; General Assembly, *The Arms Trade Treaty*, UN document A/RES/64/48, 12 January 2010.

114 See, for example, Promoting Discussion on an Arms Trade Treaty European Union–UNIDIR Project, Regional Seminar for Countries in Asia and the Pacific 13–14 October 2009, Kuala Lumpur, Malaysia.

115 Le Meur, P., *Un traité sur le commerce des armes –champ d'application et paramètres* (Paris: Fondation pour la recherche stratégique, 2011).

iv Peaceful Settlement of Disputes

Direct negotiations are often the most effective way of solving a dispute,[116] especially by preventing the escalation of problems, tackling issues as they arise.

If a dispute grows into some proportion a third State or the Secretary General of the United Nations may offer their *bona officia*[117] to assist the reaching of an agreement, normally by approaching each party separately to discuss a potential solution of the problem.

The third party may also take part by consulting with the two parties and proposing solutions to the negotiating parties; such assistance is usually referred to as 'mediation'.[118] The two methods can be combined, as in the border war between Kenya and Somalia in 1967 when President Nyerere of Tanzania offered a venue for talks in Arusha by good offices and President Kaunda of Zambia mediated. Other efforts of mediation have been made by a succession of American presidents in the disputes between Israel and the Palestinians, offering a venue in Camp David and suggesting points of agreement. The Dayton Accord concerning Bosnia-Herzegovina was reached by similar, albeit considerably more 'authoritative', mediation by the United States.

A more institutionalised system of investigation is also used. When the dispute is about questions of fact, a Fact Finding Commission may be useful to objectively ascertain the background.[119] Sometimes such commissions are entrusted with both the task of fact-finding and with mediation and thus perform what is commonly called conciliation services.[120]

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116 *Cf.*, Kass, S.L., 'Obligatory negotiation in international organisations', *CanYIL*, 1965, 36 *et seq.*; *cf.*, Icle, F.C., *How Nations Negotiate* (New York, 1964).

117 Pechota, V., *The Quiet Approach: A Study of the Good Offices Exercised by the United Nations Secretary General in the Cause of Peace* (New York: UNTAR, 1972); Bindschedler-Robert, D., 'Les bons offices dans la politique étrangère de la Suisse', in *Handbuch der Schweizerichen Aussenpolitik*, 1975, 670.

118 Schücking, W., *Das völkerrechtliche Institut der Vermittlung* (Kristiania: Aschehoug & Co., 1925); Politis, N., 'L'avenir de la médiation', *RGDIP*, 1920, 130; Randolph, L.L., *Third Party Settlement of Disputes in Theory and Practice* (New York, 1973); Young, D.R., *The Intermediaries: Third Parties in International Crises* (Princeton: Princeton University Press, 1967); *cf.*, Burton, J., *Conflict and Communication in International Relations* (New York: Macmillan, 1969). See below Chapter 11, section A ii c on mediation for the purposes of ensuring implementation of treaties on the Law of War.

119 See, *e.g.*, Shore, W.J., *Fact-Finding in the Maintenance of Peace* (New York: Dobbs Ferry, 1970); Politis, N., 'Les commissions internationales d'enquête', *RGDIP*, 1912, 149; Bensalah, T., *L'enquête international dans le règlement des conflits* (LGDJ), Paris, 1976.

120 Cot, J.P., *La conciliation internationale* (Paris: Pédone, 1968); Wehberg, H., 'Die Vergleichkommissionen im modernen Völkerrecht', in *Festgabe Makarov* (Stuttgart: Kohlhammer, 1958), 551; Revel, G., 'Rôle et caractère des commissions de conciliation', *RGDIP*, 1931, 564; Efremott, 'Organisation de la Conciliation comme moyen de prévenir la guerre', 59 *RCADI*, 1937, i, 103; Hamzeh, F.S., *International Conciliation* (Amsterdam: Djambatan, 1965); Schindler, D., *Die Schiedsgerichtbarkeit seit 1914* (Stuttgart: Kohlhammer, 1938), 176 *et seq.*; van Asbeck, F.M., 'La tâche et l'action d'une commission de conciliation', *NTIR*, 1956, 1; Castberg, F., *Mellemfolkelig Rettspleie* (Oslo: J.W. Cappelen, 1925), 86; Hambro, E., *Folkerettspleie* (Oslo: Gyldendal, 1956), 68; Hyde, C.C., 'The place of commissions of inquiry and conciliation treaties in the peaceful settlement of international disputes', *BYIL*, 1929, 96.

The Hague Convention I of both 1899[121] and 1907[122] provided for the solution of disputes by *bona officia* and mediation and the parties agreed to attempt such solution before resorting to any armed force. Contracting parties also agreed that efforts by third parties to settle their disputes by such negotiation would not be regarded as any unlawful intervention. The Convention of 1907 also provided for assistance by Fact-Finding Commissions, without any obligations for the parties, however, to refer disputes to such bodies.

A number of bodies have been established for conciliation purposes, for example under the Bryan Treaties[123] and under the auspices of the League of Nations.[124] The Charter of the United Nations provide ample provisions for the peaceful settlement of disputes.[125]

Arbitration[126] and judicial settlement, as encouraged by the Hague Conventions of 1899 and 1907,[127] are other normal ways of settling disputes peacefully[128] and have grown in importance in modern times. Arbitration has developed into a much used method of resolving disputes.[129] There are obvious reasons for referring disputes to the International Court of Justice,[130] although the recent lack of respect for the Orders and Judgments of the ICJ has given cause for concern.[131]

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121 26 *NRGT*, 2 série, 920.

122 2 *NRGT*, 3 série, 360.

123 *AJIL*, 1939, suppl., 861.

124 But note that many 'conciliation' commissions set up under peace treaties are really concerned with claims, for example regarding property; on such commissions, with quite different functions, see 14 *RIAA* 1965 13 (Anglo-Italian Commission); *ibid.*, 67 (US-Italian); 16 *ibid.*, 1969 183 (French-Italian) and *ibid.*, 228, 300 (Netherlands-Italian) and *cf.*, Vignes, D., 'La commission de conciliation franco-italienne', *AFDI*, 1955, 212.

125 Articles 24, 35–37 for the Security Council; articles 11, 12 and 14 for the General Assembly. See Stone, J., *Legal Controls of International Conflict* (Sydney: Maitland, 1954), 185 *et seq.*; Lall, A.S., *International Negotiations* (New York: Columbia University Press, 1966); Jimenez de Arechaga, *Voting and Handling of Disputes in the Security Council* (Montevideo: Universidad de Montevideo, 1950).

126 See, *e.g.*, Stuyt, A.M., *Survey of International Arbitrations 1794–1970*, 1972; Simpson, J.L. and Fox, H., *International Arbitration: Law and Practice* (London: Stevens, 1959); Carlston, K.S., *The Process of International Arbitration* (New York: Columbia University Press, 1946); Chapal, P., *L'arbitrabilité des différends internationaux* (Paris: Pédone, 1967); Sohn, L.B., 'The function of international arbitration today', 108 *RCADI*, 1963, i, 1.

127 Above, in this Chapter, this section.

128 Delbez, L., *Les principes généraux du contentieux international* (Paris: LGDJ, 1962); Hallier, H.J., *Internationale Gerichte und Schiedsgerichte* (Cologne: Heymanns, 1961); see also the European Convention for Peaceful Settlement of Disputes, 320 *UNTS* 243, which widens the scope of reference to the ICJ.

129 For example, the numerous cases Iran and the United States currently dealt with by the Permanent Court of Arbitration in the Hague.

130 See *e.g.*, Rosenne, S., *The Law and Practice of the International Court* (Leiden and New York: Sijthoff, 2 vols, 1965).

131 Above, Chapter 2, section B on the *Hostages in Teheran Case* (in which Iran withdrew from the Court), and the *Nicaragua Case* (in which the United States withdrew from the proceedings).

v Pacts against War

The numerous treaties which forbid the use of force and bind parties not to resort to war[132] also play their part in the peace preserving process. By making war illegitimate such treaties will restrain some State action. But conventions on prohibitions of force will assist little in the reduction of internal war as the non-State party is not bound by any of the agreements forbidding war and cannot conceive its behaviour as illegitimate under international law as the traditional version of this system normally[133] does not recognise insurgent groups as 'international persons', capable of directly assuming rights and obligations.[134]

vi Interaction by Trade and Loans

Strong economic interdependence may not be a guarantee against war[135] but it normally has a stabilising effect. Much could be said about the intricate effects of international trade and concessional finance as peace preserving factors. For example, trade is, at least in the West, usually perceived as the *primus motor* of détente and conducive to prevailing concerns of peaceful activities. As regards the relationship between States, it may be sufficient to point at the activities of WTO,[136] the International Monetary Fund (IMF),[137] and the World Bank[138] on the universal level. On the regional level customs unions and free trade areas also contribute to link States together by trade.[139] Many of these organisations also fill a function by institutionalising cooperation.[140] But much is achieved by general world trade

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132 Above, Chapter 2, section A.

133 But see below, Chapter 6, section B i c on obligations of liberation movements.

134 See my *Concept*, *op. cit.*, Chapter 1, on my own theory of non-State parties as direct subjects of international law. Few academic writers share my views on this point but it is the only theory which can be reconciled with contemporary State practice which is also confirmed by case law of national and international courts. It would, for example, be impossible to punish individuals as war criminals as was done in the Nuremberg and Tokyo trials, and as is now done in the War Crimes Trial Tribunals of former Yugoslavia and others (see below, Chapter 12, section C), if not even individuals were directly bound by international law.

135 *E.g.* between Germany and other European States in 1939; some famous scholars assumed economic factors would be more important than they proved to be in the event: see Keynes, J.M., *The Economic Consequences of Peace* (New York: Harcourt, Brace and Howe, 1920), 17.

136 See www.WTO/benefits. *Cf.* on GATT, Dam, K.W., *The GATT Law and International Economic Organisation* (Chicago: University of Chicago Press, 1970); Flory, T., *Le GATT: droit international et commerce mondial* (Paris: LGDJ, 1968); Jackson, J.H., *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969).

137 See, *e.g.*, Carreau, D., *Souverainté et coopération monetaire internationale* (Paris: ed. Cujas, 1970).

138 See *e.g.* Broches, A., 'International legal aspects of the World Bank', 98 *RCADI*, 1959, 301.

139 For a survey, see my *Ekonomisk integrationsrätt* (Uppsala: Almqvist & Wiksell, 1973).

140 See below, in this Chapter, next section.

although new trends of 'economic nationalism' may be undermining.[141] Investment finance mechanisms and supplementing machinery for the solution of investment disputes are also important factors in the peace preserving effort.[142]

vii Institutional Factors

The United Nations may play a role in several different ways in international armed conflicts, using one or several of the mechanisms mentioned above. It has been suggested that the UN will be particularly helpful to open up issues by public debate; assisting by 'quiet diplomacy', good offices and conciliation; offering inquiries and reports; ascertaining the 'will of the people'; carrying out on the-spot observation and surveillance; contributing to consensual peacekeeping and policing; offering economic assistance and technical cooperation; determining which governments are entitled to be represented at the United Nations; taking sanctions and enforcement measures; elaborating norms and criteria of conduct.[143]

The only item on this useful list which does not quite square with our problem concerning liberation wars and internal wars is perhaps the one concerning representation of governments at the United Nations; for in view of the participation of non-State bodies to treaties on the Law of War[144] and in view of their part in the warfare itself, the participation of 'States' rather than emerging 'nations' in the UN is sometimes an anomaly. There is little harm non-State movements could do were they to take part in debates. On the contrary, they might derive some benefit themselves and become more aware of the obligations which are incumbent upon them. But the world has been too worried to give non-State movements any 'standing' or any particular 'status', almost forgetting that, in reality, certain movements already behave very much like State entities and often, so far, without the entailing duties.[145]

There were serious protests by Israel, as one could have expected, when Palestine was allowed to become a member of UNESCO in 2011. Less predictably, the United States also voted against Palestine's membership, and threatened to cut off contributions to UNESCO's budget. The United States was joined in its vote against membership by both Germany and Sweden and 11 other States. A total of 52 States abstained, including the United Kingdom. Yet, in the discussions it is remarkable that no one raised the fact that another specialised agency, UPU, the Universal Postal Union, has 'territories' without full standing as States, as members.[146] The UPU is highly important to international communications and to

141 Mayall, J., 'Reflections on the "new economic nationalism"', 10 *Review of International Studies*, 1984, 313.

142 See my *Finance and Protection of Investments in Developing Countries*, 2nd edn (London: Gower, 1987), 133 *et seq*.

143 Schachter, O., 'The United Nations and internal conflict', in Moore, J.N., *Law and Civil War in the Modern World* (Princeton: Princeton University Press, 1974), 409.

144 Below, Chapter 6, section B i c.

145 Below, Chapter 6, section B ii c.

146 See, Detter, I., *Law Making by International Organisations*, *op. cit.*, Chapter 3 and above in this work, Chapter 2 A iii d on the status of the PLO in UNESCO.

international society as a whole. No one has ever protested that non-States have been accepted in the UPU as members.

Some international organisations were created precisely to constitute stabilising factors to ensure peace, in a more technical, more precise and probably more effective way than the general methods of the United Nations. This was the case of the European Community for Coal and Steel (ECCS)[147] although this is often forgotten in the maze of contemporary economic regulations. This organisation was established to create a common market, with free circulation of goods, manpower and capital, for the two main *base industries of war*: coal and steel. No member of the Community can start armaments without the knowledge of the other parties. The second objective was to create a balancing factor between the two super-powers and introduce Europe as a balancing factor, along the lines of Immanuel Kant and Abbé de St. Pierre.[148] Later, when nuclear power was thought viable and important as another base industry for war the European Community for Atomic Energy was formed in 1957, creating a common market for fissile material.[149]

The general common market, the European Economic Community, later supplemented the other two Communities, the ECCS and Euratom, by deep economic integration of the Member States. This customs union, later transformed into the European Union merging the three Communities, has external tariffs to third States and, to some extent, similar foreign policy to third parties.

As a consolidated and integrated structure, the European Union was at one stage perceived as capable of effectively reducing risks of war between the members themselves. Like any other alliance,[150] tension to outside parties may be enhanced in proportion to the professed loyalty between members themselves. Such tensions to the outside world may be expressed in economic terms – as when, for example, the United States referred to the EU as 'fortress Europe' – or, indeed, in terms of political hostility. Furthermore, the EU increasingly turned out to be to the detriment of developing nations: EU hand-outs to the Third World cannot disguise the plight of developing countries being disadvantaged exporting their products to Europe.

In spite of questionable constitutional right of action in disputes outside its territory, the EU did not hesitate to intervene, even with Russian and Czech 'advisors' in the war between the Yugoslav Federal Army and the States, Slovenia and Croatia, which sought to secede from the 'Socialist People's Federation'. An arms embargo was imposed on the nations that wished to secede from the communist federation headed by Belgrade. In this affair the EU did not always act without bias and

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147 Reuter, P., *La Communauté européenne du Charbon et de l'Acier* (Paris, 1952). Before the United Kingdom joined the European Communities and when these were predominantly francophone, known as CECA, an abbreviation still often used for *La Communauté européenne du Charbon et de l'Acier*.

148 On these theories, and for references, see my article on 'The problem of unequal treaties', *ICLQ*, 1966, 1086.

149 On the vast literature on the origins of the Communities, see my *Bibliography of International Law* (New York: Bowker, 1976), 523 *et seq.*

150 See, further, in this Chapter, section C i.

certainly did not reduce the length of hostilities, but almost certainly prolonged the war.

However, as a rule, international organisations may be most important to reduce the risk of armed conflict. Certain *technical* arrangements contribute probably most to the prevention of violence and ensuing war and, yet, play a much underrated role in this respect. States are interlinked and deeply interdependent on technical cooperation through organisations like the specialised agencies of the United Nations, especially the Universal Postal Union (UPU), the International Telecommunications Union (ITU), the World Health Organisation (WHO), the World Meteorological Organisation (WMO) and the International Civil Aviation Organisation (ICAO). States are inhibited from resorting to violence if it implies the disruption of activities of these organisations with regard to their country. It is awkward to be outside the postal or telecommunication networks (under UPU and ITU), or without the cooperation in health matters (under WHO), and it will be hazardous to continue civil aviation operations (under ICAO).[151]

Another peace preserving factor is the vertical displacement of representatives of States in organisations: it is not normally the foreign ministries who send delegates to the technical organisations, but the post offices, telecommunications departments, health ministries and meteorological departments. This means that the integrating network ties together State administration lower down than at the normal level of external contacts, *i.e.* lower down than the *niveau* of the foreign ministries. A consequence of this is the integration on a wider organisational basis within Member States of organisations. Seen together with common rules of simple majority votes, or 'contracting out' procedures, dispensing with any further form of State approval,[152] the new law of organisations represents substantial technical peace preserving guarantees.

151 On the activities and powers of these organisations, see my *Law Making, op. cit.*, 217–329.

152 For a detailed analysis of these rules and State practice, see *ibid., passim*.

Chapter 4
The War-Waging Machinery

A THE RESOURCES OF STATES

States have permanent forces and assets which are put to their disposal in war. Other belligerents lack these resources and this explains why, for example, guerrilla wars are fought on land, and not at sea or in the air; for guerrillas do not have warships or aeroplanes.

States use their forces, military aeroplanes[1] and other transport and equipment. It is particularly important to set out what a warship implies as such ships form an important part of the war-waging machinery.

There is, with regard to ships, a similar problem to that of distinction between civilians and combatants.[2] Ships operated by navies are of two kinds. First, there are fighting ships, including auxiliary cruisers and converted merchantmen. Secondly, there are auxiliary ships of all description. These ships are public ships. They are all commanded by a commissioned officer of the fighting fleet, manned by a crew subject to military discipline, bear external marks distinguishing its nationality, are listed in the list of warships of the belligerent nations and, finally, observe the laws and customs of the Law of War.[3]

Merchantmen can be converted into warships on the condition that they comply with all the characteristics of fighting ships.[4] Conversion can, according to the French doctrine, take place on the high seas[5] although this has been contested elsewhere.[6] By being absorbed in the navy of a state converted ships are in a

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1 On the importance of identification markings, see Detter, I., 'Foreign warships and immunity for espionage', *AJIL*, 1984, 65.

2 Below, in this Chapter, section C.

3 *Cf.*, Convention 1982 on the law of the Sea, article 29. See further on the status of warships, Detter, I., 'Foreign warships', *op. cit.*, 60 *et seq.*

4 Hague VII 1907, articles 1–6; *The Kronprinz Wilhelm*, AD 1929–1930, 510.

5 Rousseau, *Conflits armés*, *op. cit.*, 223.

6 On the conversion of the Russian merchantmen *The Smolensk* and *The Petersburg* in the Red Sea in the Russian-Japanese War, see 'Chronique, Communication de F. Rey', *RGDIP*, 1909, 509.

different class from privateering ships, which under special *lettres de marque*, had formerly been authorised to attack enemy merchant vessels.[7] A third group of ships often employed by navies are merchant ships under charter which carry out services, like carrying provisions and supplies, for a limited time. Such ships are usually held to remain private ships.[8]

Merchantmen may carry defensive armaments but, in order not to be classified as converted vessels, such armaments must only be light.[9] However, in earlier German doctrine any armed ship is considered as a warship[10] although it is considered that this is contrary to generally accepted opinion.[11]

B BELLIGERENTS AND COMBATANTS

The State is, say some, the sole source of the 'right' to use violence.[12] It is certainly the traditional war-waging machine.[13]

If war is defined as a state of armed conflict between States it follows, to those who accept this definition, that the 'subjects' of belligerence can only be States. In other words, some claims that only States can be bearer or rights and duties in war.[14] That cannot be correct: even traditionalists admit, on reflection, that groups of citizens, for example those recognised as belligerents in civil war,[15] can wage war and then enjoy specific rights and have to abide by certain duties. Even other groups, of some consolidated structure,[16] can be belligerents, as amply demonstrated in contemporary warfare, in Korea, in Vietnam or the Middle East. If only States have rights and duties in war, it would also be illogical to instigate legal actions against individuals for war crimes.

International organisations can also be belligerents. Some have held that it is somehow incompatible with the tasks of the United Nations to claim that the organisation is involved in a war.[17] But surely the peace-keeping efforts of the United Nations[18] do not alter the factual situation in which the United Nations

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7 Privateering was forbidden by the Declaration of 1856, below, Chapter 8, section B i. On the practice see Wilson, 'Conversion of merchant ships into warships', 2 *AJIL*, 1908, 271.

8 *The Princess Alice*, 6 *Hackworth* 447; 23 *AJIL* 673; but *The Locksun*, a collier ship, was held not to be a merchantman, *loc. cit.*

9 *Cf.*, Scott, 'The execution of Captain Fryatt', 10 *AJIL*, 1916, 865.

10 Strupp-Schlochauer, *Wörterbuch des Völkerrecht*, 1920, 503.

11 Rousseau, *Conflits armés*, *op. cit.*, 226.

12 Weber, M., 'Legitimacy, politics and the state', in Gerth, H. and Mills, C.W. (eds), *From Max Weber: Essays in Sociology* (New York: OUP, 1958), 77, reprinted in Connolly, W., ed.), *Legitimacy and the State* (Oxford: Blackwell, 1984), 33.

13 Above, Chapter 1, section D i a and further below, in this section.

14 Berber, 3 *Lehrbuch des Völkerrechts, Kriegsrecht*, (Munich: Becksch, 1969), 5.

15 Above, Chapter 1, section D i a.

16 On the threshold, see above, Chapter 1, section B iii b.

17 McNair, A.D. and Watts, D.V., *The Legal Effects of Wars*, 4th edn (Cambridge: CUP, 1966), 45.

18 On the earlier UN Peace-Keeping Forces, see Higgins, R., *United Nations Peace-Keeping Forces*, 4 vols (Oxford: OUP, 1976–81); Bowett, D.W., *United Nations Forces: A Legal Study of UN*

intervenes and it would seem illogical to impute any special character to a conflict because of an intervention by the UN when that situation already exists.

On the other hand, there might be wars in which the United Nations only *appeared* to intervene but where the organisation was not really a belligerent. This was, for example, the case in Korea where the UN appeared as an umbrella for collective State action.[19] There have been other cases where the distinction is sometimes difficult to draw between collective action and action by an organisation. For example, the Inter-American Peace Force in the Dominican conflict in 1965 consisted of units from States and was probably a collective body for intervention purposes.[20]

Some claim that international organisations in general lack the competence to wage wars, with the notable exception of the United Nations.[21] The reason for this exception would be that article 42 of the Charter expressly foresees forceful action by the Security Council which might involve the use of armed forces of the organisation.[22]

There is no reason why other organisations could not be belligerents and no *a priori* reason why such entities should be excluded as subjects of the Law of War. For example, the planned European Defence Organisation was to have had an army of its own.[23] The European Union now has a rudimentary structure for its own 'army', necessarily bound by the rules of the Law of War. The forces of NATO, too, are subjected to such rules. The forces of NATO may be recruited on a collective basis from the participating members. However, there is no doubt that the organisation has 'international personality', even by the stringent traditional tests.[24] And the troops that NATO has at its disposal gradually lose their national ties, as do the contingents to the UN forces, in favour of the allegiance to the unified command.[25] The troops operating under the United Nations aegis in Korea may fall into a slightly different category not being forces of the United Nations – as the decision to take action had been taken against the veto of the USSR. The units were probably troops of the collective operation of the Western Powers, but as such, detached from their respective home states and placed under a collective command which, at least as on an *ad hoc* basis, functioned as an international organisation.

Practice (New York: Praeger, 1964); *cf.*, Seyersted, F., *United Nations Forces in the Law of Peace and War* (Leiden: Sijthoff, 1966).

19 See Bastid, S., *Cours de droit international* (Paris: Les Cours de droit, 1951–2), 340; Baxter, R.R., 'Constitutional forms and some legal problems of international military command', 29 *BYIL*, 1952, 335; and Detter, I., *Law Making, op. cit.*, 60 *et seq. Cf.*, Alibert, C., 'Du droit de se faire justice dans la société internationale depuis 1945' (Paris: LGDJ, 1983), 6–8.

20 5 *IRRC*, 1965, 303.

21 *Ibid., loc. cit.*

22 *Ibid., loc. cit.*

23 See, Edwards, G. and Burrows, B., *The Defence of Western Europe* (London: Butterworth, 1982); *cf.*, Aron, R., and Lerner, D., *La querelle de la CED* (Paris: A. Colin, 1956).

24 CLBV, 'La personalité juridique de l'OTAN', *AFDI*, 1955.

25 The same, perhaps to a lesser extent, could be said at the time for the troops of the former Warsaw Pact. See, Gelberg, L., *Uklad Warszawaki, Studium prawno miedzynarodowe* (Warsaw, 1957).

On the other hand, if international organisations are recognised, in some conflicts, as belligerents, it follows that they, too, can be held responsible for war crimes. This would open the possibility of holding certain contingents of the UN forces, for example those that actively contributed to the Srebrnica massacre of civilians,[26] responsible for their actions.

The most important newcomers among belligerents are the internal groups, liberation movements and other non-State conglomerates. Insurgents may always have existed and there may always have been rules for their treatment: they would in many States be tried for treason for their acts against the State. Later some rudimentary rules for their protection evolved by the rules of 'recognised belligerency'.[27] There is no doubt that the present-day evolution of internal warfare has brought about considerable changes both in the substance of the law and in its ambit.

A further newcomer on the scene of international armed conflict is the terrorist and the terrorist group, for example, Al-Qaeda or the Taliban, responsible for countless atrocities in recent years. To deny that terrorists have entered the war theatre as belligerents is to deny present realities. It is even terrorists who now are the *main* belligerents in armed conflicts. With the advent of genocidal terrorists it is thus now obvious that perhaps the most active belligerents today are members of Al-Qaeda, or of one of its many sub-groups.

Other belligerents nowadays are military companies or security companies, not any longer to be dismissed as mere mercenaries;[28] they constitute special forces, often with considerable professional experience, that are sometimes called in by States or by others to assist in armed conflicts.

The rise of the nation State in the fifteenth and sixteenth centuries may originally have put an end to numerous civil wars or 'private wars'.[29] However, today it may be that the unwillingness of many States to grant equal rights to citizens, or to allow consolidated ethnic groups their own territory, actually contributes to an increase in the number and intensity of civil strife. Although a practice of recognition of belligerents in civil war has existed,[30] it was later accepted that entities which have not received such formal recognition may also qualify as belligerents: non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants.[31]

It is thus indisputable that not only States have war-waging machines today: also internal groupings, non-State entities and terrorists have acquired this quality. For more obvious peace preserving objectives, the United Nations can also take part in war as might other organisations, whether in their own name or as an umbrella for collective State action.

26 See below under war crimes, Chapter 12 C.

27 See above in this section.

28 See below in this Chapter on unprivileged belligerents, under C ii (3).

29 See above, Chapter 1, section C i.

30 See above, Chapter 1, section D i a.

31 *The Fjeld* (1952) (Prize Court of Alexandria), 17 *ILR* 1950, 345; *Diab v. AG* (1952) (Supreme Court of Israel), 19 *ILR* 1952, 550.

What must be underlined is that after States, organisations, and groups it is clearly *individuals* that are the main bearers or rights and duties in war. It is furthermore obvious that this is the case even in peace as one otherwise would not be able to explain why individuals enjoy basic human rights, such as the right *not* to be subjected to genocide, torture or other inhuman treaties *even* in situations where there is not binding treaty on the matter.[32]

If individuals thus have rights and duties in war it is still essential to establish which individuals qualify as 'combatants'. Other civilians might still enjoy certain rights (and subject to certain duties) as 'civilians'.

In inter-State wars the belligerents will be States and the combatants the members of their armed forces. Other entities described above are also potential 'belligerents' and the members of their armed forces are potential 'combatants'. Thus, it is the combatants who fight on behalf of a belligerent. But even if the members of the armed forces of the various entities are 'potential combatants' they do not become 'actual combatants' for the purposes of the application of the Law of War unless there are hostilities of certain intensity. It is, for the ambit of the Law of War, of principal importance to have a clear notion of who is, and who is not, a combatant.

C THE NOTION OF COMBATANT

i The Principle of Distinction

It is important to have clear criteria to distinguish the civilian population from combatants.[33] Any confusion of the division between the two groups will inevitably endanger protection granted under the Law of War. National manuals on warfare rely on the distinction as an important notion.[34]

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32 See on this problem, central to the entire system of international law, my *International Legal Order, op .cit., passim.*

33 On the principles of distinction, see Rosenblad, E., *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems* (Geneva: Henri Dunant Institute, 1979), 61 *et seq.*

34 *E.g.*, United Kingdom, *Manual of Military Law, The Law of War on Land*, pt.3, article 284; United States, *Laws of Warfare*, 1956, paras 39–42; France, *Règlement de discipline générale dans les forces armées*, ch. 4, article 34; ch. 2 article 5; Federal Republic of Germany, *Verordnung*, 1961, paras, 64, 68; Switzerland, *Manual des lois et coutumes de la guerre*, 1963, Chapter 2, article 25.

ii Qualifications for Combatant Status

a Potential Combatants

(1) Regular Forces
One distinguishes traditionally between regular troops,[35] whether or not including militia corps,[36] and 'other' forces. The regular troops form the core of the 'lawful combatants'. Women may form part of such regular troops and enjoy equal privileges.[37] The regular forces also include soldiers of foreign nationality.[38] An ambiguous provision in article 3 of the Regulations provided that armed forces may consist of combatants as well as non-combatants. The latter group consists of members of the armed forces not taking direct part in the hostilities.[39] Article 4(A)1 of 1949 Geneva Convention II eliminates this ambiguity by referring only to 'armed forces'.[40]

The Hague Regulations provide that:

> 'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognisable at a distance;
> 3. To carry arms openly;
> 4. To conduct operations in accordance with the laws and customs of war.'[41]

The 1949 Geneva Conventions deal also with certain criteria which distinguish civilians from combatants. Thus, to be a combatant, a person would have to be

> '(a) ... commanded by a person responsible for his subordinates;
> (b) ... having a fixed distinctive sign recognisable at a distance;
> (c) ... carrying arms openly;

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35 See Greenspan, *Modern Law of Land Warfare* (Berkeley: University of California, 1959), 68; McDougal and Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), 544.

36 As for example in Switzerland. The question of the composition of regular troops is a matter for municipal law: Hague Regulations article 1(2); *cf.*, 2 Oppenheim 255. The British Home Guard was probably to be considered as part of the regular troops: Stone, *Legal Controls*, *op. cit.*, 568. If a State incorporates semi-military organisations or police forces in the regular troops it must inform other parties to a 'conflict': Protocol 1 Article 43(3). On civil defence personnel, see below, Chapter 8, section A iii 11. *Cf.*, Sweden, Committee on International Law, *Folkrätten i krig, Rättsregler under väpnade konflikter – tolkning, tillämpning och undervisning*, Sveriges offentliga utredningar (SOU) 1984:56,76. Yet, national conditions can only supplement and not override requirements of international law.

37 ii Berber, 143.

38 On the question whether foreign nationals can be forcibly called up, as in the United States during the Vietnam War, see Rousseau, Ch., *Conflits armés*, *op. cit.*, 71.

39 On the distinction in the Hague Regulations, article 3, between combatants and non-combatants as part of armed forces, see Nahlik, S.E., 'L'extension du Statut de combattant à la lumière du Protocole I de Genève de 1977', 164, *RCADI*, 1979 iii, 171.

40 *Ibid.*, 201.

41 Article 1, 3 *NRGT*, 3 série, 464.

> (d) ... conducting their operations in accordance with the laws of customs of war.'[42]

The same requirements as apply to irregular forces presumably are also valid for members of regular units.[43] However, this is not clearly spelt out: there is no textual support for the idea that members of regular armed forces should wear uniform. On the other hand, there is ample evidence that this is a rule of law which has been applied to a number of situations to ascertain the status of a person.[44]

Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant.[45] 'Unlawful' or 'illegal' combatants may thus either be members of the regular forces or members of resistance, guerrilla movements, or – which is nowadays often the case – terrorists, all of whom do not fulfil the conditions of lawful combatants.[46]

Regular forces of belligerents may include 'militia or volunteer corps': the Hague Regulations[47] as well as the Geneva Conventions[48] all recognise that such units may be incorporated in the regular forces; this also covers so-called 'military companies', whose members occasionally form part of national armies.[49]

Protocol I of 1977 to the Geneva Conventions,[50] on the other hand, does not rely on any implied criteria for regular forces but stipulates that all

> 'combatants are obliged to distinguish themselves from the civilian population while in preparation for or engaged in an attack; even in situations where owing to the nature of the combat an armed combatant cannot distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.'[51]

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42 Article 13 of Geneva Convention I; *cf.*, article 13 of Geneva Convention II, article 4 of Geneva Convention III, and articles 4, 13, 27–34 of Geneva Convention IV.

43 Similar requirements to those in the Geneva Convention are found in national war manuals for regular forces, *e.g.* 3 *British Manual of Military Law, The Law of Land Warfare*, 1958, para. 94; US Army, FM 27-10, *Law of Land Warfare*, 1956, 27–28.

44 *Cf.*, below, in this Chapter, section C ii (2) (iii).

45 See Detter, I., 'Foreign warships', *op. cit.*, 61 *et seq.*

46 See, Baxter, 'So-called unprivileged belligerency: spies, guerrillas and saboteurs', *BYIL*, 1951 322.

47 Hague Regulations article I *in fine*.

48 Geneva Convention I article 13(1); Geneva II article 13(1); Geneva III article 4(1).

49 See below in this Chapter under C ii a (ii).

50 See Schindler and Toman, *Documents*, 2nd edn, 619; *cf.*, Roberts, A. and Guelff, R., *Documents on the Laws of War*, 3rd edn (Oxford: OUP, 1989), 387. For background to the Protocols, see Suter, K., *An International Law of Guerrilla Warfare* (London: Pinter, 1984).

51 Article 44.

The Protocol phrases these difficult criteria[52] mainly in order to cover operations of liberation movements,[53] but it enlarges, on the other hand, the notion of 'regular' forces. It defines thus the 'armed forces' of a Party to a conflict as

> 'all organised armed forces, groups and units which are under the command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law in armed conflict.'[54]

Members of such forces are combatants and 'have the right to participate directly in hostilities'.[55] Although the language is more flexible than that of the 1949 Conventions, the requirements for combatancy remain, in spite of what other commentators have suggested,[56] at least if the various parts of the text in the Protocol are read in context.

(2) Irregular Forces

International law has gradually allowed for combatant status also to those who are not members of the regular forces. Under the Geneva Conventions of 1949 regular forces are thus supplemented by irregular forces, such as other militia or volunteers corps not forming part of regular troops,[57] as well as members of resistance movements, or military companies, which will be considered lawful provided their members meet certain requirements. These requirements have shifted through history but may today be of greater importance than before given the nature of contemporary warfare.

(i) The Special Position of Volunteers As has been shown, militia and volunteers may form part of the regular army and they are then part of the regular forces. In other situations, perhaps more common, militia and volunteers are separate from the regular forces and form the core of what is called 'irregular forces'.

The Hague Regulation[58] recognised the extension qualification of 'regular' belligerents to cover also militia and volunteers. As has been shown,[59] the main characteristics of a 'combatant', which have been used to apply to members of the regular forces as well, were initially designed precisely to cover *certain* irregular forces which merited to be included under the ambit of the Law of War.[60] There were conditions, however, that their actions would be connected with their own

52 See below in the next section on interpretation.

53 Below, in this Chapter, section (iv).

54 Article 43(1).

55 Article 43(2).

56 Above, in this Chapter, under section B.

57 Above, in this Chapter, section ii a (1).

58 Article 1.

59 Above, in this Chapter, section B.

60 See, above, in this Chapter on relevant provisions of the Hague Regulations, and on the Geneva Conventions.

State and, furthermore, they had to be headed by a responsible leader, fight openly, carry a distinctive sign and observe the Law of War.

But there was little certainty as to the necessary size of units of volunteers and whether, in an actual case, a 'volunteer' would be considered as a 'combatant' or as a 'war criminal'.[61]

'Clandestine' movements, including volunteers, would, in earlier practice, not qualify as combatants. But citizens who take up arms in a *levée en masse* may qualify as such on certain conditions.[62] Under the Armistice Agreement between France and Germany in 1940[63] the French government undertook to forbid all Frenchmen to fight against Germany on the side of any of Germany's enemies. Those who did not obey this provision would be punished as illegal militia (*'franc-tireurs'*).[64] But others rising against an occupier or invader have been held to be 'legal' combatants if they fulfilled the requirements of the Hague Regulations.

When Geneva Convention III introduced the four requirements for combatant status, it became apparent that 'partisans' and resistance movements would be recognised as belligerents. The new rules were much criticised as they would put an occupying power 'under considerable strain'.[65] But many also emphasised that the conditions of the Geneva Convention were adequate as only 'secret and disguised' forces present any threat to occupying powers.[66]

Protocol I of 1977 to the Geneva Conventions altered the ambit of the category previously considered as 'irregular' by widening the notion of regular forces or, alternatively, by eliminating the distinction between the two concepts.[67] Whether or not the traditional criteria for a combatant, or the new rules, are applied it is still difficult in practice to establish who is a lawful volunteer.

National case law confirms that certain resistance movements are considered as regular troops.[68] But it is uncertain as to what distinction subsists between such movements and other types of guerrilla groups. The former category, for example the French resistance movements, all involve a certain degree of organisation but some, like, for example, the *maquis*, are not associated with 'open' activities as required for regular combatants.[69] On the other hand, certain groups were thought to be so consolidated and of such a nature that they were not even classified as regular troops.

61 In the *List Case* (1948), US Military Tribunal, *AD*, 1948 640, the Nuremberg Military Tribunal held that a civilian who takes part in hostilities is guilty of a crime against the laws of war and is a 'war criminal'.

62 See further, below, in the next section.

63 The Agreement of 22 June 1940; see Rousseau, *Conflits armés*, *op. cit.*, 73.

64 On the meaning of *'franc-tireur'*, see *ibid.*, 75.

65 Castberg, F., *Soldater, partisaner og franc-tirörer*, *op. cit.*, 73.

66 2 Oppenheim 215.

67 Above, in this Chapter, section C ii and (1).

68 *The Bruns Case* (1946), Norway, Eidsivating Lagmannsrett, 13 *AD* 1946 391. The case emphasised two of the traditional conditions for such status, *i.e.* the forces would be held to be regular provided they act openly and obey the Law of War.

69 Above, in this Chapter, section C ii a (1).

Apart from certain incidences, some involving serious violations of international law, members of the Free French Forces, *Forces françaises libres* (FFL) were treated as regular belligerents during the Second World War. And, in spite of its undoubtedly clandestine work, some commentators have also placed the *maquis*, the French Interior Forces, *Forces françaises de l'intérieur* (FFI), or other types of highly organised partisan movements.[70]

The legal position nowadays appears to be that belligerent parties may use paramilitary units or other irregulars in the conduct of hostilities on condition that the combatants distinguish themselves from civilians[71] but also on condition that belligerents are prepared to take responsibility for any infringements committed by such forces. Thus, in order for irregulars to qualify as combatants, control over them by a party to the conflict is also required.[72]

The degree of control may vary and some cases appear to indicate that effective control, in any event, is required.[73] The ICTY probably went too far when it claimed that not only effective control is necessary for a State to be responsible for irregular units but there is even a condition that the State should have assisted in the general planning of action of these combatants.[74]

(ii) Military Companies Some assumed, for quite some time, that military companies would be the same as 'mercenaries' and therefore deprived of any protection as combatants when their members took part in armed conflict. This resulted from a somewhat careless reading of article 47 of Protocol I of 1977. If we examine State practice, it is clear that such companies have nowadays been accepted to be a useful complement to regular army personnel.

There are still those today who join armies of security companies, attracted in the same ways as the Scottish men who volunteered for the Swedish army during the 30 Years' War in the seventeenth century. It was difficult to understand why such men should be excluded from regular combatant status, as some suggested they were mere mercenaries, given that they normally apply all rules of their army, wear uniforms and obey the Law of War.

A Report by the Center of Defense Information (CDI) in the United States indicates that the modern military companies have little in common with earlier mercenaries. According to Vice-Admiral Jack Shanahan, Director of CDI, it may be that 'Rather than being ragtag bands of adventurers, paramilitary forces or individuals recruited clandestinely by governments to work in specific covert operations, the modern

70 Rousseau, *Conflits armés, op. cit.*, 74–75.

71 Above in this section on these distinction requirements.

72 *Prosecutor v Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, para. 84.

73 *Nicaragua Case*, ICJ *Reports*, 1986, para. 115; *Case Concerning Armed Activities on the Territory of the Congo*, ICJ *Reports*, 2005, paras 160–161; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ *Reports*, 2007, para. 413.

74 *Prosecutor v Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, para. 84. For further criticism of the way ICTY sought to widen responsibility for war crimes without much foundation in international law, see below in Chapter 12.

mercenary firm is increasingly corporate'.[75] These companies, 'private security' or 'military advisory firms', market military battlefield skills, which either help improve a client's military forces or are used as a substitute for regular military forces.[76]

There are private military companies (PMCs) and private security companies (PSCs). The latter would be those that normally look after private clients who are exposed to dangers, especially to terrorist or other threats, such as prominent politicians, businessmen, firms with liquid assets or banks. These security companies are not really different from those which guard bank transports or provide bodyguards for private clients and firms.

But the PMCs are often engaged by government and others to engage in armed conflicts in various capacities. When these PMCs engage in battle they normally wear uniforms and are subjected to a command chain and, to the extent they abide by the Law of War, they, too, must be considered as legitimate combatants.

There are a host of these companies and contrary to mercenaries, they do not hesitate to engage in publicity for their corporate services, including elaborate websites. A number of PMCs and PSCs are thus listed on specific Internet sites like, for example, http://www.privatemilitary.org/home.html.

As mentioned, many have been engaged by governments and it is difficult to see why their members would not be treated like regular soldiers or irregular soldiers, for that matter, if engaged in combat and thus be protected by the Law of War, *provided* they abide by the conditions of the Geneva Convention and wear uniforms when engaged in battle.

One of the most prominent PMCs is Blackwater USA, with various subsidiary companies. The main company was later renamed Xe and then renamed again as Academi Blackwater. It was given a contract with the US government after the bombing of the USS *Cole* off the coast of Yemen in October 2000. In 2002 Blackwater Security Consulting (BSC) was given the assignment to provide 20 men with top-secret clearances to protect the CIA headquarters and another base that was responsible for hunting Bin Laden. It also provided security for American diplomats in Baghdad. The company was accused of wrongdoings in its military operations in 2007, but there have not been any convictions; some claims were settled for some civilian casualties in Iraq. The US State Department extended its Iraq security contract with Blackwater's air operations arm, Presidential Airways, to 2009, for a cost of $22.2 million.[77] The company was later awarded further contracts by the US government for training soldiers in Iraq and elsewhere. Blackwater/BSC/Academi is certainly one of the largest and most important military companies which is still a very important contributor to international security operations.[78]

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75 *Report & Transcript of Presentation* by Vice Admiral Jack Shanahan, director of the Center for Defense Information, and Professor Herbert Howe is a professor at the Georgetown University School of Foreign Service, available at http://www.cdi.org/adm/1113/transcript.html.

76 Isenberg, D., Soldiers of Fortune, CDI, 1997, available at http://www.aloha.net/~stroble/mercs.html.

77 *The Washington Post*, 17 March 2009.

78 Scahill, J., *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (New York: OUP, 2007).

Another prominent PMC is British Sandline International, which at times has been criticised for overstepping what PMCs can reasonably be allowed to do in international society. Here, there was a controversial $49 million contract between the Papua New Guinea government and Sandline International to supply weapons and manpower to assist the government of PNG to quell an uprising in Bougainville in 1997.

Some PMCs have actively contributed to successful military operations, such as the US Military Professional Resources Inc. (MPRI) which had a contract brokered by the United States to assist the Croatian government in Operation Storm in 1995, when the Croatian Army recaptured Krajina, taken by the Serbs in 1991.[79] Military analysts saw the operation as very sophisticated and well coordinated and it was therefore fairly clear that the US government and/or MPRI were involved in the tactical planning of the operation.[80] Some commentators state that action in this military operation was taken 'on behalf' of the US government.[81] The South African PMC company Executive Outcomes actively contributed to peace in Angola.

Among other PMCs which have had important government contracts, we may note, for example, the Airborne Tactical Advantage Co. (ATAC), operating since 1994, which has provided a fleet of tactical aircraft and services to the US military (US Navy, US Air Force and the Air National Guard), including outsourced airborne tactical air training, threat simulation as well as R&D. The Armor Group International has also provided defensive, protective security services to national governments, multinational corporations and international peace and security agencies operating in hostile environments.

The Afghan government announced in March 2012 that private military companies would be prohibited in the country and that instead security would be guaranteed by the new Afghan Public Protection Force (APPF). In response to this announcement, several international aid agencies stated that they may have to leave in view of security fears.[82]

There have been suggestions that PMCs should be regulated. One concrete plan for such regulation has come from one of the largest PMCs, Sandline International.[83] It may be that, in future years, these companies may introduce their own self-regulatory practices or, probably less likely, there is an agreement on an international regime for their operation.

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79 It would seem absurd that the International Criminal Tribunal for former Yugoslavia would later prosecute, for example, General Gotovina, for strategies which had been internationally approved, albeit by covert agreements. See further below on War crimes in Chapter 12.

80 Shearer, D., *Private Armies and Military Intervention*, IISS, *Adelphi Papers*, 316, 1998, 58.

81 Møller, B., Privatisation of Conflict, Security and War, *DIIS Working Paper* no. 2005/2; *Cf.*, Cohen, L.J., *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition*, 2nd edn (Boulder, 1995), 320–321; Burg, S.L. and Shoup, P.S., *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: M.E. Sharpe, 1999), 338ff; Johnstone, D., *Fool's Crusade: Yugoslavia, NATO and Western Delusions* (London: Pluto Press, 2000), 273.

82 Matthew Rosenberg in *New York Times*, 11 March 2012.

83 Report available at the website www.Sandline.com.

(iii) *Levée en Masse* One group which has traditionally been held to be exempt from any requirements imposed on other forces is the civilian population when it rises against an invader as a *levée en masse*.[84] If the population rises spontaneously, there is no need to be organised or to wear emblems although it is required of civilians in such a *levée* to carry arms openly and to comply with the Law of War. Yet, if they do, they should not be treated as marauders or criminals for all they have done has been to spring to the defence of their country.[85] Except for the situation of a *levée en masse*, civilians are considered as non-combatants. They are not entitled to take part in the belligerency or to use arms, even in self-defence, against the enemy. In return they enjoy protection under international law.

The spontaneous rising against the enemy has less importance in modern war where the gradual taking of villages, towns and land is not their predominant pattern. But even in traditional situations the right is very limited: the Hague Regulations[86] indicate that it can be exercised only *before* occupation and some commentators claim that citizens must use their right even *before* an invasion.[87] The right has even been called an 'anomaly' in modern international law.[88] Yet, the right to *levée en masse* undoubtedly still exists and may be considered as an expression of the patriotism of the ordinary citizen to repel the enemy.[89]

(iv) Problems Relating to the Geneva Requirements During the preparatory work of the Geneva Conventions it was not indicated which weapons had to be carried openly and commentators have assumed that the requirement concerned personal hand weapons.[90] But the conditions imply several relative concepts: at what distance must the weapons be visible? And how far must the 'distance' measure at which distinctive emblems can be seen? In the *List Case*[91] the Soviet star in a cap was not considered to be sufficiently visible at a distance.

Naturally, the criteria would, in practice, cause considerable problems. Scarcely any of the Second World War resistance movements would have qualified as combatants under the four stringent criteria of the Geneva Conventions.[92] After all, the hallmark of any resistance movement is concealment. It is probably only in peace-time that there is a clear distinction between civilian and military forces.[93]

On the other hand, in view of the War on Terror and the recurring terrorist attacks, we are now in a continuous war situation. It is impossible, as the Red Cross has

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84 See article 2 of the Hague Convention IV; Geneva I article 13(6); Geneva II, article 13(d); Geneva III, article 4A(b). For historical example, and for the special type where the *levée* is ordered by the government, see Rousseau, *Conflits armés*, *op. cit.*, 72–73.

85 Hague Regulations 1(2). *Cf.*, *British Manual*, para. 95.

86 Article 1.

87 2 Oppenheim 258.

88 Baxter, 'Spies', *op. cit.*, 335.

89 Bauer, F., *Krigsförbrytarna inför domstol* (Stockholm, 1944), 1.

90 Sweden, *Folkrätten i krig*, *op. cit.*, 82.

91 8 *Trials of Major War Criminals*, Nuremberg, 1947, 55–59.

92 *Cf.*, Pictet, 'The new Geneva Conventions for the protection of war victims', 45 *AJIL*, 1951, 462 at 472. *Cf.*, Baxter, R.R., 'Spies', *op. cit.*, 323.

93 Colombia, CDDH/SR.41, vol. 6, 180.

suggested, to shelve off the armed conflicts in Iraq and Afghanistan and allow the rules of the Law of War to operate in those conflicts, but not globally. There is also the new problem of persons who claim to deserve to be considered as combatants but who are not even visible: these are, for example, those who engage in cyber warfare.[94] Yet, the principle of distinction between combatant and civilian is at the root of the Law of War and it is questionable whether such participants could ever qualify for combatant status.[95]

There are two separate questions to be considered in the context of freedom fighters and insurgents. One is whether it is legal under international law to conduct war against the established government, as may be the case against an occupier. The second question concerns whether, or under what conditions, the participants in wars for independence, the freedom fighters themselves, deserve to be treated as 'combatants' and be entitled to any rights as such under international law.

With regard to the first question, we have touched upon relevant problems of legitimacy in a section on revolutionary and resistance wars.[96] It remains to investigate whether individual members if resistance or insurgent forces are 'combatants' under modern international law.

The principle of distinction[97] is of considerable importance as the very core of the Law of War: if a person fulfils the requirements for combatant status he is entitled to the 'rights' and 'privileges' of a soldier, notably to enjoy prisoner of war status if captured; if he does not fulfil the requirements, he is 'an unlawful' or an 'illegal combatant' and may be shot.

Even a third position has been suggested in case law: resistance fighters may, if they do not wear uniform or carry their arms openly, be 'lawful', provided they use no forbidden weapons and act in accordance with the Law of War. But it has been suggested that, although their activity is permitted by international law, they may not be entitled to any rights as 'soldiers' and may therefore be shot if captured.[98] In view of such anomalous repercussions, it is of little comfort to the resistance fighter to know that his activity is 'lawful'.

During the Vietnam conflict it was argued that the conditions for combatants ought to be changed so that the FLN-guerrilla could more easily comply with the requirements for combatants: as the rules stood they were unable to follow them

94 See below, Chapter 7 H on information and cyberspace warfare.

95 *Cf.*, Rosenblad, E., *Humanitarian Law, op. cit.*, 61; *cf.*, Resolutions by the General Assembly of the United Nations 2444(XXIII), and of the Vienna Conference of the ICRC 1963, Resolution XXCIII, principle 3. For comments on earlier practice, see Nurick, L., 'The distinction between combatant and non-combatant in the Law of War', *AJIL*, 1945, 680; Draper, G.I.A.D., 'Combatant status, the historical perspective', 2 *RDPMDG*, 1972, 135 *et seq.*; Veuthey, M., 'Comportement et statut des Combattants', 12 *ibid.*, 1973, 47; on recent changes in the notion of combatant see, Mallinson, W.T. and Mallinson S.V., 'The juridical status of privileged combatant under the Geneva Protocol of 1977', in 4 *Law and Contemporary Problems*, 1978, 4; Nahlik, S.E., 'L'extension', *op. cit.*, 171.

96 Chapter 1, section D ii b, c and d.

97 Above, in this Chapter, section C i.

98 Norway, *The Bruns Case* (1946) 5 Eidsivating lagmansrett, 13 *AD*, 1946, 391, in this part not reversed on appeal; the Supreme Court did not comment on this curious reasoning.

and therefore 'lost' their potential protection under international law.[99] According to a suggestion made in 1970,[100] one method which could be chosen for allowing combatant status to guerrillas would imply the use of relevant criteria for *levée en masse*.[101] This was not the path chosen; instead the problem was tackled in the 1977 Protocols.

Protocol I of 1977 recognises freedom fighters as belligerents[102] provided they act under responsible command and provided they are subject to discipline which enforces relevant rules of international law. Protocol I of 1977 even recognises that it is not always possible for freedom fighters to distinguish themselves from the civilian population and provides that they will still retain the status of combatants provided they carry arms openly during each military engagement and during such time as they are visible to the adversary while engaged in military operation preceding an attack.[103] But Protocol I does not really reduce the four conditions in the Geneva Conventions[104] but rephrases them. The requirement of military distinctive sign is still applicable; to wear some rudimentary form of uniform[105] has, by tradition, been a hallmark and a condition of combatant status[106] and for prisoner of war status.[107] Only in exceptional circumstances may a combatant not distinguish himself from the civilian population. He is unlikely to blend in and is, in any event, subjected to internal discipline under a military command structure.

Due to the difficulties caused by the application of the Geneva Convention with respect to the requirement of 'openly' carried arms,[108] this conditions has now been revised to imply that arms must be carried openly during actual fighting. Although hailed, and criticised, as an innovation, this is not an unusual rule in the Law of War: warships have often been thought to have a right to use false flag until they engage in action.[109] The suspension of the duty of distinction applies to combatants only in extreme cases; whereas permission to allow warships to fly false flag was the normal rule.

But some question these rules and claim that marks of insignia and a duty to carry arms openly are obligations which put the guerrilla fighter in a worse fighting position. Besides, the very nature of partisan warfare is against such practice.[110]

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99 Sweden, *Folkrätten i krig*, *op. cit.*, 80.

100 Draper, G.I.A.D., 'The legal classification of belligerent individuals', in Centre Henri Rolin (ed.), *Le droit humanitaire et conflits armés* (Brussels, 1970), 149.

101 See above, in this Chapter section C a (2)(iii).

102 Articles 43(1) and 44(3).

103 Article 44(3).

104 Above, in this Chapter, section C ii a.

105 But a star in a cap is not sufficient, see *supra*.

106 On the transformation of a reconnaissance soldier without a uniform into a common spy see Detter, I., 'Foreign warships and espionage', *op. cit.*, 60 *et seq.*

107 *Koi v. DPP* (1968) 2 WLR 723 (PC); *Ali v. DPP* (1968) 3 All ER 488 (PC). *Cf.*, Baxter, R., 'The Privy Council on the qualification of belligerents', *AJIL*, 1969, 290; Elman, S., 'Prisoners of war under the Geneva Conventions', 18 *ICLQ*, 1969, 178.

108 Above, in this Chapter, section C ii (ii)(iii).

109 See below, Chapter 8, section B, also for criticism of this type of warfare.

110 Trainin, I.P., 'Voprosy partizanskoi voiny v meshdunarodnom prave', in *Izvestijam Akademii Nauk SSSR*, 1945, 4, 1; *idem*, 'Questions of guerrilla warfare in the law of war', 40 *AJIL*,

The Protocols have not been ratified by any overwhelming number of States and a number of military important States are still missing from the list of those which are bound. However, the Protocols may in many respects reflect what the existing law already is and then, in those parts, be binding, not by virtue of the obligation of the Protocols as Treaties, but by virtue of the underlying obligation in previously accepted rules.[111] But with regard to the new combatant status it is to be questioned whether the requirements have actually been relaxed by Protocol I. It is submitted that similar rules to those of the Geneva conditions still apply for the status of a combatant, and correspondingly, for prisoner of war status.

The combatant still has to be subjected to internal discipline under a system which applies the rules of war. Some writers claim that guerrillas must act under some 'responsible quasi-governmental authority' in order to enjoy protection under Protocol I.[112] Naturally, the application of these rules will inevitably cause numerous problems in practice. There is, for example, little in Protocol I which prevents guerrillas from living as civilians.[113] The ICRC itself had argued that 'openness' must be a *conditio sine qua non* for privileged belligerency, *i.e.* unless guerrillas behave 'openly' they cannot enjoy privileges of combatants.[114] Some commentators have supported this view, dismissing any alternative regulation.[115]

It is a specific feature of insurgent warfare that the member of guerrilla groups merge, intermittently, with the civilian population.[116] As late as during the Nuremberg Trials it was thought that guerrillas and resistance movements would not be privileged as members of resistance forces 'must accept the increased risks involved in this mode of fighting'.[117] Germany sought to deny the status of combatants to de Gaulle's Free French forces and claimed that they were no more than a camouflage to overthrow the legitimate government of Marshal Petain.[118]

It may be correct to assume that protection of the civilian population will be undermined if there is no clear distinction between civilians and combatants. However, guerrilla movements have often in the past acted in a way to safeguard the civilian population together with whom they often have a common cause, by, for example, staying away from a village to save inhabitants from victimisation.[119]

1946, 534; Koshevnikov, F.I. and Romanov, V.A., *Mezhdunarodnoe pravo*, Moscow, 1966, 614.

111 See Detter, I., *Concept*, 2nd edn, *op. cit.*, and, in greater detail, Detter, I., *International Legal Order* (London, 1992) as well as Detter, I., *Essays on the Law of Treaties* (London, 1967), 117, on underlying basis of obligation.

112 Dinstein, Y., 'The new Geneva Protocols: a step forward or backward?', *TWA*, 1979, 267.

113 See Detter, I., 'Foreign warships and espionage', *op. cit.*, 62.

114 Ironically, the IRCR (a body specially protected by the Law of War, see below, Chapter 9, section B iii d) was itself much criticised for its lack of 'openness' during the conflict in Croatia and Slovenia in 1991.

115 Dinstein, *op. cit.*, 285.

116 See, Miksche, *Secret Forces: The Technique of Underground Movement* (London, 1950), Ch. 2.

117 *US v List, 8 Trials of Major War Criminals*, 1949, 34, 58.

118 *Cf.*, Miller, R., *The Law of War* (Lexington, 1975), 31.

119 *Ibid.*

Occasionally they have considered such tactics that their operations are not related to any inhabited area.[120]

Another case for erosion of the important and fundamental rule of distinction is the emergence of weapons of mass destruction, which assume that everyone is a target and thus involved in the war[121] and which are not *able* to distinguish between, for example, combatants and civilians. For rather than allowing such weapons to change the concept of distinction, the presumption should be that such weapons are incompatible with international law.[122]

There has been a gradual erosion of the concepts of 'freedom fighter' or member of resistance, guerrilla or terrorist movements. The term chosen sometimes merely indicates the attitudes of the beholder, or indeed, who was finally successful. What is important to assert, however, is that the Protocols of 1977 afford protection to both resistance movements and to guerrilla action insofar as members of both these types of forces will have the status of lawful belligerents, on certain conditions, and therefore qualify for, *inter alia*, prisoner of war status. It appears possible to comply with the provisions on combatant status under Protocols of 1977 without significantly reducing the protection of civilians.[123]

Protocol I of 1977 affords no protection for terrorists,[124] nor does it authorise soldiers to conduct military operations disguised as civilians. In practice it is obviously difficult to identify terrorists and distinguish them from lawful combatants: surely members of resistance and guerrilla movements often use precisely terrorist tactics and could easily be subsumed under a terrorist concept by their adversary. However, Protocol I does give members of forces operating in occupied territory an 'incentive' to distinguish themselves from civilians when preparing to carry out an attack.[125]

The French delegation wished to extend the protection to resistance movements even beyond the actual limits of Protocol I, and claimed, during the Diplomatic Conference, that even such resistance members who are not ever distinguishable from the civilian population, the true 'underground' workers, should be protected too and not only the more established '*Maquis*', 'partisan' or 'resistance' movements.[126]

The provisions on guerrilla warfare in Protocol I must be seen in the context both of the extremely limited ambit of article 1(4) to which the Protocols apply[127] and

120 Boissier, P., *Histoire du Comité International de la Croix-Rouge de Solférino à Tsoushima* (Paris: Plon, 1963), 116.

121 Rousseau, *Conflits armés*, *op. cit.*, 81.

122 Below, Chapter 7, section B i.

123 United States, CDDH/SR.41, vol. 6, 149.

124 Above, Chapter 1, section B iii c.

125 *Ibid.*

126 CDDH/III/SR.33-36, Annex, vol. 14, 537. The statement is ironic in view of France's final conclusion that Protocol I violates a State's right to self-determination, see further below, Chapter 7, section B ii b.

127 See below Chapter 6, section B i e.

in relation to the increased protection the civilian population enjoys, in any event, against reprisals.[128]

Protocol II, which has as its particular focus internal conflicts, appears to adopt even fewer criteria for combatant status. The Protocol applies to conflicts between the armed forces of a Contracting Party and 'dissident armed forces or other organised 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'.[129] The question of the threshold of application of Protocol II will be dealt with later,[130] but at this stage one may note that the result of the action of a dissident army, such as they control territory and are able to carry out sustained military operations, does not indicate what criteria shall be applied to combatant status. In the absence of specific requirements one is either obliged to revert to the basic conditions of the 1949 Conventions or, by analogy, apply the provisions in Protocol I.

Even if the more liberal rules of Protocol I were to be applied for guerrillas to qualify as combatants there would, in practice, be considerable problems. On balance, therefore, protection of guerrillas would increase the overall level of humanitarian law.

There is no doubt that the new definition in Protocol I of 1977 will remedy a defective law.[131] It was unsatisfactory to have a lack of symmetry, for example, between the concept 'prisoner of war' and 'combatant': for example, Geneva Convention III[132] defined the former concept without referring to the latter term.

On the other hand, it is not correct to suggest that the criteria of combatants are still vague and difficult to apply in practice. There is no confusion in practice as to who is a combatant and who is a civilian: the stringent criteria for qualification as a combatant are at the core of the Law of War and imply that civilians enjoy protection as such *provided* they do not take up arms to participate in hostilities; members of the armed forces, of military companies or insurgents and freedom fighters, enjoy protection as soldiers *provided* they wear a uniform, are subject to military discipline and follow the Law of War.[133]

b Illegal Combatants

(1) Terrorists

Terrorists, including the genocidal *jihad* terrorists, seek to blend with the civilian population and do not distinguish themselves as soldiers. They are therefore 'illegal combatants'.[134] The requirement of uniform, or some form of military insignia, as required by earlier and contemporary practice, is essential for combatant status

128 Below Chapter 8, section A iv c.

129 Article 1(1).

130 See below, Chapter 6, section B ii g.

131 Abi-Saab, G., 'Les mécanismes de mise en oeuvre du droit humanitaire', 82 *RGDIP*, 1978, 177.

132 Article 4.

133 *Cf.*, Furet, M.F. (ed.), *La guerre et le droit* (Paris: Pédone, 1979), 129 *et seq.*

134 See Detter, I., 'Illegal combatants', *op. cit*, *passim*.

in conjunction with other requirements retained by the 1977 Protocols.[135] This distinction is accepted in State practice although there has been some confusion caused by statements by, for example, the well-meaning Red Cross, insisting that 'everyone' must be 'protected' under the Law of War.[136] But if terrorists are given the same status as soldiers and treated as prisoners of war, the rightful protection of 'real' soldiers will be diluted. In the same vein, some have forcefully criticised the provisions on guerrillas of Protocol I, claiming that

> 'Giving quarter to a handful of guerilleros who camouflage themselves as civilians may have its merits, but the outcome will be counterproductive from a humanitarian standpoint if, as a result, a multitude of civilians be subjected to the rigours of total war.'[137]

In reality, a distinction between civilians and soldiers must be maintained as otherwise the foundation will be endangered: if also 'illegal combatants' are entitled to 'protection' this leads to an acceptance of the status of terrorists being equal to soldiers. Instead, the correct position in law is that 'illegal combatants', *i.e.* those who disguise themselves without showing that they are armed, attack innocent people by surreptitious attacks, are not entitled to anything but a very basic protection. When captured, they are 'detainees' and not 'prisoners of war'.[138] One main difference between the two categories is that the detainee may be interrogated (but with certain limits as to humane treatment)[139] whereas a prisoner of war only has to provide his name and number.

(2) Mercenaries

Another category which is exempt from protection is that of 'real' mercenaries.[140] However, the definition of such mercenaries is so narrow that many will fall outside its ambit.

Protocol I of 1977 provides in article 47 that:

> '1. A mercenary shall not have the right to be a combatant or a prisoner of war.
> 2. A mercenary is any person 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 to take part in the hostilities essentially by the desire for private

135 See comments, above, in this Chapter, section C ii (2) (iv); *cf.*, definition of war, above, Chapter 1, section B iii d.

136 See below, Chapter 9 B iii g, and, in detail, Detter, I., 'The Law of War and illegal combatants', *George Washington Law Journal*, 2006.

137 Dinstein, 'Another step in codyfying the laws of war', *op. cit.*, 1974, 284–285.

138 See, in detail, Detter, I., 'Illegal combatants', *op. cit.*, and below, Chapter 9 B iii g.

139 See below, Chapter 9 B iv c on minimum standards for detainees.

140 Article 47.

> gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) is neither a national of a Party to the conflict nor a resident of 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 a Party to the conflict on official duty as a member of its armed forces.'

Thus, only those who have been recruited to join military forces for 'personal gain' are mercenaries. But who will decide what motivates a man?

Ironically, the sort of trained person who previously sought 'adventure', as well as 'personal gain' as a mercenary, may now be the typical volunteer for service, not with the French Foreign Legion, but with the UN 'peace-keeping' forces. Others may join the 'security companies' or 'military companies' which may not fall within the category of 'mercenaries' as they usually do wear uniforms and carry their weapons openly.[141]

Third World States felt strongly about prohibiting mercenaries, if possible, 'throughout the world'.[142] One should remember 'the historical experience of many peoples bears witness to the fact that mercenaries violate many rules of international law concerning human rights'.[143] Numerous Third World States held the text should have been 'stronger' to oblige States to forbid also recruitment and training.[144] Angola even made a special Declaration on ratification that, in the opinion of that State, anyone who trains or recruits mercenaries will be considered as a mercenary criminal as well as States which allow such activities to take place in the territory under their jurisdiction.[145] However, it was outside military companies – very near the definition of mercenaries – that contributed to peace in that country.[146]

A few States emphasised that even mercenaries should enjoy some protection under the Protocol.[147] Later, other commentators have also pointed out that it is hardly compatible with the rules of the Law of War to single out a group like mercenaries, who after all constitute a category taking part in traditional warfare, for unequal and unprotective treatment.[148] Presumably mercenaries are entitled

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141 See above in this Chapter under C ii a (2) (iii).

142 Afghanistan, CDDH/SR/41, vol. 6 175. *Cf.*, USSR, *ibid.*, 203.

143 Libya, *ibid.*, 199.

144 Senegal, *ibid.*, 177; *cf.*, Mocanbique, *ibid.*, 193, referring to the Angola Trials in 1976 which 'shed new light on the scope and the criminal nature of the system of mercenaries'.

145 See *Declaration on Ratification*, 20 September 1984, to the Depository of the Swiss Government (unpublished), Annex III. Similar provisions appear in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, which has received very few signatures. It may be noted that, still in 1999, a considerable number of security companies mercenaries worked for UNITA, and later also for the government in Angola.

146 See above, in this Chapter under C ii a (2) (iii).

147 Australia, *ibid.*, 175.

148 de la Pradelle, P., 'Le droit humanitaire des conflicts armés', *RGDIP*, 1978, 28.

under the fundamental rights of the Protocol[149] to, for example, fair judicial process. To exempt them, however, from all substantive provisions, for example concerning prisoner of war status, does appear to be contrary to the demands of modern humanitarian law.

On the other hand, the category as defined by the Protocol is so narrow that many will, in practice, still fall into protected categories as their motivation cannot be assessed by other men. Furthermore, mercenaries are often made members of a national army in which case, again, they are not caught by the definition of a mercenary under the Protocol. States are also under a strict duty to apply a presumption that a person in uniform is an entitled person for due protection under the Protocol.

(3) Bounty Hunters

A category which may not be new in international society but which has recently been the focus of some attention are the 'bounty hunters'. According to some sources, numerous indicted war criminals have been brought before the War Crimes Tribunal after bounty hunters have been hired (by unknown persons) and paid money for capturing suspected war criminals. The bounty hunters have often been promised immunity under municipal legal systems for their kidnapping.[150] At least in some cases, this practice appears well documented[151] which further reduces the reputation of the War Crimes Tribunals.

(4) Spies

Spies constitute another group exempted from prisoner of war status,[152] whether or not they have acted as combatants. Traditionally, international law attaches decisive importance to whether or not a person is wearing a uniform.[153] A soldier who is not wearing uniform runs the risk of being treated as a spy.[154]

A new distinction is made in Protocol I of 1977 between spies and those members of the armed forces who gather information in occupied territory where they are resident. Such persons will not be considered as spies provided they do not employ false pretences or act through clandestine means.[155] It appears that even spies may claim certain fundamental guarantees under the Protocol such a due process of law.[156]

149 Article 75.

150 But see the UNSC Resolution 579 of 1985, issued in the wake of the *Eichmann Case*, condemning all forms of abduction.

151 See, for numerous examples and extensive documentation, Paulussen, C., *Male captus bene detentus* (Leiden and Boston: Nijhoff, 2010), 408ff.

152 Article 46(1).

153 See Detter, I., 'Foreign warships and immunity for espionage', *op. cit.*, 53.

154 *Ibid.*, on the loss of combatant status by a soldier wearing a civilian great coat but also on an apparent visit to collect papers from the enemy.

155 Article 46(2).

156 Article 75.

(5) Pirates

Under the High Seas Convention of 1958[157] and the Law of the Sea Convention of 1982,[158] pirates are those who resort to unauthorised violence against a ship outside the jurisdiction of a state, on the high seas.[159] The result of their actions is that they leave themselves open, as *hostes humane generis*, enemies of mankind,[160] to universal jurisdiction, allowing any state to apprehend and convict them.

An element of the crime of piracy was originally that the pirate acted 'for private ends'. However, as scrutiny of the mind is impossible and as the subjective intention of the pirate cannot be ascertained, this element was gradually abandoned.[161] There is also a condition that the pirate had an '*animus furandi*', that is to say an intention to rob.[162]

Even in the mid 2000s[163] one could safely say that, with very few exceptions, piracy had, in its traditional form, become defunct: apart from some eccentric examples like the taking of *The Santa Maria* by some opponents of President Antonio de Oliveira Salazar in Portugal in 1961 or the seizure of *The Achille Lauro* by Palestinian Liberation Organization hijackers in 1985, there were not many modern-day examples of traditional piracy. Some even said that piracy had sunk into desuetude. In 1926, the United States did not hesitate to declare 'that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement'.[164]

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157 Convention on the High Seas, 29 April 1958, 13 UST 2312, 450 *UNTS* 82, art. 15.

158 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 *UNTS* 397, art. 101.

159 Piracy has traditionally been a crime committed on the High Seas but this condition has gradually been mitigated and in 1929 the Harvard Draft on Piracy widened the crime to extend to attacks in the air, see the Harvard Research in Int'l Law, *Draft Convention on Piracy*, 26 *AJIL*, Suppl. 1932, 739. Like pirates, those who in this work have been called 'genocidal terrorists' also place themselves outside the family of nations and make themselves enemies of mankind. See below, Chapter 9 B iv and *cf.*, Burgess, D.R., Jr., 'The dread pirate Bin Laden', *Legal Affairs*, July–August 2005, at 32, 35–36.

160 See, e.g., *Republic of Bolivia v. Indemnity Mut. Marine Assurance Co.* (1909) 1 K.B. 785 (referring to pirates as *hostes humani generis*).

161 See Harvard Draft Convention on Piracy, *op. cit.*, at 743.

162 See further what '*furare*' might mean with regard to genocidal terrorists, below, Chapter 9 B iv.

163 See Detter, I., 'The Law of War and illegal combatants', 75 *The George Washington Law Review*, 2007, 1097.

164 Reeves, J.S., 'Progress of the work of the League of Nations Codification Committee', 21 *AJIL*, 1927, 659, 665 .

There were some incidents in the Malacca Straits since the early 1990s when pirates captured the tanker *Nagasaki Spirit* in 1992 with serious loss of lives.[165] Further attacks followed and passage through the Straits became precarious.[166]

However, the coast of Somalia has recently become the most fruitful stretch of water for pirates and this is now reflected in it being classified as a very high risk area for insurance. In particular luxury liners and luxury yachts have been targeted. From 2005 onwards there was a virtual explosion in pirate activities. In 2005 pirates captured *The Seaborn Spirit*, a American liner; and in 2007 the cargo ship *The Danica White*.

Then the situation rapidly deteriorated. During one single year, in 2008, Somali pirates seized the French luxury yacht *Le Ponant*; *The Sirius Star*, a super-tanker carrying around $100 million worth of oil; *The Faina*, a Ukrainian ship, carrying an arms consignment for Kenya; the US destroyer *Howard* for which the pirates demanded a $20 million ransom; and an Iranian cargo ship, *The Iran Deyanat*. Finally, the UN Security Council intervened, authorising other States to enter relevant territorial waters and use 'all necessary means' to stop 'piracy and armed robbery at sea, in a manner consistent with international law'. The sums lost by pirate attacks are considerable. The surge in pirate attacks off Somalia resulted in the United States organising, in 2011, a multi-national effort to patrol adjacent waters.

Pirates have traditionally no rights at all and can be 'strung up by the mast' or drowned by their captors.[167] Punishment and treatment of a pirate are invariably harsh. The United States Code also prescribes that '[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life'.[168] The reason for this was that the pirate, by his own volition, had placed himself outside the law.[169] In earlier days, the pirate was thus not even entitled to any form of trial but could, if caught *in flagrante delicto*, be summarily executed.

Piracy *iure gentium* is a crime triable by all states, and thus subjected to universal jurisdiction.[170] In the *Case of the S.S. Lotus* before the Permanent Court of International Justice in 1927, the Court said that a pirate 'is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish'.[171] *In re Piracy Jure Gentium* before the House of

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165 A collision between the container ship *Ocean Blessing* and the hijacked tanker *The Nagasaki Spirit* occurred in the Malacca Strait in September 1992. Pirates had boarded *The Nagasaki Spirit*, removed its captain from command, set the ship on autopilot and left with the ship's master for a ransom. The whole crew on *Ocean Blessing* perished and there were only two survivors on *Nagasaki Spirit*.

166 See Darin Phaovisaid, D., 'Where there's sugar, the ants come: piracy in the Strait of Malacca', 14 *International Affairs Review*, 2005, 81, 87–88.

167 Kontorovich, E., 'The piracy analogy: modern universal jurisdiction's hollow foundation', 45 *Harv. Int. LJ*, 2004, 183, 190.

168 18 USC § 1651 (2000).

169 Colangelo, A.J., 'Constitutional limits on extraterritorial jurisdiction: terrorism and the intersection of national and international law', 48 *Harv. Int. LJ*, 2007, 121, 144.

170 *In re Tivnan* (1864) 122 Eng. Rep. 971 (Q.B.).

171 *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) No. 10 (Sept. 7).

Lords, the Court considered 'piracy by law of nations', a person guilty of such piracy has placed himself beyond the protection of any State. 'He is no longer a national, but *"hostis humani generis"* and as such he is justiciable by any State anywhere'.[172]

The power to capture and punish a pirate that all States have even involves a duty to do so: as any State has thus the right – and, indeed, the duty – to apprehend a pirate, it also has the unlimited right to interrogate and question him. A pirate can never be treated as a prisoner of war but instead has lesser rights than a common criminal.[173] As the pirate by his acts has placed himself outside the civilised world, he has forfeited the protection of its rules. There is no mention, in treaties, or national rules, of any right to legal advice or judicial trial. It will be discussed later in this work that the legal situation of a pirate and a genocidal terrorist, who also has placed himself outside the law and become a *hostes gentium*, may be similar. It is indeed difficult to see why a terrorist should be able to expect better treatment than a pirate under international or national law.[174]

D LEGAL EFFECTS OF COMBATANT STATUS

The main effect of being a lawful combatant is entitlement to prisoner of war status.[175] 'Unlawful' or 'illegal' combatants, on the other hand, are a legitimate target for any belligerent action but, if they are captured, they are not entitled to any prisoner of war status. They are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and enjoy no protection under international law.[176]

Combatants are entitled to privileged status even if they belong to a State which has not been recognised.[177] During the Conferences in 1907 it was argued by the Great Powers that there was only need for one distinction: that between regular forces and civilians. Regular forces would be entitled to far-reaching privileges under international law but resistance movements and guerrilla movements were not protected. This would naturally lead to weaker resistance in countries under occupation. Smaller States claimed, at the Conferences, that also civil defence units and resistance movements play an important role in the defence of State and that they, too, ought to be considered as combatants.[178] But, as has been shown,[179] State practice recognised certain irregular soldiers during the Second World War.

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172 *In re Piracy Jure Gentium* [1934] AC 586 (PC) (appeal taken from HK) 589.

173 *Cf.*, Detter, I., *The International Legal Order*, *op. cit.*, 413–417.

174 See below, Chapter 9 B iv on the treatment of captured terrorists.

175 See further below, Chapter 9, section B iii f.

176 See Detter, I., 'Foreign warships', *op. cit.*, 62.

177 Geneva Convention III article 4A (3). See below on prisoners of liberation movements, Chapter 9, section B iii f. But notice the different status of detainees and unprivileged or 'illegal combatants', Chapter 9 B iv.

178 Wulf, T., *Handbok i folkrätt under krig, neutralitet och ockupation* (Stockholm: Publica, Liber Förlag, 1980), 77.

179 Above, in this Chapter, section C ii (1).

After the amendments and clarification of the law in the Geneva Conventions of 1949 and in the 1977 Protocols, it is now fairly established that guerrillas also, under certain conditions, may acquire combatant status. However, as long as ratifications of Protocol II are not forthcoming in any number and from any major States, it is questionable to what extent guerrillas, or 'detainees' when captured, may acquire prisoner of war status.[180] It is not that the number or quality of such ratifications determine what is a rule of law but rather what is *necessary* for a reasonable application of the general rules of the Law of War.[181] Humanitarian aspects would seem to prevail if there is any degree of doubt as to how a person in an armed conflict should be treated. The main difference between combatants and those deprived of that status is that a combatant will be entitled to prisoner of war status if captured whereas an illegal combatant will be considered as a detainee without such privileges. As mentioned above, the detainee may be interrogated 'humanely',[182] whereas a prisoner of war only has to provide his name and number.

In 2002, Donald Rumsfeld, America's defence secretary, stated that suspected Al-Qaeda fighters held at Guantanamo Bay naval base in Cuba would not be treated as prisoners of war because they were 'unlawful combatants'. He said: 'Technically, unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly what we have been doing.'[183]

The terms 'unlawful' or 'illegal' combatants thus to refer to guerrillas, terrorists (including genocidal *jihad* terrorists) and other irregular fighters who do not fulfil the conditions required for lawful combatants. They also include men who do not carry arms openly in preparation for and during a military operation. It is on this important distinction between combatants and illegal combatants that the whole of the Law of War rests.

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180 Chapter 9, section B iii f and B iv.

181 See in detail Detter, I., *International Legal Order, op. cit.*, Chapters 3, 4 and 5 and Detter, I., *Concept, op. cit.*, Part III.

182 See below, Chapter 9 B iv c on minimum standards for detainees.

183 As reported in *Telegraph*, 17 January 2002; *cf.*, *Telegraph*, 12 January 2002 that Taliban detainees would not be treated as prisoners of war.

Chapter 5
The Nature of the Law of War

A THE HISTORICAL BACKGROUND

There is evidence that some ancient civilisations prohibited certain methods of warfare; agreements on the treatment of prisoners of war were concluded in Egypt around 1400 BC.[1] The Manu laws in India prohibited, around 500 BC, the use of poisoned and other inhumane weapons.[2] But elsewhere, barbaric practices often accompanied a victory in war. The maxim *vae victis* implied that a vanquished nation could expect little mercy. There was, for example, a practice in Abyssinia to cut off the right hand and the left foot to show who had lost a battle.[3] The influence of religion on the regulation of warfare is readily recognised in modern times.[4] Philosophers like St Augustine and St Thomas Aquinas had considerable influence on the historical development of humane warfare, as did certain specific Edicts like the prohibition of certain weapons by Innocentius II in 1139 during the Second Lateran Council and the prescription by Alexander III for humane treatment of prisoners of war in 1179 during the Third Lateran Council.[5] There were early secular attempts as well, such as rules issued in the fourteenth century by Casimir the Great of Poland[6] and by Richard II of England.[7]

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1 A Swedish Working Group Study, *Conventional Weapons, Their Deployment and Effects from Humanitarian Aspects, Recommendations for the Modernisation of International Law* (Stockholm, 1973), 11.

2 *Ibid., loc. cit.*

3 But Europeans could usually avoid such a fate by special treaties which secured sums of money for the treatment of European prisoners of war. Gong, G.W., *The Standard of Civilisation in International Society* (Oxford: OUP, 1984), 122–123.

4 *Ibid., loc.cit.*

5 *Cf.*, Marin, M.A., 'The evolution and present status of the laws of war', 92 *RCADI*, 1957, ii, 656; Coursier, H., 'L'évolution du droit internationale humanitaire', 99 *RCADI*, 1960, i, 380.

6 Gorbiel, A., 'The protection of war victims under Polish legislation, up to the end of the eighteenth century', *IRRC*, 1975, 273.

7 Fuller, J.F.C., *Armament and History: A Study of the Influence of Armaments on History from the Dawn of Classical Warfare to the Second World War* (Washington: GPO, 1946), 62;

The rules of chivalry[8] governed armed conflicts between knights but probably only because they considered themselves as equals.[9] If taken prisoner they were often released for ransom; the ordinary foot soldier had, on the other hand, no such treatment.[10]

The captor could initially keep the ransom for himself but, slowly, a new system developed which implied that if the captive was a person of some consequence the State, the king or prince would consider him his own 'property'.[11] Later officers, but not privates, received privileged treatment by being released against ransom whereas the ordinary soldier did not.[12] The discrimination in treatment between officers and men could, however, be inverted as it was during the French Revolution. Thus, a French Decree of 1792 allowed reprisals only against enemy officers as these would be 'class enemies' but not against common soldiers who may defect to join the revolutionary cause.[13]

Some treaties during the seventeenth century showed some concern for non-combatants and provided that, for example, women and children, including boys under 12, would be released without ransom.[14] Unilateral regulations for armed forces also contributed to increased humanity in war.[15] Developments in philosophy during the Age of the Enlightenment also had a mitigating effect on

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Marin, M.A., 'Evolution', *op. cit.*, 656.

8 See Nussbaum, A., *A Concise History of the Law of Nations* (New York: Macmillan, 1961), 18; Thomson, J.F., *Economic and Social History of Europe in the Later Middle Ages* (New York: F. Ungar, 1960), 3; Fuller, J.F.C., *Armament, op. cit.*, 60; some claim that chivalry reappeared in the First World War, 'at least in air combat', Spaight, J.M., *Air Power and War Rights* (London: Longmans, Green, 1933), 107.

9 For example, when Richard Lionheart's horse had been killed, Sultan Saladin is said to have provided him with another one before they resumed fighting, *cf.*, statement by France, CDDH, III/Sr.3336, Annex V, vol. 14, 537.

10 Gardot, A., 'Le droit de la guerre dans l'oeuvre des capitains français du XVIe siècle', 72 *RCADI*, 1948, i, 493. See, in general, Marin, M.A., 'Evolution', *op. cit.*, 655; Vagts, A., *A History of Militarism* (London: Meridian, 1959); Locker, M., *Das Kriegsgefangenrecht inbesondere nach römischen und heutigen Recht*, diss., Breslau, 1913.

11 Spaight, J.M., *War Rights on Land* (London: James Molony, 1911), 264.

12 *E.g.* Flory, W.E.S., *Prisoners of War: A Study in the Development of International Law* (Washington: American Council of Public Affairs, 1942), 55. There was a price list of various grades of officers: 19; Parry, C., *The Consolidated Treaty Series* (Dobbs Ferry: Oceana), 79–93; se further Tüscher, H.P., *Die völkerrechtliche Regelung des Loses des Kriegsopfer vor dem Abschluss der Genfer Konvention von 1864* (Zurich: Tullianum, 1969), 77. The system of ransom survived until well into the nineteenth century; Martens, G.F., *Précis du droit des gens* (Paris: Guillaumin, 1864), 241; Wheaton, H., *Elements of International Law* (London, 1866) (ed., OUP, 1936), 361 *et seq.*; Phillimore, R.J., *Commentaries on International Law* (London: Butterworth, 1885), 164.

13 1 NRGT 363; *cf.*, Basdevant, J., *La révolution française et droit de guerre continentale* (Paris: L. Larose, 1901).

14 See the Treaties between France and the Netherlands 1673, Parry, C., 12 *The Consolidated Treaty Series*, (Dobbs Dobbs Ferry, NY: Oceana Publications,. 1961-1986) 457–461 and of 1675, *ibid.*, 13, 379. *Cf.*, articles 23–24 of the Treaty between the United States and Prussia of 1785, Parry, *ibid.*, 49, 349–352.

15 For example, article 7 of the instructions issued by Catherine the Great in 1778 stipulating that Turkish prisoners of war must be treated with humanity, see, Butler, G. and Maccoby, S., *The Development of International Law* (London: Longman, 1929).

the cruel practices in war. Montesquieu wrote, for example, that international law rests on the principle that nations

> 'doivent se faire dans la paix le plus grand bien et dans la guerre le moins de mal qu'il est possible sans nuire à leur véritables intérêts.'[16]

Later theorists on war argued that since war is only the means to obtain an objective, that of forcing the enemy to submission, any unnecessary or revengeful destruction of life is not lawful. Plundering and devastation was thus condemned as barbarous and uncivilised, especially since such practices inflict little harm on the government but merely on the citizens.[17] States began, around the middle of the nineteenth century, to issue codes for conduct in war reflecting more humanitarian ideas.[18] The United States provided in its instruction for the army that 'unnecessary or revengeful destruction of life is not lawful'[19] and France issued similar rules.[20] The St. Petersburg Declaration was concluded as a treaty in 1868[21] and in 1899 a prohibition of dum-dum bullets was introduced by another Convention.[22] In 1907 the comprehensive Hague Conventions were concluded on various aspects of warfare.[23] Later developments have included numerous treaties on the prohibitions of specific weapons.[24] All these rules are supplemented by special rules protecting the human persons, both by exempting them from being targets of attack[25] and by assured relief and assistance when in need.

The International Red Cross was created in 1870 to alleviate suffering in war.[26] A forerunner of the Red Cross had existed in Spain since 2 May 1808, the date of the insurrection of the Spaniards against the French, and bore the name Society of the Holy Cross of 2nd May. This Organisation was still effective during the Second Carlist War in Spain in 1872–1876 and lent its support to the official sections of the Spanish Red Cross which had been created in various parts of the country since 1870.[27]

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16 *L' esprit des lois*, 4 i, Ch. III. 'Nations should do, for themselves, the greatest good in peace and as little harm as possible in war as far as this is possible without harming their vital interests.' Numerous writers who refer to this quotation leave out the last words which introduce an important qualification to the statement.

17 Clausewitz, *Vom Kriege*, 1834, *op. cit.*, Bk 1, Ch. 1, 3; Bk V, Ch. 3, 13.

18 *Cf.*, Wright, Q., *A Study of War*, 2nd edn, *op. cit.*, 332.

19 Article 68 of the so-called 'Lieber' Code for Armies in the Field, 1863, named after the statesman and thinker Lieber. A similar code was adopted in 1899.

20 Règlement 6.5.1859, *Journal militaire officiel*, No. 17, 243. On similar regulations issued by Russia, see Romberg, E., *Les belligérants et des prisonniers de guerre* (Paris: Chaix, 1894), 288.

21 8 *NRGT* 474; below, in this Chapter, section C v.

22 Hague Convention 1899, 26 *NRGT* 2 série 1002 and below, Chapter 7, section i.

23 26 *NRGT* 2 série 920; 3 *NRGT* 3 série 1002.

24 Below, Chapter 7.

25 Below, Chapter 8.

26 Boissier, P., *Histoire du Comité International de la Croix-Rouge, De Solférino a Tsoushima* (Paris: Plon, 1963).

27 ICRC Bulletin, No/4, July 1970, 173; See further, Moreillon J., *Le comité international de la Croix-Rouge et la protection des détenus politiques, Les activités du CICR en faveur des*

By the 1980s the ICRC was held to be a highly important organisation in situations or war and armed conflict,[28] assisting and alleviating human suffering and contributing, by strict observance of confidentiality,[29] to the development of humanitarian law. It also produced solid and competent papers and surveys of international law in war and armed conflict. It was also thought to be an important catalyst in observing the Law of War, especially as it was independent and not dependent on any State funding.

Nowadays, however, a large portion of the ICRC budget is made up by contributions from governments and, after this budgetary change, its lack of bias may have changed as well.

Unfortunately, the splendid image of ICRC was largely ruined by the action of some of its own staff during the war in Slovenia and in Croatia, when the ICRC showed remarkable bias in favour of the Serbs, referring all matters to the Red Cross office in Belgrade. The Federal Yugoslav Army brought out 297 patients from the Vukovar Hospital on 19 November 1991 to be shot[30] but the IRCR, with offices nearby, in virtually the next building, did little to intervene,[31] except some modest attempts to 'negotiate', by some fairly lame efforts, with the European Community, and with the Yugoslav (Serb-dominated) Federal Army.[32] Even after the outrageous violation of the Law of War by the Serbs in Vukovar hospital ,[33] the ICRC activities in Croatia were for a long time subordinated to their office in Belgrade with prominent pigeon holes for mail at the Zagreb office, placing Belgrade ahead of Geneva. In Vukovar the ICRC distributed large quantities of leaflets advising Serbs how to cope with Croatian 'aggression' when the world well knew who were the victims. Such actions were not conducive to inspire confidence in the ICRC as the integrity that organisation once enjoyed, had gave way to almost embarrassing bias in a serious war situation.

The reputation of the ICRC fell further when some of their less qualified lawyers suggested that civilians have the 'right' to take up arms and engage in hostilities without losing their protection as 'civilians' under the Geneva Conventions and claiming that terrorists should be entitled to prisoner of war status as 'all' must be protected.[34]

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personnes incarcerées dans leur propres pays à l'occasion de troubles ou de tensions internes (Lausanne: éd. L'Age d'Homme, 1973), 14.

28 Durand, A., *Histoire du Comité International de la Croix-Rouge, De Sarajévo à Hiroshima* (Geneva: CICR, 1978); Huber, M., *The Red Cross, Principles and Problems* (Geneva, 1941); *cf.*, Haug, H., *Rotes Kreuz* (Stuttgart: Verlag Hans Huber, 1966); and on specific activities, *e.g.*, Moreillon, J., *Le Comité*, *op. cit.*, 123.

29 Below, Chapter 11, section ii d.

30 *E.g. International Herald Tribune*, 21 January 1993, 'Evidence testifies to mass execution of 200 Croats in '91'.

31 Below Chapter 8, section A iii b (6) and Chapter 11, section B iii d.

32 See Mercier, M., *Crimes sans châtiment* (Brussels: Bruylant, 1994), 134 *et seq.*

33 Exhumations carried out by the United Nations at Ofčara, near Vukovar, in 1998, confirmed the atrocities.

34 See further, below in this Chapter under C iii c and Chapter 4 under 2 B I and Chapter 9 B iv on treatment of terrorists.

However, there have recently been valiant efforts to restore previous high standards of the ICRC by recruiting qualified experts and academics who have substantially improved the standing of the organisation in international society.

B THE FUNCTION OF THE LAW OF WAR

i Force Supplements Unsatisfactory Law

When Machiavelli advocates force in the international society it is, *inter alia*, because the laws are not sufficient or satisfactory.[35] The 'laws', in this context, are those laws which fail to provide justice, or to provide what is required by one State, above what may be just. We may assume that it signifies 'laws' in general, as Machiavelli explains the behaviour of State by analogy to the behaviour of individuals when the 'laws' fail to satisfy their interests.

What Machiavelli says illustrates that if laws are sufficient for the interests which they serve, the risk of resorting to war will be lessened.[36] By analogy, one may also infer that if the Law of War is adequate for the interests to be protected, then the risk of excessive force and cruelty may be avoided.

There may be occasions when humanitarian rules are prescribed by instinct. Certain African tribes have, it is said, respected occasional rules on non-combatants, with respect to those who are wounded or to women and children.[37] But then in other situations they have not. For it is often cruelty, rather than restraint, that comes naturally to man. It is thus desirable that behaviour is governed by reason rather than by impulse. As Clausewitz remarked, it may well be a fallacy to think that one can defeat an enemy without much bloodshed but then, as he added, 'war is such a dangerous business that the mistakes that come from kindness are the very worst'.[38] But, he continues, wars between 'civilised' nations are governed by the mind, not like the wars between savages who are ruled by passion. If, then, prisoners of war are not put to death 'it is because intelligence plays a larger part in (the) method of warfare (of civilised nations) and has taught them more effective ways of using force than the crude expression of instinct'.[39] The Law of War must thus be adequate to safeguard the interests of its subjects; and it must be the expression of reason rather than of impulse.

35 Machiavelli, *Il Principe*, 5XVIII (ed. Vertelli, Minal, 1960), 72: *'Dovete adunque sapere come sono due generazione di combattere: l'uno con le leggi, l'altro con la forza: quel primo è proprio dello uomo, quel secondo delle bestie: ma perchè il primo molte volte non basta, conviene ricorrere al secondo.'*

36 Although, as illustrated in *Il Principe*, some may wish for more force than is justified.

37 Bello, E.G., *African Customary Humanitarian Law* (Geneva: IRRC, 1980), 34 *et seq.*

38 Clausewitz, *Vom Kriege*, *op. cit.*, Bk. 1, Ch. 1.

39 *Ibid.*, 76.

ii The International Element

The Law of War is even more international than the law of peace. In the case of the Law of War, as, for example, case law on prize shows, there is no doubt, that even when they appear before municipal courts, issues must be dealt with by 'the Law of Nations' and not by the municipal law of any particular country.[40] Occasionally Law of War is adapted to local customs[41] but for the most part rules are of universal application.

On the other hand, each set of rules need not be applicable *in toto* for all interested parties. Treaties may often claim that there is no such right of 'separability' of certain clauses. For example, the Declaration of London of 1909[42] prescribed that its provisions must be treated as a 'whole' and could not be separated. Such a provision is usually inserted in view of the fact that parties have made concessions in consideration of others[43] and it would therefore not be satisfactory if one State could make a reservation[44] concerning a provision to which another Contracting Power attached considerable significance. However, in spite of such provisions, practice shows that a treaty may be applied with regard to certain rules only. This is often the case when a treaty has not come into force, either because of a time element or because it has not received the necessary support. Then certain rules may be selected and applied by States; one example, again, is the 1909 Declaration.[45] But one might suggest that it is not really rules of a treaty that are applied: it may be that those rules merely reflect other rules which are binding anyway.[46]

iii The Element of Complexity

Even if the Law of War thus is 'international' and not fragmented by various national systems, it has become increasingly complex. It contains rules, some of which are highly technical, susceptible to different legal interpretations, embodied in a very complicated interwoven network of conventions as well as entrenched in general

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40 *Le Laux v. Eden* (1781) 2 Dougl.594, 610, per Buller J. For application of International Law in prize cases see, *The Elsebe* (1804) 5 C.Rob, 174, 180; *The Recovery* (1897) 6 *ibid.*, 341, 348; *The Odessa* (1915) P. 52, 61; *The Håkan* (1916), P. 266; *The Zamora* (1916) AC 77, 91 (PC); *Cf.*, *The Consul Corfitzon* (1917) AC 550; *Cf.*, *The Sudenmark* (1917) AC 620.

41 *Cf.*, reference above, in the previous section, note 33, and Khadduri, M., *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins Press, 1955); Viswanatha, S.V., *International Law in Ancient India* (Bombay: Longmans, 1925).

42 See further below, Chapter 8, section B i, on the substance of the agreement.

43 Like the modern package deal technique used, *inter alia*, with regard to the 1982 Law of the Sea Convention.

44 On the problems of fragmentation caused by reservations, a particularly unsatisfactory effect for law making treaties, see Detter, I., *Concept*, *op. cit.*, 104 and Detter, I., *Essays*, *op. cit.*, 117 *et seq.*

45 *Cf.*, the application of the 1982 Law of the Sea Convention, which has not entered into force, by the International Court of Justice, in the *Libya v Tunisia Case*, ICJ *Reports*, 1984, 18, and the *Libya v Malta Case*, ICJ *Reports*, 1985, 13.

46 On the underlying basis of obligation in such cases, see my *Essays*, *op. cit.*, 116–117, and my *International Legal Order*, *op. cit.*, Chapters III and IV.

international law. It has now even been suggested that 'adviser positions' should be established for all armed forces to ensure that the military commander is able to avail himself of the necessary expertise to secure compliance with the law.[47]

C THE CONTENTS OF THE LAW OF WAR

i *Jus ad Bellum* and *Jus in Bello*

A distinction has traditionally been made between the right to wage war and the rights and duties which operate once a war has started. The unlimited right to start war, the *jus ad bellum*, has gradually been restricted in State practice. Only certain wars would be allowed: if the war was 'just' it could be waged but otherwise a State could not resort to war under international law. Theories soon flourished as to what precisely *bellum justum* implied. The various just war theories had considerable flaws, above all concerning who was to assess whether a war was just. Since there could be few objective criteria, it appeared that the test, in the final analysis, must be a subjective one. The just war theories, largely based on the teachings of St Augustine[48] and St Thomas Aquinas,[49] certainly had the beneficial effect of restricting unlimited rights of war, especially after the rise of the nation States in Europe. But the theories also led to difficulties insofar as two enemy States sometimes both argued that they were fighting a just war.[50] But some were more concerned with the morale of the soldiers: they would fight better if they were engaged in a just war for they would not be afraid of anything, knowing they had justice on their side.[51]

The right to aggressive war has now been abolished, largely by the Briand-Kellogg Pact of 1928[52] and by the United Nations Charter.[53] It is to be noted that the First World War, the 'Great War', was therefore not 'illegal' as international law then stood.

Nowadays no aggressive war can be justified under modern international law. But the right to self-defensive war remains, for example under article 51 of the Charter of the United Nations, for a 'defensive war'. The danger is obviously that the right of self-defence is then interpreted so widely as to justify – and thus camouflage – what is essentially an attack on another State.[54]

Now that aggressive war has been outlawed one would expect the 'just war' theories to be of more than historical interest. Yet, some Third World countries now claim that certain liberation wars are 'just wars'.[55] Ayatollah Khomeini claimed that

47 Obligations to ensure the presence of such advisers are assumed by the Contracting Parties under article 82 of the Protocol I to the Geneva Conventions.

48 *E.g. Quaestiones in Heptateuchum*, vi, 10b.

49 *Summa Teologica*, II, ii, 40.

50 Suarez, *De Caritate*, disp. xiii, vi, 1–4.

51 Jean de Bueil, *Le Jouvencel*, 1466, ii c. (ed. Favre and Lecestres, Paris, 1887), 20.

52 94 *LNTS* 57 and above, Chapter 2, section A i.

53 Above, Chapter 2, section A i.

54 See, in detail, above Chapter 2 B iii.

55 See further above, Chapter 1, section D ii.

jihad was the Islamic concept of just war[56] that entitled him to authorise certain acts of violence. Similar language has been used by both Colonel Gaddafi of Libya and Saddam Hussein of Iraq.

The fact that a war is not a just war or that is in violation of a treaty has been invoked as a reason for a suspension of any duty to be called up to take part in such a war.[57] But in this respect States preserve their competence to recruit members of armed forces.

Distinguishable from the now largely obsolete concept of *jus ad bellum*,[58] are the rules on warfare and the humanitarian rules that apply within a war, the *jus in bello*. It may appear that since the right *to* war has been abolished there would not be any need for rules *in* war. However, it is clear that given the number of and intensity of present-day conflicts, both international and internal, there is a great need for the regulation of the humanitarian issues.

The Law of War lessens the threat to survival of our civilisation and may ensure the survival of mankind.[59] Some visualise the humanitarian law applied in internal wars as a third type[60] but as we shall see,[61] similar humanitarian rules may now, certainly *de lege ferenda*, apply in both international and internal wars. To the extent that they do not, *de lege lata*, they should at least be conceptually understood as part of the same complex of rules.

ii The Law of the Hague and the Law of Geneva

The treatment of individuals in times of armed conflict is closely related to the field of human rights, considerable attempts have, however, been made, both earlier and in recent times to distinguish the 'law of Geneva' and 'the law of the Hague'. The latter 'law' concerns the behaviour of belligerents in war and neutrality and, in the terms of traditionalists in international law, regulates primarily the behaviour of States whereas the 'law of Geneva' concerns the protection of the person.[62] Perhaps the latter set of rules is a further vindication of the thesis of this work that, in war, it is the individual who is principal subject of international law, and the immediate bearer of rights and duties.[63]

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56 On this concept, see, Rechid, A., *L'Islam et le droit des gens*, 60 *RCADI*, 1937, ii, 375; Khadduri, M., *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955), 51.

57 *US v Mitchell* (1967) 386 US 972, concerning the Vietnam War.

58 Unless restrictively understood as meaning only the right to wage aggressive war, *jus ad bellum* can be conveniently used as a the right to resort to force under contemporary international law: Rousseau, Ch., *Conflit armés*, *op. cit.*, 25; Scelle, G., *'Jus ad bellum'*, 6 *NTIR*, 1959, 292; Bretton, Ph., *Le droit de la guerre* (Paris: Armand Colin, 1970), 8.

59 Röling, B.V.A., 'The significance of the laws of war', in Cassese (ed.), *Current Problems of International Law* (Milan: Giuffrè, 1975), 155.

60 Baxter, R.R., '*Jus in bello interno*, the present and future law', in Moore, J.N. (ed.), *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press, 1974).

61 Below, Chapter 9.

62 *E.g.*, Nahlik, S., 'Droit dit "de Genève" et droit dit "de la Haye": unité ou dualité', *AFDI*, 1978, 9–10.

63 See further below in this Chapter under v, vi and vii.

However, it would seem indisputable that any regulation of the behaviour of belligerents in armed conflict will have inevitable effects on the individuals affected by a dispute: restrictions of certain types of arms, for example, the St Petersburg Declaration of 1868,[64] commonly held to form part of 'the law of the Hague',[65] forbidding certain types of bullets, would seem to have an immediate beneficiary effect on individuals and conceptually in a similar category to rules alleviating suffering of the wounded as by the Convention of 1864 on the Treatment of Wounded Persons in War.[66]

Yet, it was by many thought necessary to distinguish rules applying between belligerents in armed conflict and rules which concern the victims of that conflict. The coincidental fact that the major conventions on methods of warfare were concluded at the Hague and the major conventions on protection of victims of warfare were concluded in Geneva contributed to entrenching the division between the two sets of rules.

Rules on victims cannot be separated from rules on warfare, as is shown in Protocol I of 1977.[67] Nor can rules on disarmament, to the extent that they exist, be completely separated from laws of warfare and weaponry. Some claim that disarmament questions are basically distinct from the Law of War, as disarmament *eliminates* certain weapons. But occasionally treaties on disarmament only forbid *certain uses* of a specific weapon and, to the extent that this is the case, the regulation is, of course, highly relevant to the application of the Law of War: the parties to a conflict are then in very much the same position as when they are bound by any other treaty on weaponry. Besides, the line between disarmament and arms control is, on close analysis, arbitrary and subjective. The complex interaction between disarmament and weaponry issues is illustrated, for example, by the operation of the Conventional Weapons Convention,[68] the En-Mod Convention,[69] or the Biological Weapons Convention.[70]

iii Identification of the Law of War

As indicated earlier in this work, the 'Law of War' signifies the body of rules which govern relationships in war.[71] This body of law consists of different sets of rules which are, albeit interlinked, of different substance.

The Law of War as understood in this work thus comprises (1) laws on weapons; (2) laws on warfare, including rules on permissible tactics and strategies and on illegitimate targets; and (3) humanitarian rules.

64 18 *NRGT*, 1 série, 474. 1 *AJIL*, 1907, Suppl. 95.

65 *E.g.* Nahlik, S., 'Droit dit "de Genève"', *op. cit.*, *loc. cit.*

66 *NRGT* 1 série, 612.

67 *Cf.*, comments in the *Lugano Report*, 28 and below, Chapter 9, section A.

68 Below, Chapter 7, section A ii.

69 *Ibid.*, section E i.

70 *Ibid.*, section D i.

71 See above, the Preface to the first edition.

a Rules on Weapons

Rules on weapons are those which abolish, restrict or regulate specific weapons or their use in war. Some of these rules have been discussed in connection with disarmament and with demilitarised zones.[72] So has the question of legality of certain weapons, particularly of nuclear weapons. Other questions to be analysed are questions of legality and restrictions of conventional weapons and of biological and chemical weapons.

b Rules on Methods

Rules on methods concern primarily the question of what may be the target of combatants in war. Rules on legitimate and illegitimate targets are supplemented by provisions on certain permissible or forbidden strategies, tactics and practices of war.

c Humanitarian Rules

(1) 'Humanitarian Law' and 'Human Rights'
'Humanitarian law' is a branch of law which has been 'contaminated' by idealism[73] and constitutes 'that considerable portion of international public law which owes its inspiration to a feeling for humanity and which is centered on the protection of the individual (which) appears to combine two ideas of a different character, the one legal, the other moral'.[74] The humanitarian law concerns primarily the protection of individuals in war or in armed conflict and probably also some rules of refugee law.[75] However, in this work we have adopted a more narrow definition of humanitarian law by insisting[76] that rules protecting individuals from being attacked are conceptually part of the rules of methods of warfare. Yet, it is important to clarify whether there is any overlap between rules protecting individuals under the Law of War and in other instruments dealing with human rights.

The Secretary General of the United Nations was asked to submit reports to the General Assembly from 1969 onwards on 'Human Rights in Armed Conflicts' which made some writers question whether the right terms were being used. 'Human rights' concern, some say,[77] a different 'regime'[78] and the two areas should not be confused. The two sets of rules certainly have a different history and often a different field of application, both *ratione personae* and *ratione temporis*. Human

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72 Above, Chapter 3, section C iii.

73 Pictet, J., *International Humanitarian Law* (Geneva: ICRC, 1985), 3.

74 Pictet, J., *Humanitarian Law and the Protection of War Victims* (Leiden: ICRC, 1975), 11. *Cf., idem, Développement et principes du droit international humanitaire* (Geneva: CIRC, 1983), 4.

75 *Cf.*, Kimminich, O., *Humanitäres Völkerrecht – Humanitäre Aktion* (Munich, 1972), 77 *et seq.*

76 Below, Chapter 9, section A.

77 *E.g.* Draper, G.I.A.D., 'The relationship between the human rights regime and the law of armed conflict', 1 *YHR*, 1971, 193; *cf.*, Suter, K.D., 'An inquiry into the meaning of the phrase "Human rights in armed conflicts"', 15 *RDPMDG*, 1976, 393.

78 On the usefulness of the concept, see my *Concept*, *op. cit.*, 29.

rights thus apply to *all* people and humanitarian law applies to *certain* groups of persons (for example, to the wounded, to prisoners or war, to civilians) and, furthermore, humanitarian law applies only in times of armed conflict.[79] On the other hand, 'human rights' and 'humanitarian law' regulate, *ratione materiae*, similar rights at least insofar that they all intend to increase the protection of individuals, alleviate pain and suffering and secure the minimum standard[80] of persons in various situations.

One may perhaps say that 'human rights' is the genus of which 'humanitarian law' is a species[81] but it seems desirable to retain a horizontal distinction, rather than to introduce a new, hierarchical one, as 'human rights' really concern rights enjoyed by all at all times,[82] but essentially in peace-time, whereas 'humanitarian rules' concern rights protecting individuals in armed conflicts. It would appear appropriate, therefore, to view 'human rights' and 'humanitarian law' as *ratione materiae* inter-related fields, both raising the level of behaviour towards individuals and both concerned with the rights and protection of individuals.

(2) Operation of Human Rights in War

Most human right documents have safeguards which exclude their application, or at least the application of certain provisions, in times of war and armed conflict. Thus, the United Nations Covenant on Civil and Political Rights of 1966[83] provides that States bound by the Covenant may derogate from it during times of emergency if such emergency is on such a scale that it 'threatens the life of the nation'. The measures taken must correspond to the demands of the emergency that appears to express a condition of proportionality. Furthermore, the measures must not, in any event, be taken with any discriminatory distinctions.

Equally, the European Convention on Human Rights provides[84] that in time of war or other public emergency, again 'threatening the life of the nation',[85] contracting parties may derogate from the provisions, on the condition of similar rules of proportionality as announced in the UN Covenant.

The American Convention on Human Rights also allows[86] such derogations 'in time of war, public danger of other emergency which threatens the independence

79 See, below, Chapter 6, section B ii g (1) on the problem of establishing whether armed conflict exists.

80 On the point concerning minimum standard as part of natural law, see Detter, I., *International Legal Order*, *op. cit.*, 288; *cf.*, Calogerospoulos-Stratis, A.S., *Droit humanitaire de droits de l'Homme, La Protection de la personne en période de conflit armé* (Geneva: Sijthoff, 1980), 139.

81 Robertson, A.H., 'Human rights as the basis of international humanitarian law', *Acte du congrès international de droit humanitaire* (San Remo, 1970), 174.

82 On suspension of instruments on human rights in times of armed conflict, see below, in this Chapter, next section.

83 Article 4.

84 Article 15.

85 *Cf.*, the similar wording in the Advisory Opinion of the ICJ in the *Nuclear Weapons Case*, below, Chapter 7 C ii, allowing States to resort to use nuclear weapons.

86 Article 27(1).

or security of a party'. There is a condition on proportionality similar to that in the Covenant.

The latitude of action is certain greater with regard to the American Convention which introduces the rather more flexible criterion concerning the threatened security and independence of the State.

But the derogation rules cannot be read in isolation. All three documents also refer to provisions from which States must not derogate under any circumstances. Thus, provisions on the duty to refrain from torture, inhuman and degrading treatment,[87] and slavery[88] are always binding. There are numerous other provisions in the three documents from which no derogation must be made, for example on retroactive criminal legislation,[89] but in the finer details the three Conventions then diverge along slightly different paths.[90]

The question arises as to how these conventions, and the Universal Declaration on Human Rights,[91] can be implemented, with regard to the protection of the right to life, in case of armed conflict. When the Universal Declaration was drafted the French representative René Cassin emphasised that, had there been a similar document during the Second World War, proclaiming the right to life, States might have taken some action to intervene instead of asking themselves whether they had any right to do so.[92]

There is a particular problem with regard to the right to life of soldiers in times of armed conflict. The right to life is guaranteed in peace[93] but it would not make sense that soldiers engaged in armed forces in a war would preserve this unqualified right. It would therefore seem that this right is suspended, as far as soldiers are concerned, during armed conflict. However, this suspension does not exclude the duty that attempts must be made, even in times of such conflicts, to save life.[94]

Armed conflicts which are defensive and compatible with the provisions of the Charter may cause loss of life but, it has been claimed, this would not be done 'illegally'.[95] Within the rights enjoyed under the Law of War, there is internal

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87 Covenant, article 7; European Convention, article 3; American Convention, article 5.

88 Covenant, article 8; European Convention, article 4(1); American Convention, article 6.

89 Covenant, article 15; European Convention, article 7; American Convention, article 9.

90 Compelling provisions are, apart from those referred to in the Covenant, articles 11, 16 and 18; in the European Convention, there are no further such articles; in the American Convention, articles 3, 12, 17, 18, 19 and 20.

91 Article 3 proclaims the right to life.

92 E/CN.4/SR.13.

93 Covenant, article 6; European Convention, article 2; American Convention, article 4; European Convention, article 2.

94 A case is being brought against the Ministry of Defence in the UK with regard to the duty of the State to provide adequate equipment to protect the life of a soldier. The question whether a soldier is protected by article 2 of the European Convention concerning the 'right to life' will be discussed by the Supreme Court on appeal in this landmark case, *The Ministry of Defence v Deborah Allbutt Daniel Twiddy Andrew Julien*, Court of Appeal, Case B3/2011/1928, 19 October 2012. In this case it is argued that the death of a soldier was the consequence of the failure of the Ministry of Defence to provide suitably armoured equipment for soldiers on active service in Iraq, in breach of their obligation to safeguard his right to life, enshrined in Article 2 of the European Convention on Human Rights.

95 See discussion in the General Assembly, A/C.3/SR/ 810, para. 18 *et seq.*

hierarchy: some such rights are more important than others and may not be suspended in emergencies; whereas there may, in specific circumstances, be derogation from others. Article 75 of Protocol I and article 4 of Protocol II provide 'absolute' protection which must not be suspended even in times of emergency.[96]

It is important to emphasise that the provisions securing the right to life in the three mentioned documents on human rights, and in the Universal Declaration, protect all persons whether or not they are nationals of a party. In this sense these Conventions go further than, for example, Geneva Convention IV on Civilians, which does not protect nationals of a State which has not ratified it.[97]

The Geneva Conventions and its Protocols are not capable of safeguarding the right to life to the same extent as the Conventions on Human Rights as the former are all instruments of the Law of War, designed to apply in times of armed conflict when, by definition, the right to life is diminished. On the other hand, the protection afforded by the Human Rights Conventions may be more detailed in certain aspects of life which are important in everyday life, such as the freedom of religion, the freedom of expression and assembly. But the Geneva Conventions and the Protocols regulate, in greater detail, the specific situations occurring in armed conflicts and attempts to secure further protection to numerous individuals affected by such conflicts.

To the extent that the provisions of the Human Rights Conventions are not suspended during armed conflict, individuals would seem to be entitled to cumulative treatment. But the adherence of certain States to the Human Rights Covenants could not dispense further adherence to the Protocols which cover a ground which sometimes overlaps but generally is distinct from that regulated by the Human Rights Conventions. On the other hand, decisions will probably be so difficult to take at times for the individuals involved in the execution of the Protocols that they will be expected to have legal advisers at hand to advise the military leaders on the 'appropriate level of application' of Protocol I.[98]

iv Bodies Participating in Drafting of Rules of the Law of War

Present-day rules on warfare and humanitarian law are formed by constant feedback between various bodies. Particularly, various organs of the United Nations, the International Committee of the Red Cross (ICRC) have been involved, as well as specialist groups of experts.

Numerous Resolutions of the General Assembly have thus 'endorsed' resolutions by the ICRC. It is important to remember that the ICRC is actually a non-governmental organisation and not any inter-State or inter-governmental body. Yet, it has until recently been a valuable guide and an important instrument for the development of international humanitarian law and of important parts of the Law

96 *Cf.*, Herzegh, G., 'State of emergency and humanitarian law, on article 75 of Additional Protocol I', *IRRC*, 1984, 272. See further below, Chapter 6, section B ii g.

97 On the development of the Convention into declaratory law, however, see, *infra*, Chapter 12, section B ii d.

98 Article 82.

of War.[99] The UN has correspondingly endorsed many of the drafts and Resolutions of the ICRC.

For example, General Assembly Resolution 2444 (XXIII) of 1968 specifically approved of Resolution XXVIII of the XXth International Conference of the Red Cross in Vienna in 1965 which had re-emphasised that the right to adopt means of injuring the enemy is not unlimited;[100] that no attacks must be launched on civilian population;[101] and that at all times distinction[102] must be made between those taking part in hostilities and the civilian population in order to spare the latter 'as much as possible'. General Assembly Resolution 2597 (XXIV) of 1969 furthermore endorsed the Resolution of the XXIst Conference of the Red Cross in Tehran in 1966 on protection of civilians and combatants in conflicts arising from struggles for liberation.[103] General Assembly Resolution 2676 (XXV) of 1970 similarly endorsed the ICRC preceding resolution on prisoners of war.[104] The ICRC was also involved with the preparatory phase of the Conventional Weapons Conventions, later transferred to the aegis of the United Nations.[105]

Other important links have been established between various bodies concerned with the Law of War. The cooperation between the Disarmament Conference (CD), which is now being revived to again be an active inter-governmental State Conference, and the United Nations has developed into semi-organic contacts: here there is a constant cross feed between the discussions in the General Assembly and other UN organs and CD. National delegations to CD also transfer their work from Geneva to New York during the sessions of the General Assembly to facilitate such contacts.

v The Positivist Problem

Remarkably few courses are given in universities on humanitarian law or on the Law of War. Even international law is being increasingly evaded as a compulsory subject for law students; and in the last few years the professors at Oxford and Cambridge succeeded[106] in what even Lenin had not managed to do: to remove international law from the compulsory syllabus for law students.[107] After 9/11 there has been an

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99 At one stage, when the ICRC employed some less experienced lawyers, there was some confusion as to the analysis of relevant rules of the Law of War, see below in the context of treatment of terrorists who, according to the ICRC, should be treated on the same footing as regular soldiers, see below, Chapter 9 under B iii g.

100 Below, in this Chapter, next section.

101 Below, Chapter 8, section A i.

102 Below, Chapter 8, section A ii c.

103 *Cf.*, above, Chapter 1, section D ii a (1).

104 Below, Chapter 9, section B iii f.

105 Below, Chapter 7, section A i.

106 At the universities of Oxford and Cambridge international law is now an optional subject in the Law Faculty.

107 Lenin did 'abolish' international law in 1918 but was forced to re-introduce it as a subject in the universities as the new Soviet State needed to conclude valid treaties. Lenin declared in 1918 that there would not be 'a single thread linking the Soviet Union with the "Imperialists"', see St. J. Macdonald, R. and Johnston, D.M., *The Structure and Process of*

increase in what is available as courses on the rules of war and armed conflict, but the question still remains why so little interest has been displayed in law faculties to one of the most important issues of the day, that of the standard of behaviour in internal and in international armed conflicts. Another paramount question is that which concerns the legal situation and the treatment of international terrorists. In fact, law faculties have, for a long time, evaded what has been on the front page of newspapers all over the world. Why is this?

It may be suggested that the refusal of States to ensure that universities teach the Law of War is derived from certain misconceptions of academics; many may be unwilling to teach a subject that so violently conflicts with notions they have set out in their traditional textbooks. States have neglected their duty to teach humanitarian rules, a duty that they have accepted as a binding obligation under the Geneva Conventions. Again, one may ask why there is this reluctance – and what is actually a flagrant violation of a binding obligation under the Conventions.

But it is not States who teach international law but academics. So teaching is the realm of those academics who have already made their position clear in that they do not accept individuals as subjects of international law and who, furthermore, assume the State has the right to adhere or not to adhere to rules of international law as they – or the majority of them – adhere to the positivist or the voluntarist school. There is an overspill also of political theories according to which the State can decide on every matter and that rules of international law only operate within a State if 'converted' into internal legislation. Such attitudes were obviously held by States that adhered to the communist system but even numerous democratic States, like Sweden, would, in their law faculties and administration, also often claim that no rules have effect in the internal sphere unless 'approved' by the State.[108]

The Law of War is difficult to reconcile with voluntarist theories that leave all decisions to the discretion of the State. Furthermore, traditional theories do not accept non-State actors as subjects of international law and are at a loss to explain the advent of multinationals, charismatic leaders, terrorists, and at a loss to explain the role, in terms of rights and duties, of ordinary individuals.

It is indeed impossible to teach the Law of War, humanitarian law, or human rights without recourse to notions of natural law or minimum standards of behaviour in international society. The positivist school has dominated the teaching of law during the last 150 years. Adherents to this school insist that all legal rules must be *jus positum*, that is to say all legal rules must be a concrete or enacted expression of the will of the State, in writing or in clear consent to customary rules. There have been efforts to explain the binding nature of rules by resorting to theories on various forms of consent.[109] Minimum standards have been accepted at times, not

International Law: Essays in Legal Philosophy, Doctrine and Theory (Dortrecht and Boston: Nijhoff, 1985). *Cf.*, Korovin, E.A., *Mezhdunarodnoe pravo perekhodnogo vremini* (Moscow, 1924).

108 See further, on this point and on the monist and dualist school, Detter, I., *The Concept*, *op. cit*, Chapter One.

109 On different forms of consent and on implicit consent, see Detter, I., *International Legal Order*, *op. cit.*, at 413–417; Detter, *Concept*, *op. cit.* (rejecting customary law in its traditional form). On 'abstract consent' to later decisions and acts of international organizations, see

as 'universal' standards but only as 'national' standards – which obviously fragments any behaviour pattern in international society.[110]

For a long time – possibly for the last 150 years – the majority of scholars have, under the influence of the positivist school, pretended that international law consists of only those rules to which States have agreed in treaties or that can be demonstrated to form part of customary law, which is notoriously nebulous,[111] as well as some fairly vague 'general principles'. Furthermore, virtually every textbook[112] insists that only States and inter-governmental organisations are 'subjects' of international law and thus capable of having direct rights and duties,[113] although it is clear that individuals also have direct rights and duties under the Law of War, under humanitarian law, and under rules of human rights.[114]

It is obvious that most rules in the international society are formed by treaties and other agreements between States. But there is a core of immutable rules, concerning human dignity, that are intrinsic in international society, in other words *inherent rules*.

vi General Principles of Ethics of Warfare

It may seem that war, as the ultimate type of violence, cannot be restrained by specific rules. Yet, there is a body of *jus in bello* which operates during warfare. The substratum of these rules consists of rules on 'ethics' or 'humanity', forbidding in particular certain weapons and attacks against certain targets.[115] It has long been accepted that there are certain basic rules which must be respected. Perhaps helped by mechanisms like reciprocity,[116] certain such rules have emerged.

There are two important general standards that provide guidance in armed conflicts and war: Common article 3 and the Martens clause. Common article 3 is a provision included in all the four Geneva Conventions of 1949 (and therefore

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Detter, I., *Law Making of International Organisations* (Stockholm, 1965), Chapter One. On 'consent' to and 'acceptance' of all rules, including those of natural law, ethics, and minimum standards that may be construed as indirect or tacit by virtue of a state being a member of international society, see Detter, I., *International Legal Order, op. cit.*, Chapter III D, I and Chapter IV iii, at 157–165, 197–211, 220–224, 304, 439.

110 See further in detail on standards, Detter, I., *International Legal Order, op. cit.*, Chapter IV, ii, f and g and Chapter III D I (iv).

111 Detter, I., *Concept, op. cit.*, at 107–113.

112 But see Detter, I., *The International Legal Order, op. cit., passim*; Detter, I., *The Concept, op. cit., passim.*

113 For a detailed discussion on the definition and identification of subjects of international law, see Detter, I., *Concept, op. cit.*, at 4–24, 46–49 and Detter, I., *International Legal Order, op. cit.*, at 31–143, 174–176, 198, 304–305.

114 See also the Nuremberg and Tokyo Trials, as well as the cases tried by the United Nations War Crimes Tribunals, the Tribunal for Former Yugoslavia (ICTY) and for Rwanda (ICTR).

115 On the historical background see Calvo, C., 4, *Le Droit international, théorie et pratique* (Paris, 1888), for example on early prohibition of poisoned weapons, or, later, of guns firing two bullets (at 171–172) or on the medieval restriction of the use of cannon against city walls but prohibited in field battle (at 148–149).

116 Below, Chapter 12, section B ii a.

called 'Common' article 3), an article which proscribes violence, murder, mutilation, cruelty and torture. This article probably only reflects some basic rules that, in any event, apply in internal as well as in international armed conflicts. There are also rules that prevent unnecessary suffering and new holistic practices to save the loss of lives in armed conflicts and war.

a The Martens Clause

The Martens clause figured in the St Petersburg Declaration of 1868, in the preamble to the Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land and in the four Geneva Conventions of 1949 (article 63 G I; article 62 G II; article 142 G III and article 158 G IV). The clause is named after the Russian negotiator at the Hague Conferences in 1899 and 1907 and is highly illustrative of the differences between the Law of War and other parts of international law. The clause stipulates that:

> 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.'

Thus, the clause would supply the necessary norms for cases where there was no textual support in the Convention or the annexed Regulations. But the Convention and the Regulations were only concerned with land warfare and the other Conventions concluded at the Hague in 1907[117] on, for example, naval warfare did not contain the clause. However, it was soon recognised that the clause covered all types of warfare and that it would supply valuable guidance in unregulated cases. The Martens clause is widely considered to have the status of general international law, as also confirmed by the International Court of Justice.[118] The clause, in the preambles of the Hague Conventions, was given a higher status in the 1977 Protocol I by being included in the main text of article 1.[119]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) is probably wrong in law when it suggests, in the *Kupreškić Case*, that the clause would not be a source of international law and relegates this important clause to be one of minor importance. The Tribunal states that

> 'this clause may not be taken to mean that the 'principles of humanity' and the 'dictates of the public conscience' have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference

117 Above, Chapter 3, section C iv.

118 In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ *Reports* 1996, at p. 259 at para. 84.

119 CDDH/SR.36, vol. 6, 62.

> to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise.'[120]

On the contrary, the Martens clause is one that in the absence of other guiding principles and rules will mark the distinction between what is acceptable and what is abhorrent in the practices of war. The ICTY and other courts dealing with war crimes should be the first to respect this important guidance.

The Martens clause had been upgraded in Protocol I of 1977 to form part of the substantive text. It is inserted among basic obligations,[121] such as the duty not to mutilate prisoners of war or to carry out medical experiments on such persons or on civilians, that form the substance of the Martens clause which thus provides that, in cases not covered by 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."[122]

The Martens clause is of the greatest importance in modern international law, especially to rebut any suggestions that States are free to behave as they wish within their own territory, a consequence of the extreme emphasis of sovereignty usually encountered in the former Eastern bloc and even more in Scandinavia. Extreme positivist views may gradually be mitigated by the insistence that the 'public conscience' can, at times, be relied on to assess what is right or wrong.

At the Diplomatic Conference it was suggested the term 'public conscience' should be replaced by the expression 'universal conscience'[123] but it may be that such a global reference may make it more difficult to ascertain its contents.

What is then this conscience? States do not have a conscience nor do groups. Who does? Individuals, combatants, and those who actually fight the wars, do. Is it not reasonable to think that it is they who in the unregulated cases will have to do their best to assess what the law might be, assuming at all times that the law itself must be reasonable? It is important to underline the implications of the Martens clause that it is really the conscience of individuals, or of a group of individuals, perhaps a large body of individuals, that, in the last resort, will be relevant since States themselves have no such conscience. World opinion would, in this respect, play an important role. The condemnation by such opinion of certain practices of liberation movements and States alike will contribute to the development of humanitarian law.

It has been suggested that the essence in the Martens clause rests on four principles: necessity, discretion, proportionality and humanity.[124] Others claim that

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120 *Prosecutor v. Zoran Kurpreškić, Mirjan Kurpreškić, Vlatko Kurpreškić, Drago Kurpreškić, Dragan Papić and Vladimior Santić, the Vlado Case.* Judgment, 14 January 2000, Case No. 95-16-T, para. 525.

121 Article 11.

122 Protocol I 1977 article 1(2).

123 CDDH/SR.36, vol. 6, 62.

124 Falk, R., 'Law and responsibility in warfare, the Vietnam experience', in Trooboff, P.D. (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (Chapel Hill,: University of North Carolina Press, 1975), 103 *et seq.*

the clause could be used for new developments in the sense of supplementing the law. The clause could be used for any change in, for example, combatant status.[125]

It may be simpler than that. The Martens clause probably covers the most basic rights and is a counterweight to literally interpreted law. The Martens clause explains the existence of law which underlies the Convention although it has not been incorporated or spelt out in the text, this might also mean that the impact of that law goes beyond the circle of the contracting parties. For if the law that can be discerned through the Martens clause exists, behind the textual world of treaties, it may be that its underlying obligation is derived from international law in general.[126] In that case States not bound by treaties in question might well be bound, albeit on another ground, by another mechanism or by another source of obligation, than that which is entrenched in written international law. This is the line that certain courts have taken in trials concerning the treatment of persons in war. In one case it was, for example, held that the rules on the treatment of prisoners of war in the Hague Regulations applied to Germany even in the absence of ratification as such rules form part of international law.[127] In another case it was considered 'irrelevant' whether or not the Soviet Union had adhered to the Geneva Convention of 1920; its provisions were binding in any event.[128]

Members of some armed forces are often instructed on the limits of their mission set in relation to the law. For example, British soldiers are issued with yellow cards indicating both their precise mandate and the limits of the law. By making the level of the mandate considerably more limited than what is prescribed by law, the soldier will have some latitude for personal errors of judgment. But the case may arise when he is unguided in his decision for action. Is he then not best equipped himself to decide what he must do? It seems that the Martens clause is merely an application of the rule of common sense in a practical situation. In a sense then individuals are subjects of this limited part of international law which, sometimes, requires their assistance for its application.[129]

There was considerable discussion at the Diplomatic Conference on the ICRC Draft of 1973 as this Draft referred to the principles of humanity and the dictates of public conscience as a source outside international law.[130] The Martens clause was adopted in the final versions in its original form which indicates that such principles and dictates form part of international law.

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125 Draper, G.I.A.D., 'The legal classification of belligerent individuals', *op. cit.*, 149.

126 *Cf.*, above, Chapter 5, section C v on underlying obligations and on ethics of warfare.

127 See, *Prisoner-of-War (Germany) Case*, (1919), *AD* 1919–1922, 433 (before the Leipzig Supreme Court).

128 *The Great War Criminals Case*, IMT, 1.10.1946.

129 Pictet, J., *Humanitarian Law and the Protection of War Victims* (Geneva: ICRC, 1975), 22; Schmid, J.H., *Die völkerrechtliche Stellung Partisanen im Kriege* (Zurich: Polygraphischer Verlag, 1956), 82.

130 On the Draft see above, Chapter 6, section B i c.

b Common Article 3

The other important yardstick for behaviour in all forms of war and armed conflict is the so-called 'Common article 3', a provision in all the Geneva Conventions, laying down minimum rules. The article provides that

> '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.'

This provision is, in its formulation, said to be limited in its formulation to apply to non-international conflicts. Although the article states that it applies to 'conflicts not of an international character' it is widely held to apply to both internal and international armed conflicts. The rules contained in Common article 3 of the Geneva Conventions are thus considered to represent the '*minimum minimorum*' of rules, applicable in all types of armed conflicts.[131]

The Supreme Court of the United States in one notable case extended its application to international terrorist situations.[132] In *Rumsfeld v Hamdan* the Supreme Court of the United States went to extraordinary lengths to explain that the rules would also apply in global armed conflicts with terrorists, claiming that, since terrorists are not representing 'nations', such conflicts fall into the right category of conflicts 'not of an inter*national* character'.[133] The Court thus used quite a complicated way to justify the conclusion: 'international' in the text of the article

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131 See ICTY, *Prosecutor v Delalić* et al., Case NO. IT-96-21-A, A.Ch., 20 February 2001, paras 147 and 150. *Cf.*, ICTY, *Prosecutor v Boškoski*, Case No. IT-04-82-T, T.Ch.II, 10 July 2008, paras 175–292.

132 Supreme Court of the United States, *Hamdan v Rumsfeld, Secretary of Defence*, 28 June 2004; 30th Judicial Circuit Court of Ky., 410 US 484.

133 *Rumsfeld v Hamdan*, 2006, cited above.

does not mean 'global' but rather 'inter-nation' or 'between nations'. Because Al-Qaeda is not a nation-State, the court held, the conflict with Al-Qaeda was not an inter-nation, or international, conflict, however worldwide it might be. Under the language of Common article 3, the court deemed the conflict with Al-Qaeda an 'armed conflict not of an international character' and thus the article would apply. Furthermore, if such a non-international conflict takes place in the territory of a party to the Geneva Convention, like Afghanistan, the court held, Common article 3 could be applied. With these two requirements met in the court's eyes, that the conflict was not of an international character and took place in the territory of a Party to the Geneva Conventions, the court then went on to hold that the additional provisions of Common article 3 were also applicable. This means that requirements relevant to the *Hamdan Case* that criminal sentences can only be imposed by a 'regularly constituted court' providing 'all the judicial guarantees ... recognized as indispensable by civilized peoples'.[134]

However, without going into such unreasonable semantic arguments there is good authority that these basic rules apply in all types of armed conflict and war.

This article has proved a useful provision and has been applied as providing authority for action by the International Committee of the Red Cross (ICRC) in, for example, Guatemala in 1954 and in Algeria after 1954.[135] The article is not entirely dependent on merely the good will of States but affects, if violated, their international responsibility.[136]

The attitudes of delegations of various States at the Conference where the Geneva Conventions were negotiated illustrate the complex problems involved. On the one hand, it was argued forcefully by the United States that every State has the right to put down rebellion and punish insurgents according to the law. Furthermore, said the United States, it is well known that premature recognition of insurgents is a 'tortious act' against the lawful government and constitutes a breach of international law.[137] Nevertheless, stated the United States, the Conventions should be applied to internal conflicts which amount to war under international law, that is they are waged by an organisation with the characteristics of a State; it has *de facto* authority over defined territory; it has forces under organised military authority, and subjected to the Law of War; and the insurgent civil authority agrees to be bound by the provisions of the Conventions.[138]

The other delegates, however, were more in favour of a compromise clause and it is this that was adopted. This clause was so plain and so 'innocuous' and said to merely bind the parties to a conflict.[139]Parties bound by the clause would only undertake not to do 'certain things, none of which any civilised State would be

134 See further below in Chapter 9 B 3 g on treatment of detainees.

135 *Cf.*, Siotis, *Le droit de la guerre*, *op. cit.*, 209–212.

136 *Ibid.*, 219; on responsibility see further *infra*, Chapter 12, section D.

137 *Cf.* above, Chapter 1, section D i a.

138 Joint Committee, Report to the Plenary Assembly, *Final Record*, ii, B. 128.

139 *Cf.*, above, Chapter 4, section C, on qualifications for combatants. Common article 3 was drafted at a time when the criteria for combatant status were more stringent and the expression noncombatant, possibly covering guerrilla forces, must be interpreted in that light.

expected to do anyway',[140] for example, murder, torture, mutilations of prisoners and of non-combatants. As a result the basic and elementary safeguards of Common article 3 are applicable to internal conflict when such a conflict has reached certain proportions.[141]

In spite of the modest ambitions of Common article 3 States have still attempted to evade application of this article claiming that a conflict did not fall within its ambit but constituted a mere 'police action'. This was, for a time, the position with regard to Algeria,[142] although the ICRC held that, by allowing Red Cross missions to visit Algeria, France had agreed that Common article 3 was applicable.[143]

In situations where it has not been clear, at least not to all parties, as to whether there was an international situation in which the Geneva Conventions, as a whole, applied to a contracting party, Common article 3 has retained its importance. For example, Leopoldville made declarations of succession to the 1949 Geneva Conventions in February 1961,[144] but it regarded Katanga forces as rebels. Still, the central government was obliged to apply Common article 3. Katanga, on the other hand, did not apply to accede to the Geneva Conventions at that stage but declared itself willing to adhere to principles recognised by all countries, presumably covering similar ground as Common Article 3.[145]

In many cases the General Assembly has appealed for a certain standard of treatment of detainees to ensure that they were given some protection above the rudimentary provisions of Common Article 3. The General Assembly thus asked France to give the status of 'political prisoners' to Algerian captives in France as they were not entitled to prisoners of war status under the Geneva Conventions.[146] The concern of the United Nations for the victims of war was such that repeated calls on all parties to give prisoner of war status to freedom fighters have been made by the General Assembly.[147] Similar calls have been made on Israel but this State still refuses to give prisoner of war status to captured PLO combatants.[148]

For the General Assembly to call on States to grant freedom fighters prisoner of war status might have been a vaguely reasonable idea in the early 1970s although it did appear drastic even at the time: a freedom fighter is only a freedom fighter if he wins – otherwise he is a terrorist. It is clear that any such call now to grant prisoner of war status to anyone except soldiers who openly wear arms and abide by the Geneva Convention[149] would seriously undermine the Law of War. It

140 Yingling, R.T. and Ginnane, R.W., 'The Geneva Conventions of 1949', 46 *AJIL*, 1952, 393.

141 *Cf.*, *ibid.*, 395–396.

142 Farer, T.J., 'The humanitarian laws of war in civil strife', *op. cit.*, 30.

143 ICRC and the Algerian Conflict (Geneva: ICRC, 1962), 4.

144 Schindler and Toman, *Documents*, *op. cit.*, 479.

145 43 *RCIR*, 1961, 140.

146 Res. 1650 (XVI) of 1961. *Cf.*, Resolutions 2395 (XXIII) 1968; 2547 A (XXIV) 1969; 2207 (XXV) 1970; 2795 (XXVI) 1971; 2918 (XXVII) 1972 and 3113 (XXVIII) of 1973.

147 Resolutions 2395 (XXIII); 2547 (XXIV) of 1969; 2270 (XXV) of 1970, 2795 (XXVI) of 1971; 2918 (XXVII) of 1972 and 3113 (XXVIII) of 1973.

148 *E.g.*, PLO-Observer. A/C.6/37/SR,195, para. 18.

149 See above in Chapter 4 C ii on the Geneva requirements for combatants.

would dilute the protection that real combatants deserve along with the civilian population. On the other hand, States are obliged to apply Common Article 3 and this obligation also covers terrorists, and even what in this work has been called genocidal terrorists.

In a decision rendered on 20 February 2001 by the Appeals Chamber for the ICTY held that Common Article 3 is applicable in international armed conflicts. It stated:

> 'It is both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of Common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical.'[150]

But the Sierra Leone Tribunal considered Common Article 3 extremely important when assessing the fate of a war criminal. The Tribunal considered common article 3 as the laying down the main obligatory rules that had been violated by the accused. The Tribunal mentioned specifically this article in regard of virtually every point of the judgment against former President Charles Taylor on 26 April 2012.[151]

The ICRC's own Commentary to Common article 3 of Geneva Conventions IV stated, *inter alia*, that

> 'the object of the Convention is a purely humanitarian one ... and that it merely ensures respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself.'

The Commentary stated further that Common article 3

> 'represents ... the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For 'the greater obligation includes the lesser'.'[152]

150 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, 20 February 2001, para. 150. This Judgment confirmed the decision in: *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, where the interpretation of Common Article 3 in the *Nicaragua Case* was accepted. The Appeals Chamber found that 'at least with respect to the minimum rules in Common Article 3, the character of the conflict is irrelevant' (para. 102).

151 See further on this Case, Chapter 12 C ii.

152 ICRC commentary to Common article 3, in Pictet, J. (ed.), *Commentary: II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva: International Committee of the Red Cross, 1960), 35. This comment also appears in the commentary to the three other Geneva Conventions.

But that is possibly not correct as application of the substance of Common article 3 would depend on the operation of 'all' the provisions of the Geneva Convention: the article merely puts on paper what constitutes minimum standards in war, regardless of the Geneva Conventions. According to its own text the article is limited to conflicts of non-international character but it is not the article that has to be applied but its substance which *coincidentally corresponds to what are general principles for behaviour in war.*

This view is confirmed by the statement of the International Court of Justice in the *Nicaragua Case*, where the ICJ stated that:

> 'Common article 3 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.'[153]

The affair in 1949 to which the ICJ referred was the *Corfu Channel Case* where the Court held that there are certain imperative general and well recognised principles concerning humanity.[154] Furthermore, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ reiterated the principle that certain minimum rules are applicable regardless of the nature of the conflict.[155]

Common article 3 is thus a convenient summary, in writing, of what represents the minimum standards of behaviour in war and armed conflict. But it is not the article which is 'applied' but the underlying principles. It can still be used to indict a person for war crimes: in the important judgment of Charles Taylor, former President of Liberia, in the Special Court of Sierra Leone, the Court referred mainly to Common article 3 for all the points of conviction.[156]

c Rules Prohibiting Unnecessary Suffering

Some rules concern the way suffering is inflicted and prohibit excesses. The St Petersburg Declaration[157] indicated that since 'it is sufficient to disable the greatest possible number of men' to defeat the enemy it is not allowed to use 'arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'.

Article 22 of the Hague Regulations[158] emphasised that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. Article 23 (e) of the Regulation introduced a complete prohibition of 'arms, projectiles or material calculated to cause unnecessary suffering'.

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153 *Nicaragua Case*, para. 218.

154 *Corfu Channel Case*, ICJ *Reports* 1949, 22.

155 *Legality of the Threat or Use of Nuclear Weapons*, ICJ *Reports* 1996, 226, 79.

156 Judgment of the Special Court for Sierra Leone, 26 April 2012.

157 18 *NRGT* 474.

158 3 *NRGT* 3 série 464.

The English version of the Regulations speak of prohibition of arms, projectiles and material which cause unnecessary suffering whereas the French text refers to '*maux superflus*', which in English would have been better translated as 'excessive injuries'. 'Unnecessary suffering', which was adopted for the official English translation, introduces a different subjective element, not present in the French text. The clause came up for discussion during the 1973 Lucerne Conference on Conventional Weapons[159] and it was then thought 'unthinkable' by the Conference to 'remove this subjective element ... from the body of international law' simply by preferring another translation of the original French text.[160] The incompatibility of the two versions was also questioned by delegates to the Conference on the Additional Protocols of 1977 to the Geneva Conventions.[161] On the other hand, the other qualification, which in English was rendered 'calculated to cause' as opposed to the French version '*propres à causer*', implied, in the English version, a more subjective assessment than the rather more objective French expression. The French qualification might, in this respect, be wider and cover situations even when there is no *intention* of causing 'unnecessary suffering' or '*maux superflus*', but this is the inevitable effect of the type of weapon. In such cases, the French, less restrictive notion should prevail in case of any doubt.[162]

Protocol I of 1977 uses a juxtaposition of the two expressions in its prohibition of the use of any weapons which are of 'a nature to cause superfluous injury or unnecessary suffering'.[163]

'Suffering' may be something which is difficult to measure and quantify as different people experience pain differently. There was discussion at the Lucerne Conference whether psychological damage should be taken into account.[164] Such suffering would be even more difficult to quantify. But there is, *grosso modo*, some agreement of what type of suffering is envisaged by the relevant prohibitions.

The general rules mentioned above limit the right of belligerents in two ways. First, parties to a conflict must not chose weapons which have the effect of causing unnecessary suffering. Secondly, they must not use other permissible weapons in a *way* which causes such suffering, or employ tactics or practices which have such effect. Furthermore, the use of weapons is always subjected to the rules of necessity and proportionality.[165]

With regard to weapons it may then first be said that weapons which *inevitably* cause unnecessary suffering are prohibited[166] All experts at Lucerne furthermore agreed that 'indiscriminate attacks' are forbidden,[167] from which can be deduced that 'indiscriminate weapons' – which inevitably cause 'indiscriminate attacks' –

159 Below, Chapter 7, section A ii b.

160 *Lucerne Report*, 1974, 8.

161 *E.g.* Australia, CDDH/IV/SR.1., vol. 16, 16.

162 *Lucerne Report, op. cit., loc. cit.*

163 Article 35(2).

164 *Lucerne Report, loc. cit.*

165 Below, Chapter 7, section A.

166 *Cf.*, British Report at Lucerne, *Lucerne Report*, 9.

167 *Lucerne Report, op. cit.*, 10.

must also be forbidden.[168] Furthermore, 'treacherous' weapons, already forbidden by the Hague Regulations,[169] or any weapons used 'with perfidy',[170] should also be forbidden.[171] Here, however, the Lucerne Conference crossed the area from weaponry to methods, as it is perfidy, or the *way* the weapon is *used* in the event, which warranted the prohibition. There is an obligation in all situations to avoid excessive injuries and damage during a military operation. The duty is obviously enhanced vis-à-vis civilians and the number of injured persons is not necessarily relevant.[172] But, again, there is clearly a highly subjective assessment of the court or of others analysing a military situation *ex post facto* as to what is 'excessive'.

On the other hand, it may be suggested that certain relatively new weapons, like the magnesium ones which make the soldier blind or the sonic ones which make him deaf (and make him lose his sense of direction) are to be classified as weapons that cause unnecessary suffering.[173]

d Holistic Strategies

Closely related to the rules forbidding unnecessary suffering are the rules on holistic strategies. New strategic thinking in the first decade of the new millennium may indicate a return to earlier ethics in warfare. The new trend towards effect-based operations[174] methods that involve considering results rather than just the immediate destruction of the enemy's forces. Such attitudes clearly reflect earlier thinking patterns of, for example, Sun Tzu, who in his *The Art of War* wrote about a preference for employing other means short of war, such as political, diplomatic or economic efforts to compel an enemy to submit.[175] Clausewitz also recognised the need to have multiple avenues to conquer an enemy.[176] For example, much advantage over the enemy can be gained by operations that have direct political repercussions, disrupt or paralyse the opposing alliance, or by other moves that gain new allies, and which thus affect the political scene. If such operations are possible, it is obvious that they can greatly improve prospects to win and they obviously provide a much shorter route to win a war, even if the 'normal' method would be to destroy the enemy's forces by fighting.[177] It may be that this holistic strategy may also be designed to save lives in warfare.

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168 Not all agreed at the Lucerne Conference that 'indiscriminate weapons' were prohibited, see *Lucerne Report*, *op. cit.*, 10, although this seems a logical conclusion from the first agreement on 'indiscriminate attacks'. On prohibition of attacks on the civilian population and the importance of discrimination, see GA Res. 2444 (XXIII) of 1968, and 106 *et seq.*, 232 *et seq.*

169 Article 23 (b). *Cf.*, below, Chapter 7, section A ii b, on treacherous weapons regulated in Protocol II to the Weaponry Convention of 1981.

170 *Cf.*, 1977 Protocol I, article 37.

171 *Lucerne Report*, *op. cit.*, 11.

172 *Cf.*, ECHR Özkan and Others v Turkey, judgment 4 July 2004.

173 See Chapter 7 on prohibition of weapons.

174 See Chapter 7 under H, space warfare.

175 Sun Tzu, *The Art of War*, transl. Griffith, S.B. (New York, 1971), 79.

176 Clausewitz, C., *On War*, *op. cit.*, 258.

177 *Ibid.*, 92.

Another change in the practice of armed conflict is designed to save lives and reduce personal injuries, but not necessarily for idealistic reasons: this is the new use of drones and robots which will involve unmanned attack flights.[178]

e Minimum Standards and Inherent Rights

Human rights apply in peace-time but are, to some extent, suspended in war. On the other hand, there are, as we shall see, important human rights rules that still apply in all wars, for example those which may be called *'inherent rules'* – rules inherent in the structure of international society. These rules often coincide with those that often are referred to as 'fundamental rules', for example rules that forbid genocide, slavery, or torture, and other rules that impose certain minimum standards in international society. Certain fundamental rules of human rights that remain applicable in war thus break through the shield of the State and must be applied by courts for the benefit of individuals.[179] Other human rights rules that continue to apply in time of war are those that ensure minimum standards in court procedures and with regard to treatment of detainees.

It may be noted that minimum standards are also viewed as unacceptable intrusions in the sovereign sphere by communist and some post-communist States: according to the communist doctrine, the State is omnipotent and international law cannot impose any limitations on its power without its consent. Some of the communist States accepted a minimum standard treatment but that would have to be the 'national' standard, not any widely accepted norm at any global or (even less) intrinsic level.

Minimum standards and inherent or intrinsic rights – which the State is unable to alter – represent a notion that was fiercely resisted by the Soviet Union and its satellite states and that is now still resented by communist States like China. These States claim that there is an iron fence around them forbidding any application of external rules lest they give permission *in casu*.[180] Such views ignore, for example, the traditional immunity granted to diplomats on the soil of a receiving State, the prohibition of gross violation of human rights, and the right to transit to the sea.[181] Furthermore, minimum standards in court procedures and for the general treatment of detainees also apply in war as in peace.[182] However, this does not mean that terrorists should be given special protection beyond these fundamental rules and minimum standards; terrorists may have forfeited the right to claim further privileged treatment.[183]

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178 See below, Chapter 7 on weapons, under B vi, drones and robots.

179 See Detter, I., *International Legal Order*, *op cit.*, at 175.

180 See above, in this Chapter, under v, the positivist problem, and references.

181 See generally, Detter, I., *International Law and the Independent State*, 2nd edn (London, 1992), *passim*.

182 See Detter, I., *Concept*, 2nd edn, *op. cit.*, at 107–113; Detter, I., *International Legal Order*, *op cit.*, at 186–190.

183 See below, Chapter 9 B iv on treatment of terrorists in detention.

f Jus Cogens, *Natural Law and Sociologically Necessary Rules*

It is clear that custom in war is not formed by States but by combatants in the field, just as much as it is clear that wars are fought by individuals and not by States.[184] But individuals must also be informed of what measure of behaviour is commonly accepted, that is, soldiers and civilians should be given information of the basic rules in the Geneva Conventions or other teaching of ethics. However, States have largely ignored the clear obligation under all the 1949 Geneva Conventions to teach and disperse knowledge of the provisions of the Conventions.

Yet, as the Martens clause indicates, the substratum of these rules is anyway rooted in the human conscience. As shown in the Nuremberg Trials no one can pretend that certain practices were not beyond the rules to which humans are subjected. These are the peremptory norms from which States cannot contract out and that are binding for all, or *erga omnes*, irrespective of agreement by treaty or other form of acceptance.[185]

So, from where, then, do such peremptory rules emerge? It is clearly not from any positive custom – or any form of custom at all – but from a set of legal norms that are sociologically essential to the survival of mankind.[186] These rules are thus intrinsic in the social fabric of world order. At times these rules are expressed in a *condemnation of earlier practice or custom*.[187]

It may be that rules of this kind are similar in their nature and origin to the rules of so-called 'natural law' so vehemently discarded by the positivists. However, rules on natural law are not rooted in any religious precepts even if the great religions would respect similar precepts. On the contrary, such rules are intrinsic in the social fabric of world order.[188]

184 See above, Chapter 1.

185 See Detter, I., *International Legal Order*, *op. cit.*, at 189; see Detter, *Concept*, *op. cit.*, at 107–108.

186 See Detter, *Concept*, 2nd edn, *op. cit.*, at 37 *et seq.*, on the survival of mankind and the survival of the State as the 'hypothetical goal' of international society; *cf.* Detter, *International Legal Order*, *op. cit.*, at 152–156 (discussing classifications of rules of international law). Hegel, who inspired both fascist and communist theories and gruesome practices. See, Hegel, G.W.F., *Phänomenolgie des Geistes*, 1807 (Berlin: Dunker und Humboldt, 1841); *cf. idem*, *Vorlesungen* über die Philosophischer Geschichte, 1 (Berlin: Duncker un Humboldt, 1837).

187 *Cf.*, below, in next section vii on the 'absurd' ideas on negative custom.

188 Detter, *International Legal Order*, *op. cit.*, at 153; see Detter, *Concept*, *op. cit.*, at 37. Even scholars of Soviet Russia at the Institute for Law and State accepted at a lecture by the author in 1989 that such rules are 'essential' and 'sociologically necessary' in international law, see, Detter, I., 'Peremptory rules of international law', Lecture at the Moscow *Institut Gosudarstva i Pravo*, November 1989.

An overwhelming number of writers[189] and Courts[190] accept the notion of *jus cogens*, at least covering certain basic rights, or corresponding basic *duties*. Effectively, the minimum contents of the concept of *jus cogens* may be formulated more conveniently as a set of duties rather than a series of rights. Thus, *jus cogens* contains the prohibitions of genocide, slavery, torture and apartheid.[191] But the duties of some obviously generate rights for others: the right not to be subjected to genocide, slavery, torture or apartheid. The prohibitions and corresponding rights apply both in times of peace and war.[192] In war, rules demanding a minimum humane behaviour are activated and all combatants and civilians are bound by these standards, generating rights and duties for all.

What is essential to note, as State practice shows – especially in the Nuremberg Trials and Tokyo Trials – is that these rules bind both States and individuals, including terrorists. It is also clear that individuals – as well as States – are convicted for war crimes, and in today's world, there are far more individuals indicted.[193]

But there is little agreement on what the notion *jus cogens* covers beyond the prohibition of the above-mentioned matters and certain basic rights. The exact ambit of *jus cogens* has probably not been finally decided. Yet, for the purposes of

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189 Verdross, A., v. *Jus Dispositivum and Jus Cogens in International Law*, 60 *AJIL*, 1966, 56. Verdross, A., *Völkerrecht, op. cit.*, 126. The validity of human actions are measured against eternal truths. Flores Olea, V., *Ensayo sobre la Soberanía del Estado* (Mexico: Universidad Nacional Autonoma, 1969); Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988); Nieto-Navia, R., *Estudios Sobre Derecho Internacional Público* (Bogotà: Pontifica Universidad Javeriana, 1992). For comments and discussion, see Detter, I., *International Legal Order, op. cit.*, 174–176. For various forms of indirect or implied 'acceptance', see *ibid.* at 157–249.

190 See *Military and Paramilitary Activities (Nicaragua v. United States)*, ICJ *Reports*, 1986, 14, 100–101; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1970, Advisory Opinion, 1971 ICJ *Reports* 1971, 3, 54 Jan. 26; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ *Reports* 1951, 5, 23.

191 These are the basic rules on which there is wide agreement that they and binding as *jus cogens*. Some stretch *jus cogens* further to include, for example, 'Les règles qui assurent a tous les membres de la communauté internationale la jouissance de certaines biens communs'. Ago, R., *Droit des traités à la lumière de la Convention de Vienne. Introduction*, 134 Recueil des Cours (1971), III, p. 324. The Tribunal of Arbitration in the *Aminoil Case* expressly rejected the idea of considering the permanent sovereignty on the natural resources as a norm of *jus cogens*. *Journal du Droit International*, 1982, 893. There are even consequential limits to the contents of treaties, and immoral agreements (*contra bonos mores*) are not binding (*ibid.*, 143), is a general principle of law, as affirmed by Judge Schücking in his individual opinion in *The Oscar Chinn Case* (1934) PCIJ Rep. Ser. A/B, No. 63, 149–150.

192 ICTY confirmed that the prohibition against torture in both times of peace and during an armed conflict constitutes a norm of *jus cogens* which is therefore non-derogable. See *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, 2001, para. 466. Also, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, 1998, para. 454 and references. *Cf.*, Meron, T., 'International criminalization of internal atrocities', 89 *AJIL*, 1995, 554, at 571.

193 The Nuremberg Trials amply demonstrate the truth of this proposition. See generally, e.g., Woetzel, R.K., *The Nuremberg Trials in International Law*, 2nd edn (New York: Transnational Publishers, 1962); for the Tokyo Trials, see generally Minear, R.H., *Victors' Justice: The Tokyo War Crimes Trials* (Princeton: Princeton Univ. Press, 1972). See further below in Chapter 12 C ii b on the War Crimes Tribunals.

behaviour in war and armed conflicts, it is possibly sufficient that these basic rights are covered, accepting thus that *jus cogens* is a wider concept.[194]

The basic tenets listed in Common article 3 of the four Geneva Conventions certainly constitute *jus cogens*: these rights – and corresponding duties – apply in internal as well as international conflicts and, furthermore, these rules apply both in peace-time as in times of war and armed conflict.

It is thus reasonable to suggest that the Martens clause, Common article 3, the rule prohibiting unnecessary suffering, all form part of *jus cogens*. There may be other rights and duties as well that deserve to be classified as peremptory rules but, with regard to the present work, it would seem modest to insist that, at least, the above-mentioned rights and corresponding duties are binding on States and on all individuals; and States do not have the right to modify or abolish these basic rules as they are not dispositive.

The contents of the Martens clause and of Common article 3 thus reflect what is required as civilised behaviour in any situation. In that sense, it is not the article which is 'applied' but a parallel contents existing in general international law, laying down binding rules. It is important to identify the ground of obligation which lies in the underlying contents in general international law. It is thus a convenient *codification* of contents in *international natural law*, or a system of *jus naturale internationalis*.[195]

It is indeed impossible to explain the binding nature of the Law of War without reference to natural law and to *jus cogens*, and to the fact that individuals are also subjects of international law, directly having legal rights and duties under this legal system, and not only indirectly through the state. Individuals must not, for example, be subjected to genocide as they enjoy rights under binding rules of international law – even in the absence of treaties – as amply shown by the Nuremberg and Tokyo Trials. Individuals will also be held individually responsible when they are guilty of perpetrating the crime of genocide, as again amply shown by the Nuremberg and Tokyo Trials. This state of affairs demonstrates that individuals enjoy direct rights and are directly bound by duties, as individuals, by international rules.

vii The Fallacies of Customary Law

A predominant faction of writers on international law usually refer to the sources of international law as treaties, customary law and general principles as set out in article 38 of the Statute of the International Court of Justice.[196] Then they subsume, without much justification, virtually all rules of humanitarian law, and human rights, and any other relevant rules under 'customary law' and pretend that 'general

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194 There has been confusion in doctrine where writers have included, for example, procedural maxims in *jus cogens* although such maxims are binding out of different grounds of obligation, see Detter, I., *The Concept, op. cit.*, Chapter Four.

195 *Ibid.*, Chapter One, II, ii.

196 It may be important to mention that article 38 of the Statute of the Court refers to custom as 'evidence of a general practice accepted as law', which is not necessarily what enthusiasts of customary law mean in their analyses. Statute of the International Court of Justice art. 38, 26 June 1945, See Detter, *International Legal Order, op. cit.*, at 146–211.

principles' cover all what is left of the regulatory framework in international society (treaties apart).

But it is becoming increasingly difficult to explain all rules, especially, the Law of War, as 'customary rules'. Minimum standards and inherent rights are quietly left aside as it is difficult to explain such concepts in customary terms[197] as, indeed, these writers (and courts!) are at a loss to explain the sudden importance of non-State actors.

It would be better to observe what is actually happening out there on the field and assess whether it is not abundantly clear that all individuals are also subjects of international law, *i.e.* direct bearers of rights and duties and that, furthermore, a network of basic inherent rights are guaranteed to these individuals. Conversely, these individuals are also direct bearers of duties under international law and will thus, as terrorists, be treated as directly and personally responsible for their acts.

Yet, at present the normal procedure in international courts and tribunals, especially in the important International Court of Justice, is to show examples of 'State practice'. Counsel on both sides then often present numerous decisions of municipal courts and suggest that these rulings have been 'accepted' – by *opinio juris* – and as laying down rules of 'customary law'.

But this does not always work: customary law is assessed by assembling evidence of case law, often from national systems and predominantly from Anglo-Saxon countries. This alone created an imbalance in the evidence collected. Without proper symmetry of statements by municipal courts, how can we know we have a representative selection of 'State practice'?

There is thus a vast over-dependence on case law in international courts and tribunals where there seems to be little awareness that civil law countries do not rely on precedents and in numerous countries, cases in the High Court are not always reported and often not even all Appeal cases.[198]

But a case before Court also presupposes that someone brought it there. There are numerous disputes which are solved in other ways and never come before Courts. There are also numerous situations which do not even grow into disputes. Furthermore, the textbooks are full of references to case law in countries which use languages which are easily accessible in Europe whereas there is little information on court cases in China, Japan or Russia, probably because international law is dominated by Western scholars who sometimes only read English. Another aspect of constant references to English and Commonwealth Court cases in books on international law is, obviously, that these countries have legal systems based on case law whereas different weight to cases is given in civil law countries like France and Germany. For all these reasons, pronouncements of Courts often give little guidance on what the law is, at least in the field of international law.

This radical statement is at strong variance with the unquestioning attitude of Anglo-Saxon lawyers who have been taught to rely heavily on case law. But pronouncements of courts can only state the law with respect to cases which have come before such judicial bodies: since there is a wide area where courts have no

197 See below in the next section vii on the 'absurd' ideas on negative custom.

198 For example, in Sweden hardly any judgments from first instance are reported.

jurisdiction, especially in international situations, it may well be that the general law is different from isolated case law, however 'settled' this case law appears to some.

An example of such superficial attitude to assessing to what is prevalent 'case law' can be found in the *Tadić Case* before the ICTY, a case hailed as a precedent for numerous subsequent convictions of this Tribunal and also followed by some of the other war crimes tribunals.[199] Under the section of its Appeal judgment headed 'Case-law as Evidence of Customary International Law' one would have expected a representative *tour d'horizon* of how municipal and international courts view the element of 'personal motives' in crimes against humanity. But no. The section contains a superficial survey of no more than *nine cases,* and citing four others;[200] and two of the nine cases are from low local courts of Flensburg and Braunschweig,

All cases were relating to Nazi policies, and all cases but two were decided 50 years ago.[201] Yet the Court has the temerity to state that, having surveyed the nine German related cases:

> 'The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.'[202]

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199 See *Prosecutor v Duško Tadić*, Case No. IT-94-94 1A, and further below Chapter 12 C ii b on the War Crimes Tribunals.

200 1. Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), *S. StS* 78/48, in *Justiz und NS-Verbrechen* vol. II, 498–499. 2. OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), *S. StS* 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone I*, 1949, 321–343. 3. Decision of Flensburg District Court dated 30 March 1948 in *Justiz und NS-Verbrechen*, vol. II, 397–402. 4. Decision of the Supreme Court of the British Zone dated 26 October 1948, *S. StS*, 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I.,122–126 at p. 124. (Citing also The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, *S. StS* 43/48, *ibid.*, pp. 60–62 and Decision dated 13 November 1948, *S. StS* 68/48, *ibid.*,186–190. See also Decision of the Supreme Court of the British Zone dated 20 April 1949, *S. StS* 120/49, *ibid.*, 385–391, at 388.) 5. Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen*, vol. VI, 631–644, at 639. (Citing also Decision of Schwurgericht Hannover, dated 30 November 1948, in the B. Case, *S. StS* 68/48 (in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I,186–190 and Decision of the Supreme Court for the British Zone dated 22 June 1948, *S. StS* 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I, 19–25.) 6. *U.S. v. Ernst von Weizsaecker et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, (United States Government Printing Office: Washington,1951), vol. XIV, 611, 470– 471. 7. *U.S. v. Altstoetter et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, (United States Government Printing Office: Washington,1951), vol. III. 8. *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports*, 1968, 323. 9. *R. v. Finta*, 1994, *1 SCR* 701.

201 The other two were the *Eichmann Case* (1968) and *R. v. Finta* (1994); in the latter case the Supreme Court of Canada held that a 45 years was not an 'unreasonable delay' for an indictment.

202 See Judgment, para. 270.

It is scandalous that such assessment of 'case law as evidence of customary law' would be accepted. The worse consequence of this incompetent judgment is that numerous subsequent decisions of ICTY have relied on *Tadić* as some sort of infallible precedent. But, above all, this example may be a dramatic way of showing how absurd it is to expect proof in 'State practice' for precepts which should be deductable from general principles or perhaps even from simple common sense. Finally, the 'law and customs of war' refer to what soldiers do or do not do in the field and how other members of the armed forces behave, much on condition of reciprocity, and has little to do with practice of 'States' or 'Courts'.

viii The Absurd Notion of Negative Custom

A further problem encountered in the Law of War is the identification of rules with reference to a 'negative custom'.[203] In war, such custom and customary law is not formed by States but, as suggested above, by combatants in the field.[204] Then, the argument is, according to some, that *because* soldiers have not tortured prisoners of war, and *because* soldiers have not attacked civilian targets without any military value, or, for example, *because* soldiers have not outright shot or tortured women and children, States – and combatants – would be precluded, by legal obligation, from doing so in the future. In other words, custom in this context is just 'negative' in the sense that it is (allegedly) because something has *not* been done that it is now forbidden.

Conversely, the Commentary by ICRC is highly misleading concerning legality of certain weapons. With regard to expanding bullets, the Commentary States with regard to Common article 3 that according to the Study, 'no official contrary State practice was found with respect to non-international armed conflicts, with the possible exception of the United States'.[205] The Commentary added that the absence of State practice does not mean that States consider such use as illegal in non-international armed conflict.[206] But surely it is irrelevant whether State practice is found or not when any reasonable appreciation would immediately assess that such weapons do cause unnecessary suffering. Instead the ICRC should have relied on the intrinsic and inherent rights of soldiers under the Martens clause, under Common article 3, and under the rule of unnecessary suffering (and/or the underlying provisions in general international law) all forming part of *jus cogens* which – with or without State practice – binds States and all individuals.

The reference to 'customary law' has become somewhat of a cliché among international lawyers who, when they do not know from where a rule is derived, refer to 'customary law'. In this sense, this category has become a sort of 'dustbin' of international law and courts refer to this category even in instances when

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203 See Detter, I., *The International Legal Order* (London, 1994), at 175.

204 *Cf.; ibid.*, 189.

205 Common article 3, rule on unnecessary suffering etc., the Commentary States that ICRC Customary Law Study, Vol. I, Rule 77.

206 *Ibid., loc. cit.*

custom cannot possibly have developed but rather a resentment to allow barbaric practices to be allowed or continued.

It is far more realistic and reasonable to suggest that the Law of War is guided by general principles, often based on what is necessary for the survival of the State and of mankind.[207] Many academics do accept 'general rules' but not necessarily in this form of being intrinsic rules in the international system. It may be important to emphasise that article 38 of the Statute of the Court[208] refers to custom as 'evidence of a general practice accepted as law', which is not necessarily what traditionalist adherents of customary law mean when they speak of the formation of such rules.

The ICTY does state in the case of the *Tadić Case* that:

> '[I]t cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.'[209]

But to rely on what can only be called 'negative custom' appears illogical: such custom is fluid, unforeseeable and artificial. Does this make sense? Is it not rather a peremptory rule, laid down in the conscience of combatants, and in all individuals, to behave in a civilised way, even in armed conflicts? But again, the standard of behaviour laid down in the Martens clause and in Common article 3, as well as in the rule of 'unnecessary suffering' has nothing to do with 'customary law' but is an expression of the 'common conscience or mankind'.

In view of the insistence of academic scholars, and courts, to justify most rules by reference to customary rules, it could perhaps be suggested that the mechanism by which rules of *jus cogens* come into operation is by *condemnation or earlier practice of States and individuals*: thus the *jus cogens* rule condemning slavery is the joint attitude by States to condemn this practice. In that sense, the *opinio juris* appears more essential than the practice which is condemned. One example of this development could be slavery which was practised as 'legal' and then condemned. Many rules of the Law of War have developed in a similar way: for example the condemnation of the use of gas in the First World War, condemned by States immediately after the war and codified in the Geneva Gas Protocol of 1925.

But concerning most practices in war, numerous rules now form part of *jus cogens* on the basis that States and individuals *never* allowed such methods. Then we may speak of an *opinio juris* which merely confirms, not actual practice but the 'non-practice', *i.e.*, what in this work has been called 'negative custom'.

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207 See Detter, I., *The Concept*, *op. cit.*, Chapter IV.

208 Statute of the International Court of Justice art. 38, 26 June 1945, 59 Stat. 1055, 1060, available at http://www.icj-cij.org/documents/index.phpp1=4&p2=2&p3=0. *Cf.* Detter, I., *The International Legal Order*, *op. cit.*, *loc. cit.*

209 *Prosecutor v Duško Tadić*, Case No. IT-94-94-1-AR72, Appeal Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 127.

If we return to the clear concepts of natural law as applied 150 years ago, matters become much clearer. There is clearly a need to resort to 'peremptory rules' – a term which seems acceptable to all although it means roughly the same[210] as 'natural law' – for rules in war and armed conflict.

So, from where, then, do such peremptory rules emerge? It is clearly not from any positive custom – or any form of custom at all – but from a set of legal norms which are sociologically essential to the survival of mankind.[211] It may be that rules of this kind are similar in their nature and origin to the rules of so-called 'natural law' so vehemently discarded by the positivists. However, rules on natural law are not rooted in any religious precepts (as some positivists sometimes claim) even if the great religions would respect similar precepts. On the contrary, such rules are intrinsic in the social fabric of world order. International lawyers of great fame did not hesitate to subscribe to this notion some 250 years ago.[212]

Writers on international law usually refer to the sources of international law as treaties, customary law, and general principles as set out in article 38 of the Statute of the International Court of Justice. But, to the extent they comment on the Law of War – which is rare – they speak of 'customary' rules that apply in armed conflicts. But since customary rules are normally formed by custom plus an element of assessing such custom is binding, the *opinio juris*, one must ask the simple question: who forms this custom? The States? But States are mere conceptual entities composed by their citizens, that is to say by individuals. So, it is far more likely that such custom that is at the base of the Law of War concerning the conduct in armed conflict is formed by soldiers in the field and by other members of the armed forces.

The development away from attitudes focusing on the individual is reflected in the adjective 'international' describing the global legal system, an expression which replaced the earlier *droit des gens*, or 'law of peoples', which dominated earlier doctrine and practice.[213]

Most positivists reject natural law and ethics and seek for every rule the clear consent of the state.[214] Thus, in the field of international law, positivists refuse to acknowledge any rules that States have not expressly concurred in forming, either by treaty or by 'custom'. For this reason academics are often unable to explain the binding force of the Law of War, as the bulk of this system is based on natural law, on ethics, or on what is sociologically necessary, and not necessarily on written and 'accepted' rules.

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210 See Detter, I., *The Concept*, 2nd edn, *op. cit.*, for an analysis and classification of rules. *Cf.*, Detter, I., *The International Legal Order*, *op. cit.*, 197–211 on which rules can rightly be said to belong to natural law.

211 See Detter, I., *The Concept*, 2nd edn, *op. cit.*, 107–108.

212 See, for example, Vattel, E., *Le droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains* (Paris, 1758).

213 See above in this Chapter under v and below under vi and Dissenting Opinion of Judge Cançado Trindade in the *Case Concerning Jurisdictional Immunities of the State, Germany v Italy*, ICJ, *Reports*, 2012 (judgment 3 February 2012), part V.

214 On the presumed consent, or consent in advance (abstract consent), or various forms of other agreement by States to abide by rules, see Detter, I., *The International Legal Order*, *op. cit.*, Chapter III D, I and Chapter IV iii, at 157–165, 197–211, 220–224, 304, 439.

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On the other hand, an overwhelming number of writers accept the notion of *jus cogens*, that is to say peremptory norms from which States cannot contract out and that are binding for all, or *erga omnes*, irrespective of agreement by treaty or other form of acceptance.[215] Some of these rules are compulsory to safeguard the survival of humanity. The International Court of Justice has clearly accepted that *jus cogens* concerns certain basic rights,[216] even if the exact ambit of *jus cogens* has not been finally decided.

It is indeed impossible to explain the binding nature of the Law of War without reference to natural law or to *jus cogens*, and to the fact that individuals are also subjects of international law, directly having legal rights and duties under this legal system, and not only indirectly through the State. Individuals must not, for example, be subjected to genocide as they enjoy rights under binding rules of international law – even in the absence of treaties – as amply shown by the Nuremberg and Tokyo Trials. Individuals, soldiers who 'obey orders', or terrorists, will all be held individually responsible when they are guilty of perpetrating the crime of genocide, as again amply shown by the Nuremberg and Tokyo Trials. This state of affairs demonstrates that individuals enjoy direct rights and are directly bound by duties, as individuals, by international rules.

The minimum contents of the concept of *jus cogens* may more conveniently be formulated as a set of duties rather than as rights. Thus, *jus cogens* contains the prohibitions of genocide, slavery, torture and apartheid, as well as the most basic rules for civilised behaviour in war and armed conflict. But the duties of some generate rights for others: the right not to be subjected to genocide, slavery, torture or apartheid, or to atrocities in war. The prohibitions and corresponding rights apply both in times of peace and war. What is essential to note, as State practice shows – especially in the Nuremberg Trials and Tokyo Trials – is that these rules bind both States and individuals, including terrorists.

The limits of weapons and methods under the Law of War apply even in the absence of conventions and treaties. That this is so is patently clear from the proceedings in the International Court of Justice and in the War Crimes Tribunals and in the International Court of Justice.[217] The ethics of warfare thus form an important part of natural international law which, after much scorn by the positivist school,[218] has been revitalised during the last two decades, not so much by the writings of

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215 That is to say no formal acceptance short of giving a form of 'abstract consent' by joining the international society as a State. See on this argument, Detter, I., *The Concept*, 2nd edn, *op. cit.*, 37, and Detter, I., *The International Legal Order*, *op. cit.*, 152–156.

216 See *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 ICJ, 14, 100–101 (June 27); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 ICJ, 3, 54 (January 26); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

217 See below, Chapter 12 C 2.

218 For example, Lundstedt, *Le droit des gens: danger de mort pour les peuples* (Paris: éds. de la Phalange, 1937); Lundstedt, *Superstition or Rationality in Action for Peace?* (London: Longman, 1925).

academics[219] as by the clear practice of States. And it is the behaviour of States that ultimately proves the contents of international law and of the Law of War.

We shall examine what type of weapons and methods of warfare are outlawed in the contemporary international *society*, retaining the basic limitations introduced by the universally accepted basic rules of ethics of warfare as set out above.

219 But see, Detter, I., *Concept, op. cit.*, Chapter Two on 'intrinsic rules' and Chapter One on 'the hypothetical goal' and Detter, I., *The International Legal Order, op. cit.*, Chapter III on 'maxims, intrinsic rules and general principles' as well as on 'the hypothetical goal'.

Chapter 6

Spatial Application of the Law of War

A TRADITIONAL SPATIAL APPLICATION

i Delimitation of Territory

Spatial notions are relevant in several ways to the application of the Law of War. It is often by examining whether an incursion has been made into the territory of a State that it can be established that the territorial rights of a State have been violated, activating the Law of War. It is thus important to ascertain the actual territory of a State and be clear about its land, water and air boundaries. Numerous disputes have been caused by disputes regarding borders,[1] alleged incursions into a State's territory, violations of the water margin or the national air space.[2] Disputes over territorial can lead to conflict and even war.

Obvious geographical criteria that apply in peace-time establish the spatial limits of the belligerents themselves, in war. Geographical delimitation of third States becomes of primary importance: incursions into neutral States are particularly serious violations of the Law of War.[3]

Apart from notions bearing on the geographical limitations of States, there is, in war, a need to establish the geographical region affected. It has often been thought important to distinguish certain areas where war itself would be enacted and such areas have usually been referred to as 'theatre' and 'regions' of war.

ii Regions of War and Theatre of War

A distinction has traditionally been made between the region of war and the theatre of war: the region is the larger notion within which the theatre is contained; the theatre is where hostilities actually take place.[4] Historically, the concepts served

1 Above, Chapter 3, section B.

2 See, on various incidents, my 'Foreign warships', *op. cit.*, 56. On right of passage see my *International Law and the Independent State*, *op. cit.*, 29–90.

3 *E.g.* Castrén, E., 'La neutralité aérienne', *ZaöRVR*, 1951, 120.

4 2 Oppenheim para. 70 *et seq.*, 237.

to study and improve strategies of land armies within a limited area. Nowadays, it is not altogether clear what purpose this distinction serves apart from stating the obvious that certain geographical areas are affected or involved in the war as forming part of the territories of the belligerents whereas hostilities are limited to smaller areas where the fighting takes place.

First, the Law of War applies with equal force and to equal extent within both areas, a region or a theatre of war, although humanitarian law, for example, will be more likely to become more intensely relevant in the theatre of war.

Secondly, the distinction is no longer warranted in view of the nature of modern war. The distinction may have been once valid when wars were primarily fought between armies, or navies, lined up with some symmetry against each other. However, the distinction has now lost its importance as modern warfare makes no distinction between regions included in the war and the actual theatres of war. The enemy can strike anywhere within the region of war; thus the territory of belligerents, with the exception listed below, form part of the theatre of war. Modern weapons have made the distinction superfluous. It is naturally true that a war may be geographically limited: but in law there is no distinction between the region and the theatre of war. Aerial warfare is thus not confined to any location but comprises the whole of the sky.[5]

The perception of a de-localisation of the theatre of war became even more pertinent when the genocidal terrorists appeared in the mid 1990s. After 9/11 in 2001 it became clear that, with this type of enemy, we do not know where the next attack will take place. We can speculate and rely on security measures but, as the attacker(s) are prepared, or even determined, to perish themselves in the attack, it is impossible to fully protect and secure any person or any place.

iii Neutrals and Neutralised Areas

Some commentators claim that neutrality presupposes the existence of 'war'.[6] But neutrality in modern times is often used to signify an alliance-free policy in peace as well. When there is a war, however, duties and rights of neutral States intensify. In particular, belligerents must respect the land and sea territory of neutral States where acts of war must not take place.[7]

Certain States have, by tradition, conducted a neutral foreign policy. This has, for a long time, been the case in Sweden, Switzerland and, after the *Staatsvertrag* in 1955, Austria. Sweden thus has declined to join NATO but claims to have a 'close' relationship, cooperating in the Partnership for Peace (PfP) together with NATO, non-NATO countries in Europe, Central Asia and Northern Caucasus. Sweden is also member of the Euro-Atlantic Partnership Council (EAPC), a body which provides a framework for exchange of information and security questions. Sweden has long

5 *Cour d'appel*, Montpellier, 20.6.1945, *Gaz. Palais* 18.9.1945: '... *la zone de combat ... embrasse la totalité du ciel*'.

6 Castberg, F., *Neutralitet*, n.p., n.d., 275.

7 Gihl, T., 'Svensk neutralitetsrättslig praxis under de båda världskrigen', *Jus Gentium*, 1949, 1.

defended its views of neutrality by renaming it a policy of non-alignment and 'alliance-free'.

There were concerns, both when Sweden and when Austria joined the EU, that the neutral state of these countries would be compromised. This is almost certainly the case now when the EU plans to coordinate foreign policy and have a joint diplomatic corps. But, considering the ailments and problems of the EU, this may, of course, not come about, at any rate, not in the near future.

The neutral policy of States must be distinguished from the neutral duties that crystallise in war and armed conflict. Rules on rights and duties of neutrals are laid down in Hague Convention V of 1907.[8] But the provisions of the Convention are the result of the 'United States view' which, at the time, diverged from Scandinavian views on armed neutrality which were considerably stricter.

Belligerents may have access to courts under 'neutrality legislation' of neutral States,[9] and innocent passage may be enjoyed through the territorial waters of a neutral State. But restrictions to any such rights may be imposed by special regulation of neutral States.[10] And further restrictions may follow upon violations by belligerents.[11]

Certain areas are exempt from being brought into the hostilities in war. First, in peace-time certain areas or countries may be used to denote areas as 'neutral' and are consequently exempt from attack or involvement in future war. Such protection is sometimes afforded by a State's neutrality being entrenched in a treaty[12] or by a specific declaration.[13] A whole State may also be excluded from normal war regions by its entrenched neutrality: thus Switzerland is permanently[14] neutral.[15] It is unclear what the status of Sweden and Austria would be in a war situation now that their neutrality has been 'reduced' after their joining the EU.

Secondly, other areas may obtain similar protection by specific treaties which withdraw a certain territory from wars and their effect, by declared neutralisation.[16]

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8 See above, Chapter 2, section A iii on neutrality and intervention; and further, below, Chapter 10, section C iii, on the effects on trade.

9 Sweden promulgated such legislation in 1912, *SFS* 1912:436 and in 1938, *SFS* 1938:187.

10 *E.g.* Swedish regulation during the First World War, KK 29 November 1915 and 19 July 1916, on the inner territorial waters, followed by protests by the European powers that the regulations violated the 'exhortation' in the Preamble in Hague Convention XIII of 1907 not to alter neutrality legislation during the course of a war.

11 *Cf.*, further Swedish restrictions under the 1938 regulations by KK 12 April 1940 after the German invasion of Denmark and Norway; *cf.*, also KK 28 June 1941 on outer territorial waters.

12 As in the case of Austria under the State Treaty (*Staatsvertrag*) of 1955, *AJIL*, 1955, Suppl. 162; 217 UNTS 223.

13 As in the case of Sweden during the Second World War, see the preceding notes.

14 On the notion of permanent neutrality, see, Verosta, S., *Die dauernde Neutralität* (Vienna: Wien Manz, 1967).

15 Bindschedler, R., 'Die Neutralität im modernen Völkerrecht', 17 *ZaöRVR*, 1956–7, 1.

16 Delbez, L., 'Le concept d'internationalisation', *RGDIP*, 1967, 13: *'La neutralisation consiste à soustraire par traité d'une façon durable et juridiquement obligatoire un territoire déterminé à la guerre et à ses effets.'*

A whole State may be neutralised in this way, like Austria by the 1955 State Treaty.[17] Under the Lateran Treaty also the Vatican State is neutralised.[18] Neutralisation can also apply to a part of a country. For example, borderline territory may be neutralised.[19]

Other neutralised areas are the Åland Islands,[20] the Spitsbergen,[21] the Magellan Strait,[22] and the islands of Corfu and Paxo.[23] Important waterways are often neutralised, like the Suez Canal under the 1888 Convention as well as the Panama Canal.[24] Outer Space has been neutralised under the 1967 Outer Space Treaty, a regime that is coupled with its demilitarisation.[25]

Neutralised zones may be used to denote areas designed to treat the wounded or civilians. Such zones may be established by special agreement, for example under Geneva Convention IV[26] or by unilateral declarations under Protocol II of 1977.[27] These areas are specifically treated as 'undefended' and, as such, illegitimate for attack.[28]

Neutralisation and neutral status entail by tradition numerous legal effects with regard to rights and duties.[29] The rights of neutrals to avoid the immediate effect of war are balanced by their duties to remain passive in a conflict. The disrespect for the duties of neutrals will suspend their rights. Thus, only 'effective' neutrality must be respected by third States, *i.e.* the type of neutrality which actually abides by the rule of passivity.[30]

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17 For reference, see note 12 *supra*. See, further, *e.g.* Rotter, M., *Die dauernde Neutralität* (Berlin, 1981). *Cf.*, Bindschedler, 'Die Neutralität', *op. cit.*, 29, 30.

18 1 Oppenheim, para. 106 and Wright, H., 'The status of the "Vatican City"', *AJIL*, 1944, 452.

19 *E.g.* The Convention between Sweden and Norway on Demilitarisation, 1905, demilitarising all land in the southern part of the border, *SOFM*, 1905.

20 Convention 1921 between Sweden, Finland, Estonia, Germany, Denmark, United Kingdom, France, Italy, Estonia, Latvia and Poland. 23 UKTS 1924 Cmd.2203. See, further, my *International Law and the Independent State*, *op. cit.*, 185 *et seq.*

21 Convention 1920 between Norway, United States, Denmark, Sweden, France, Italy, Japan, Netherlands and the United Kingdom, *UKTS* 1924 Cmd. 2092.

22 Treaty between Chile and Argentine of 1881, 12 *NRGT* 2 série, 491.

23 Treaty of London 1864 on neutralisation of the Ionian Islands, 18 *NRGT* 55, 63; *cf.*, Rettich, H., *Zur Theorie und Geschichte des Rechts zum Kriege; völkerrechtliche Untersuchungen*, (Tübingen: Laupp, 1888).

24 On the regime in general, see my *Independent State*, *op. cit.*, 43, 165–166, 182–183, 214–217.

25 Below, the next section and my 'Demilitarisation of space', *Symposium on Space Law* (Rome, 1994), *passim.*

26 Article 15. *Cf.*, Geneva Convention I, article 23.

27 Article 59.

28 Below, Chapter 8.

29 *E.g.* no acts of hostilities must take place in neutral States, Hague V, article 1; no troops or convoys of either munitions of war or supplies must be moved through neutral territories, *ibid.*, article 2; all hostilities in territorial waters of neutral States are forbidden, Hague XIII, article 2.

30 *The Tinos Case* (1917) before the French *Conseil des prises*, *RGDIP*, 1918, shows that ships captured in Greek neutral waters had been validly taken as Greece had allowed numerous hostile acts. See further Rousseau, *Conflits armés*, *op. cit.*, 218.

It appears logical to assume that similar rights and duties devolve on States which have sovereignty and control over neutralised territories. Furthermore, the duty of passivity is also activated in the case where neutrality has not yet been declared in the event of war between other parties. Until States have taken a position in a dispute they will be assumed to be neutral with ensuing rights and duties. This duty of passivity covers also, as has been discussed above,[31] situations where there is internal war in another country.

On the other hand, as neutralisation means that an area is exempt from being a target of belligerents, it does not limit the application of the Law of War. Thus, in the event of war (or civil war) in a neutralised State, the Law of War applies with equal force as in any other war situation.

iv Demilitarised Areas

No fixed military installations may be placed in demilitarised areas; but within these areas there may, contrary to in neutralised zones, be war action. Demilitarisation, however, does not preclude defence measures.[32]

There are numerous example of earlier demilitarised areas in State practice.[33] The Rush-Bagot Treaty of 1817 on naval forces on the North American lakes, demilitarised the frontier between the United States and Canada.[34] The Paris Peace Conference of 1856 demilitarised the Black Sea and closed the Bosphorus and the Dardanelles to warships; this regime was abrogated by the London Treaty of 1871[35] but reaffirmed in the Lausanne Treaty of 1923,[36] in turn replaced by the Montreux Convention in 1936, which provided for discriminatory treatment of Black Sea States.[37] The Washington Treaty of 1922[38] prohibits new fortifications of naval bases on islands in the Pacific, except as specified. The Antarctic Treaty of 1959[39] introduced complete demilitarisation of a whole region. The Sea-Bed is also

31 Above, Chapter 2, section A iii b.

32 See on the revision of the 1921 Åland Convention, Croneborg, A., 'Utrikesutskottet vid 1939 års riksdag', *Statsvetenskaplig Tidskrift*, 1939, 262; *cf.*, my *Independent State, op. cit.*, 184.

33 On earlier regimes like those of Danzig and Tangier, see, Rousseau, Ch., *Traité du droit international public*, 323 *et seq.*; *cf.*, Erich, R., 'La question des zones démilitarisées', *RCADI*, 1929, i, 591.

34 United Nations, *Study on the Naval Arms Race, op. cit.*, 8.

35 *AJIL*, 1907, Suppl., 89.

36 *AJIL*, 1924, Suppl., 53.

37 *AJIL*, 1907, Suppl., 89, article 11.

38 *AJIL*, 1922, Suppl., 40.

39 402 *UNTS* 71.

demilitarised as far as regards certain weapons.[40] Outer Space is neutralised and partially demilitarised.[41]

The Moon is demilitarised by the Outer Space Treaty of 1967[42] but there is only partial demilitarisation of Outer Space in general. A USSR Draft of 1983 suggested a widening of the prohibitions of space objects in orbit,[43] but as often in similar contexts, verification presents considerable problems.[44]

The Partial Test Ban Treaty of 1963[45] and the Outer Space Treaty of 1967[46] forbid the testing and use of nuclear weapons in space but are both silent on the illegality of use of *other weapons* in Outer Space. There is also a differentiated regime for celestial bodies and for Outer Space in the 1979 Moon Treaty:[47] celestial bodies are thus completely demilitarised. Furthermore, in Outer Space in general it is prohibited only to place nuclear weapons, or other weapons of mass destruction, in orbit or in location in space,[48] but nuclear weapons could conceivably be used in other ways. Thus the treaty does not preclude *all* use of nuclear weapons or other weapons of mass destruction, nor does it prohibit the use of weapons which are not weapons of mass destruction. On the contrary, they are usually devised to eliminate identifiable specific and limited targets.

Space should, according to numerous provisions in relevant treaties, be used for 'peaceful purposes'.[49] But it has seriously been argued by the United States that 'peaceful' means non-aggressive and that therefore other military activities are allowed in Outer Space. The former Soviet Union claimed[50] that 'peaceful' means 'non-military' and this view is supported by many writers.[51]

Special problems are caused by the placing of weapons in Space, for example under the previous Strategic Defence Initiative (SDI) of the United States, the so-called Star Wars Plan. Although this plan came to nothing after the collapse of communism, it may well be that similar systems may be put into operation at a

40 Treaty for the Prohibition of Emplacement of Nuclear Weapons and Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil therof, 1971, *ILM* 1971 145, *UKTS* 1973 13; *TIAS* 7337; *cf.*, above, Chapter 3, section C iii b (1) and below, Chapter 7, section B ii d.

41 Outer Space Treaty, 610 *UNTS* 205. See my 'Demilitarisation', *op. cit.*, and below, Chapter 7, section B ii.

42 610 *UNTS* 205.

43 For comments, see Jasani, B. and Lee, C., *Countdown to Space War* (London: Taylor & Francis, 1984), 89.

44 France suggested in 1978 that a special Inter-satellite Moon Agency (ISMA) should be established; other suggestions have been to make use of already existing regional agencies, for example the European Space Agency (ESA) in Paris, *ibid.*, 91.

45 480 *UNTS* 43.

46 610 *UNTS* 205.

47 Article 3.

48 Article 4(1) of the 1967 Outer Space Treaty; article III of the Moon Treaty.

49 See also the European Space Agency which is dedicated to 'peaceful' space activities although most satellites may lend themselves to dual purposes.

50 *E.g.*, G.P., 'Practical problems of space law', 9 (Soviet) *International Affairs*, Moscow, 1963, 27.

51 *E.g.*, Guiterres Espada, C., 'What is the law on military use of Outer Space?' in *Proceedings of the 28th Colloquium on the Law of Outer Space* (Stockholm, 1985), 32.

later date, perhaps by other States. Even at the time of the United States Star Wars Plan, there was unconfirmed information that the former Soviet Union had copied and installed a similar system to protect Moscow.

Even though few writers now discuss the implications of the placing and the use of weapons in Outer Space, it is important to set out the legal rules; it may be that the elimination of tension between East and West after the fall of communism may be replaced by other conflicts once States have regrouped in new alliances and counter-alliances. Space will always be a pre-eminent area for military control of the world.[52] In 2012 there was some concern at news that North Korea was launching a satellite which conceivably could be used for non-peaceful purposes.

It is thus important to understand the principles governing this defence/ aggressive space system. The plans, developed in the 1980s, were designed to position space weapons above the United States as a 'shield' averting missile attacks by non-nuclear weapons, *inter alia,* laser, particle beam and kinetic energy weapons. Direct energy weapons depend on a stream of charged particles (protons, electrons and ions) accelerated to high energy and projected towards a target. The weapons can destroy targets at great distance but may have problems transmitting through the atmosphere and are therefore more designed to attack objects in space, such as missiles or satellites. The Star Wars system would, at a cost of $1,000 billion 'or more', use difference 'phases' for destroying enemy missiles; rising from silos, mid-flight or in their terminal approach.[53] Satellites would perform essential functions under SDI. Passive satellites may be activated to function as battle stations using particularly laser and particle beam weapons. It would be the use of satellites which would have enabled Star Wars to turn into an offensive, rather than a defensive, system.[54]

Outer Space is, as mentioned above, only partially demilitarised and there has, at times, been intense negotiation whether there could not be established further a 'demilitarised sanctuary' in Outer Space to prevent this turning into a battlefield between space based systems.[55]

The En-Mod Convention of 1977[56] prohibits hostile use of environmental modification techniques to alter the dynamics, composition or structure of Earth or Outer Space. But it is not such techniques which are of primary interest for defence or attacking systems like Star Wars. It is, first of all, whether a similar system is compatible with the ABM Treaty.

One pertinent question concerns whether the ABM Treaty of 1972 forbids the establishment of a weapon systems like Star Wars. The Treaty provides[57] that the 'Parties undertake not to develop, rest or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based'. An 'Agreed

52 See the Preface to the second edition.

53 Thompson, E.P., *Star Wars* (Harmondsworth: Penguin, 1985), 72.

54 Martinez, L.F., 'Telecommunications as space activity for weapons of mass destruction', *Proceedings of the 28th Colloquium on the Law of Outer Space* (Stockholm, 1985), 94.

55 See, for example, Statement by France in CD 1983 to this effect, CD/375, p. 1.

56 Below, Chapter 7, section E ii.

57 Article V.

Statement' D, appended to the Treaty, stipulates further that the 'Parties agree that in the event ABM systems based on *other physical principles* and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are *created in the future*, specific limitations on such systems and other components would be subject to discussion in accordance with Article XIII or Article XIV of the Treaty' (emphasis added). The two articles referred to deal with implementation of rules and with revision; it is clear that in any event agreement by the other party is necessary for any new space weapons using 'new principles', as does the Star War system, Furthermore, under the ABM Treaty even land- or sea-based systems, prohibited under the Convention, would be held to make 'military use' of Outer Space during trajectory flights.[58]

The United States initially accepted that no new weapons should be developed in space. But by 1985 the position had changed. One statement underlines that although deterrence 'based on threat of offensive nuclear retaliation' had formed the basis of United States security policy for the then foreseeable future the United States 'should not be content to confine [itself] to that in perpetuity'.[59]

The problem concerns basically whether any 'development' – by itself forbidden by the ABM Treaty – could be allowed if forming part of 'research'. There is argument that 'research' would allow some 'testing' and that certain 'testing' would not be confined to laboratories. The position of the United States is that the treaty is at least 'ambiguous' and allows for development of and experiments with new space weapons.[60] It may be that 'positions' of countries may shift as and when there is revival of plans of weapons in space.

However, one may question why the United States, taking the position it has so far, did not prefer to denounce the ABM Treaty rather than stretching an interpretation of the agreement which must deviate considerably from its wording.[61] But although the ABM treaty does allow for denunciation,[62] there have to be 'extraordinary events' relating to the subject matter of the Treaty which have 'jeopardised the supreme interest' of the Party wishing to denounce the agreement. Any notification of withdrawal must be accompanied by a statement of such alleged 'extraordinary events'. For political reasons such a statement may not have been easy but in 2002 the United States withdrew from the treaty.

However, even apart from possible contingent use of satellites and space weapons under the Star Wars programme, Outer Space is already heavily 'militarised' by satellites. The number of satellites in orbit is ever increasing and although they are used for allegedly 'peaceful' information purposes, such as telecommunications

58 Other relevant Conventions regulating the use of Outer Space are the 1968 Agreement for Rescue of Astronauts; the 1972 Convention on International Liability for Damage Caused by Space Objects and the 1975 Convention on registration of Objects Launched in Space.

59 Nitze, P.H., 'The ADI and the ABM Treaty', United States, Department of State, Bureau of Public Affairs, *Current Policy*, No. 711, 2, 30 May 1985.

60 Statement by A.D. Sofaer, *ibid.*, No. 755, 22 October 1985.

61 *E.g.*, Thierry, H., in Anglo-French Colloquium on Outer Space, University College, London, 2 December 1986.

62 Article XV requiring six months' notice.

or maritime information, they all have possible military uses. It may be impossible to distinguish peaceful, military and aggressive activities in space: all activities in Outer Space are inevitably of military importance.[63]

As mentioned above, certain areas which are neutralised under a treaty are also demilitarised. This is the case of Spitsbergen,[64] the Magellan Straits,[65] the Åland Islands,[66] and the Southern border area between Sweden and Norway.[67] Similar regimes apply to Rhodes and other Greek islands,[68] as well as to certain islands off the Tunisian coast,[69] and to Sicily and Sardinia.[70] In more recent practice, there has been demilitarisation of the Kuwait/Saudi Neutral Sector.[71]

Any territory can, *ad hoc*, be demilitarised by parties to a conflict.[72] 'Safety zones', an old Red Cross idea, can also be used for such exception purposes.[73] The doctrine of 'non-defended localities', *e.g.* 'open towns', can also be conceived as a system of demilitarisation. This doctrine was codified in the Hague Regulations of 1907; Protocol I of 1977[74] developed the Hague regime by allowing for agreement on further localities. Such agreement is in any event possible but the Protocol offers a convenient framework for further extending areas.

It is sad to observe the fragility of the rules on 'safety zones' and 'open towns' in recent conflicts. Not only did the Serb dominated army of Federal Yugoslavia totally ignore such rules in the case of a 'safety zone', declared by the United Nations in Srbrenica in Bosnia but there was even very little protest from international organisations, or from statesmen and governments in the world. Even more surprising was the lack of condemnation at the bombing of Dubrovnik by the Serb Navy in 1991: Dubrovnik was not only specially protected as an 'open town' but was also inscribed on the list of the World Heritage of UNESCO, as well as being specially protected as a town of cultural monuments under the Hague

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63 Lay, S.H. and Taubenfeld, H.J., *The Law Relating to Activities of Man in Space* (Chicago: University of Chicago Press, 1970), 100.

64 See Treaty of Paris, 9 February 1920, article 9; *cf.*, Piccioni, C., Le Spitzberg et la Convention du 9.2. 1920, *RGDIP.* 1923, 104 *et seq.*

65 See Convention 23 July 1881, 12 *NRGT* 2 série, 491.

66 Geneva Convention 20 October 1921; 12 *NRGT* 3 série, 65; Finlands Överenskommelser med Främmande Makter, 1922, No. 1; *cf.*, the Treaty of Paris 1856, and the Finland Peace Treaty 1947, article 5; see my *Independent State*, *op. cit.*, 183 *et seq.*; DeVisscher, F., 'La Convention relative à la non-fortification et à la neutralité des Iles d'Åland', *RDILC*, 1921, 568 *et seq.*

67 *SOU:* 1984, *op. cit.* and Sweden, *Folkrätten i krig*, *op. cit.*

68 Italian Peace Treaty, 1947, article 14. See Leontiades, L., 'Die Neutralität Griechenlands während des Weltkrieges', *ZaöRVR*, 1930, 130.

69 *Ibid.*, article 49 on Lampedusa, Lampione and Linosa.

70 *Ibid.*, article 50.

71 See the Convention of Uquaie, 133 *BSFP*, ii, 726 and Treaty 7 July 1965, 60 *AJIL*, 1966, 744; El Ghoneimy, M., 'The Legal Status of Saudi Arabia Kuwait Neutral Zone', *ICLQ*, 1966, 690. There is some uncertainty whether 'neutral' has any meaning under this treaty in 'military' terms or refers only to 'common territory': Hosni, M., 'The partition of the Neutral Zone', *AJIL*, 1986, 635.

72 *Cf.*, article 60 of Protocol I of 1977.

73 *Cf.*, articles 14–15 of Geneva Convention IV.

74 Article 59.

Convention of 1984.[75] Yet, it was possible for a warring party to attack such a target without much reaction from the world. The attack on Dubrovnik, the old Ragusa, represents, however, one of the most pertinent breaches of the Law of War in recent times; not even in the Second World War was there displayed such arrogance with regard to cultural monuments.[76]

There are obligations under the 1982 Law of the Sea Convention to use the high seas only for 'peaceful purposes'.[77] This statement may be seen in relation to General Assembly Resolutions to use the 'common heritage of mankind' for peaceful purposes only.[78] But it is questionable as to what 'peaceful' implies. It may be an exhortation to refrain from force[79] but is doubtful that the rules, which probably reflect general international law, establish any form of demilitarisation.[80] On the other hand, the provisions dealing with innocent passage in the 1982 Law of the Sea Convention[81] enumerate military or quasi-military activities which are to be regarded as 'non-innocent'.[82]

v Denuclearised Zones

Nuclear disarmament will, to the extent it is successful, eliminate certain nuclear weapons or certain use of such weapons.[83] At the present stage of development, however, there are few such treaties. Even Outer Space is only partially denuclearised under the Outer Space Treaty.[84] And, in spite of the provisions of the Sea-Bed Treaty,[85] certain nuclear mines are conceivably 'legal'.[86] On the other hand there is a trend to limit the geographical area within which nuclear weapons, or their testing, is allowed. Such objectives are carried out by the establishment of nuclear free zones.

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75 Below, Chapter 8, section A ii b.

76 The attack on the monastery of Monte Cassino, by an erroneous lack of judgment or on the basis of false information, by the Americans, assuming this was a German stronghold, caused numerous casualties, many by 'friendly fire', and the loss of some of the most important medieval manuscript collections in the world. The attack on Dresden by the United Kingdom, in retaliation for the bombing of Coventry, caused the total destruction of one the most important cities in Europe, together with the Meissen porcelain works. But otherwise, the cultural heritage of Europe was spared: neither Rome nor Paris was bombed.

77 21 *ILM* 1261. See article 301 for the general rule and articles 88 on the high seas; 58 on EEZ; 131 and 155 on the 'area'; 141 on the sea bed; 147 on installations; 143(1), 240(a), 242(1) and 246(3) on marine research.

78 See General Assembly Resolution 2749 (XXV) 1970.

79 See article 301.

80 The Sea-Bed Treaty, on the other hand, introduced a denuclearised regime, *infra*, in the next section.

81 21 *ILM* 1261.

82 Articles 19; *cf.*, 35(c), 311 (3); 53(3).

83 Above, in this Chapter, in the previous section.

84 Above, in the previous section and Cheng, B., 'Le Traité du 1967 sur l'Espace', *Journal de droit international*, 1968, 598.

85 Above, Chapter 3, section C b (1).

86 Above, Chapter 7, section A iii.

A new type of zone in which a specific type of weapons is prohibited has appeared. This is the denuclearised zone where nuclear weapons[87] are prohibited.

Other States may be bound[88] not to possess, manufacture or develop nuclear weapons[89] but such provisions do not prevent the stationing of nuclear weapons in the area if such weapons were manufactured elsewhere.[90]

The General Assembly clarified in Resolution 3261 F of December 9, 1974, that:

> 'obligations relating to the establishment of nuclear-weapon-free zones may be assumed not only by groups of states, including entire continents or large geographical regions, but also by small groups of States and even individual countries.'

Mongolia made such a declaration in 1992 and agreed to be bound by this act.

Other unilateral efforts to proclaim individual States nuclear free have also been made, for example, by Romania for a Balkan Nuclear Free Zone.[91] Other efforts include Sweden in the Undén Plan in 1961[92] and Finland in the Kekkonen Plan in 1963.[93] These two efforts were clearly mere proposals. Discussions on a Nordic Nuclear Free Zone,[94] or a 'mini zone' comprising at least Sweden and Finland,[95] have been going on for some time and are clearly of paramount interest to the Nordic States.[96] On the other hand, the declaration by France to refrain from testing nuclear weapons in the Pacific during the Nuclear Test Cases before the International Court of Justice,[97] was a binding unilateral declaration.[98] Negative security assurances; that is to say pledges by States that they will not use nuclear weapons against States that do not have such weapons themselves, have been made within the Disarmament Conference in Geneva by some of the major nuclear powers.[99] All

87 But see the Treaty of Rarotonga, 1985, below, later in this section, on a regime *sui generis*.

88 *E.g.*, Peace Treaty on Germany, 23 October 1954, Dept. of State Publ. 5659, *International Organisations and Conferences*, Series II, 5; Peace treaties with Finland, article 17, 42 *AJIL*, Suppl., 204: Bulgaria, article 13, *ibid.*, 190; Romania, article 14, *ibid.*, 262; Hungary, article 15, *ibid.*, 239.

89 Furthermore, the prohibition only concerns the manufacturing of weapons; Germany is a major exporter of nuclear reactors. One reactor was sold to Brazil in 1984 and one to Argentina in 1985: *New Scientist*, 3 October 1985.

90 *Cf.*, Quéneudec, J., 'Les zones dénuclearisées', in Colloque de Montpellier (ed.), *Le droit international des armes* (Montpellier, 1982).

91 Rydell, R., 'The Balkans, a nuclear weapons free zone', *Bulletin of Atomic Scientists*, May 1982.

92 ENDC/C.1. 246.

93 *Ibid., loc. cit.*

94 *Cf., Svenska Dagbladet*, 25 July 1983.

95 *Cf., Hufvudstadsbladet*, 19 May 1983, 9 August 1983; such a zone would have been much less favoured by the ex-Soviet Union.

96 Ekéus, R., *Nuclear Disengagement in Europe* (Stockholm: SIPRI, 1983).

97 ICJ *Reports*, 1974, 253, 267.

98 On the legal effects of unilateral undertakings, see my *International Legal Order, op. cit.*, 191ff.; my *Concept*, 2nd edn, *op. cit.*, 97ff., and my *Law Making, op. cit., passim.*

99 Declarations by France, China, the former USSR, the United Kingdom and the United States, *Arms Control Reporter*, 1 September 1983, 860–864.

these developments are closely tied to discussions on the legality of use of nuclear weapons and the trend to limit their use.[100]

Other nuclear free zones have been established by treaty. A single State so bound is Austria. An individual State may thus be denuclearised by treaty: this is the case of Austria under the *Staatsvertrag* of 1955[101] which forbids the emplacement of nuclear weapons in Austria.

Numerous declarations of intent have been made by regional bodies to establish nuclear free zones, and some of these have matured into binding treaties. Declarations of the Conference for the Security and Cooperation in Europe (CSCE)[102] in 1973 and 1975 on the denuclearisation of the Mediterranean[103] have not yet led to the conclusion of a Treaty. Other efforts[104] have been delayed by unwillingness even to adopt declarations of intent as for example in the Middle East. The General Assembly had encouraged projects for this important area[105] but attempts for an agreement were delayed by the Israeli attack on Iraqi nuclear installations in 1981.[106]

Nor have the parallel declarations of North and South Korea resulted in a Treaty. On 20 January 1992, both Korean states signed a Joint Declaration on the Denuclearization of the Korean Peninsula. The stated aim of the Declaration was to 'eliminate the danger of nuclear war' and, in particular, to 'create an environment and conditions favourable for peace and peaceful unification of our country'. However, South Korea's proposal for a system of challenge inspections was not accepted by North Korea. The Joint Declaration entered into force upon the exchange of appropriate instruments on 19 February 1992. However, the decision by North Korea to withdraw from the NPT rendered the Korean nuclear-weapon-free zone agreement null and void. But soon it became clear that North Korea under the regime under Kim Jong-Un has no intention whatsoever to abide by any limitation in nuclear activities. In spite of world wide protests after two attempts to launch nuclear missiles, North Korea proceeded, in February 2013, to a third launch of a nuclear missile.[107]

Protracted discussions about a Central Asian Nuclear Free Zone (CANWFZ) finally led to the Treaty of Semipalatinsk, concluded between Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, signed in 2006. The Treaty entered into force in 2009.

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100 See below in Chapter 7 ii c D (2) on legality or illegality of nuclear weapons as weapons of mass destruction (WMDs).

101 217 *UNTS* 223, article 13.

102 Above, Chapter 3, section C iii (3).

103 UN, *Study of the Naval Arms Race*, Geneva, 26th July 1985, 121. *Cf.*, General Assembly Resolutions 36/102, 1981, 37/118, 1982, 38/189, 1983, and 39/153, 1984.

104 *Cf.*, *United Nations Study of Nuclear Weapons Free Zones*, revised edn (New York, 1984).

105 See General Assembly Resolutions 3263 (XXIX) 1974; 36/82 AB 1981.

106 *Cf.*, General Assembly Resolution 38/98 1981.

107 See further below in Chapter 7 ii c D (2) on North Korea's nuclear program and on its expert of nuclear material and technology to unstable regimes.

The 1964 Cairo Declaration of the Organisation of African Unity (OAU) on denuclearisation of Africa[108] led to the establishment of an African Nuclear Weapon Free Zone. The final Treaty is known as the Treaty of Pelindaba and establishes a vast nuclear free zone in Africa. The Treaty was signed in 1996 and came into effect with the 28th ratification on 15 July 2009.

One nuclear free zone was established by the Treaty of Tlatelolco of 1967[109] and provided for the 'military denuclearisation of Latin America'. This Treaty was based on an earlier declaration, in the form of a *pactum de contrahendo* of 1963. Such statements are an important step towards possible future regulation forbidding nuclear weapons or tests in specified area. The whole of South America is now a nuclear free zone under the Tlatelolco Treaty which came into force in 1968.

The Tuvalu Declaration of 1984 of the South Pacific forum on the South Pacific nuclear free zone[110] did come to fruition in the Rarotonga Treaty concluded on 7 August 1985.[111] The parties are Australia, the Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Nieu, Papua New Guinea, the Salomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. This Treaty provides a regime *sui generis*, banning nuclear tests and weapons in a specific area. In a somewhat contradictory way, however, the provisions are combined with the express provisions for passage of nuclear ships.[112] The Treaty has been 'countersigned' and ratified by the United Kingdom and France. The United States has signed, but has not ratified, this Treaty.

The ASEAN Declaration of 1971 on South East Asia as a 'Zone of Peace, Freedom and Neutrality' (ZOPFAN),[113] also finally led to a binding agreement, the Bangkok Treaty on a South East Asia Nuclear Weapons Free Zone (SEANWFZ), which was concluded in 1995 and entered into force in 1997. It binds Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam, as well as Laos, Cambodia and Myanmar.

vi Areas under Occupation

The Law of War applies fully in occupies areas and specific rules have been designed to regulate precisely the relationship between occupying forces and the taken

108 The declaration was endorsed by General Assembly Resolution 2033 (XX) of 1965; *cf.*, GA Resolution 1652 (XVI) 1961 and 1911 (XVIII) 1963.

109 634 *UNTS* 326. The Treaty enables States of two types outside the region to adhere to its provisions, first, States which have responsibility for territories in the area, and second, States possessing nuclear weapons. United Kingdom (1969), for Belize, Falkland and certain islands in the Caribbean; United States (1983) for Guantanamo Bay, Puerto Rico and the Virgin Islands, have signed the Protocol whereas France considers herself to have constitutional difficulties in signing this Protocol: see Gros Espiel, H., 'La signature du Traité de Tlatelolco par la Chine et la France', *AFDI*, 1973, 13; *idem*, 'La signature par la France du Protocol I du Traité du Tlatelolco', *AFDI*, 1979, 806 *et seq.*; United Kingdom (1969), United States (1971), France (1974), China (1974) and USSR (1978) have all signed Protocol II.

110 Declaration by Australia, New Zealand, Cook Islands, Fiji, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa; *ibid.*, 122.

111 *ILM* 1442.

112 Article 5(2).

113 *Ibid.*, 120.

territory.[114] Most of these rules concern the rights and duties of the occupying party with regard to movable and immovable property in the area and will be discussed in conjunction with other relevant rules bearing on property.[115]

A basic rule for wartime occupations stipulates that title or sovereignty of the territory does not pass to the occupying Power.[116] But certain quasi-sovereign powers will be exercised in the occupied territory, for example legislative[117] and administrative[118] powers will be carried out. On the other hand, it is more uncertain whether an occupying power can exercise jurisdictional powers in the captured territory.[119] Nowadays arguments cannot be put forward that a territory has been 'annexed'[120] by force as conquest and annexation no longer afford legitimate title in international law.

Specific duties of the occupying Power are laid down in Geneva Convention IV of 1949 which regulates in great detail the treatment that must be afforded to the population in the territory.

There is an obligation to keep economic and social conditions as they are in occupied territories. But such rules may be suspended by alleged legitimising factors.[121] For example, it might be claimed that the territories are not occupied but 'retaken', and again forming an integral part of another State. This is the argument put forward by Israel with regard to any part of Palestine to explain that the Geneva Convention on Civilians does not apply in this area.[122] On the other hand, this

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114 v. Glahn, G., *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957); on the historical background, see Graber, D.A., *The Development of Belligerent Occupation 1863–1914; A Historical Survey* (New York: University of Columbia Press, 1949).

115 Below, Chapter 10, section C iii b.

116 Hague Regulations, article 43; *Affaire de la Dette Ottomane*, *RIAA*, 1925, 525; *Great War Criminals Case*, IMT Nuremberg, 13 *AD*, 1946, 202; Cmnd. 6964, 1946; for France see the *Naoum Case*, *Gaz. Palais*, 1970, 1. 62; and see Rousseau, *Conflits armés*, *op. cit.*, 137 for further examples in French and continental practice.

117 *E.g.*, *Reidar Haaland Case* (1945) Norway, Hoyesterett, *AD*, 1943–5, 444. But, in principle, the occupied State retains power to legislate on matters which do not concern occupation: Belgium, *AD*, 1919–22, no. 311; *ibid.*, no. 310; Latvia, *ibid.*, no. 321; Poland, *ibid.*, 1927–8, no. 380; but *contra*, Greece, *ibid.*, 1929–30, no. 292. On Allied occupation of Germany exceeding powers of belligerent occupation see Friedmann, W., *The Allied Military Government of Germany* (London, 1947); *cf.* Robert, A., 'What is military occupation', *BYIL*, 1984, 268–271.

118 *The Lighthouses Arbitration* (1956), P.C.A., 23 *ILR* 659.

119 *E.g.*, Cass. belge, 4.12.1919, *Pasicrisie* 1920.1 and Rousseau, *Conflits armés*, *op. cit.*, 139. But see Geneva IV, articles 68, 70–73.

120 See, Marek, K., *Identity and Continuity of States in Public International Law* (Geneva: Librarie E. Droz, 1954); Scheuner, U., 'Die Annexion im modernen Völkerrecht', 49 *Friedenswarte*, 1949, 81; Schätzel, W., 'Die Annexion', 1 *AVR*, 1980, 1; Zimmer, G., *Gewaltsame territorielle Veränderungen und ihre völkerrechtliche Legitimation* (Berlin: Duncker & Humblot, 1971).

121 *Cf.*, above, Chapter 2, section B.

122 Shamgar, M., 'The observance of international law in the administered territories', 1 *IYHR*, 1971, 263.

argument cannot be valid for other occupied territories, for example with regard to the Golan Heights, where the Convention at any rate must apply.[123]

The essential protection afforded to persons in occupied territories is designed to ensure respect for their lives.[124] No methods of coercion must be used[125] and, in particular, persons must not be subjected to murder, torture, corporal punishment, mutilation or medical experiments.[126] Nor must they be subjected to forced labour.[127] Power to order administrative detentions is also limited.[128] Persons in occupied territories must not be deported[129] but may, if necessary, be evacuated to another region.[130]

After the Palestinian-Arab violence in 2002, Israel began construction of a barrier that would separate most of the West Bank (Judea and Samaria) from areas inside Israel. The ICJ found in its *Advisory Opinion on Construction of a Wall* in occupied areas, that such a wall was contrary to international law.[131] The Court held that Israel could not rely on a right of self-defence or on any state of necessity in order to preclude the wrongfulness of the construction of the wall. Accordingly, the Court found that Israel must cease forthwith the works of construction of the wall, dismantle forthwith those parts of that structure situated within the Occupied Palestinian Territory, respect the right of self-determination of the Palestinian people and respect obligations under humanitarian law and human rights law, guarantee access to holy places to Christians, make reparation for all damage suffered by all natural or legal persons affected by the wall's construction.[132]

According to article 6 of the Fourth Geneva Convention the Occupying Power is bound by article 47 on the prohibition of depriving 'protected persons' of benefits of the present; by article 49 which forbids individual or mass forcible transfers and deportations; by article 52 that, *inter alia*, forbids measures to create unemployment to induce workers in the occupied area to work for the Occupying Power; article 53 which prohibits destruction of private property;[133] and by article 59 which obliges

123 Boyd, A., 'The applicability of international law to the occupied territories', 1 *IYHR*, 1971, 260; Dinstein, Y., 'The international law of belligerent occupation and human rights, 8 *IYHR* 104 (1978)107. Similar claims were previously made with respect to Sinai. In Lebanon Israel claims that she has only set up special units for civilian assistance; *Report of the International Commission to Enquire into reported Violations of International Law by Israel during its Invasion of the Lebanon*, Geneva, 1983, 114.

124 Hague Regulation, article 46; Geneva IV, article 27.

125 Geneva IV, article 31.

126 Article 32. *Cf., infra*, Chapter 9.

127 Hague Regulations, article 52; Geneva IV, article 51.

128 Geneva IV, article 78.

129 Geneva IV, article 49. See, de Zayas, A., 'International law and mass population transfers', 16 *Harvard ILJ*, 1975, 207.

130 *Ibid.*

131 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, *Reports*, 2004.

132 When the Wall was built there had been destruction or requisition of properties under conditions which contravened the requirements of articles 46 and 52 of the Hague Regulations of 1907 and of article 53 of the Fourth Geneva Convention.

133 Except where such destruction is rendered absolutely necessary by military operations.

the Occupying Power to agree to relief schemes if the population is inadequately supplied and grant free passage to consignments.

The Court also reminded Israel that it is also bound by certain articles of the International Covenant on Civil and Political Rights and by important obligations under the International Covenant on Economic, Social and Cultural Rights, in the occupied areas, namely: the right to work (articles 6 and 7); protection and assistance accorded to the family and to children and young persons (article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right 'to be free from hunger' (article 11); the right to health (article 12); the right to education (articles 13 and 14), as well as the similar provisions in the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in articles 16, 24, 27 and 28.[134]

The Court found in 'that construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those 'assimilated thereto'). And one city with 40,000 inhabitants was totally enclosed in an enclave with one single checkpoint access point.[135]

A particular question during occupation concerns, *inter alia*, the controversial right to resistance, which some see as a *jus insurrectionis*;[136] other deny that it exists.[137] The duty of 'obedience' to an established 'effective' occupier[138] would at least cease in the case of an occupier who has himself committed substantial violations of international law.[139]

vii Positive and Negative Zones

The areas described above which are neutralised, demilitarised or denuclearised are all exempt from some effects of war by being enclosed in zones into which war activities, perhaps of a certain kind, are not to extend. Such zones are therefore negative in the sense that they prohibit war activity within a certain area.

Other zones may be positive in character in the sense that they establish areas inside which war activities are to take place and into which, for example, neutrals must not enter; or if they enter, they do so at their own peril for there is a presumption that anyone and anything inside a positive zone will be attacked.

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134 Paras. 125–136 of the Opinion.

135 See para. 133 and *cf.*, *Report* of the Special Rapporteur in the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 199312 A and entitled 'Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine', EICN.41200416, 8 September 2003, para. 9.

136 Above, Chapter 1, section D ii b and iv in relation to resistance and guerrilla warfare.

137 Above, Chapter 2, section B ix.

138 *Ibid.*

139 *The Flesch Case, Gestapo Chief in Norway* (1948), *Retstidene*, 1948, 80.

The distinction between positive and negative zones has perhaps not been made in the literature. But it is a convenient conceptual way to explain the existence of war zones in the context of spatial application of the Law of War.

viii War Zones

As has been shown, territories may be withdrawn from the potential effect of war by treaty or by declared status of neutrality. The effect of such regulation is that it limits the geographical effect of war. But it does not result in the exemption from the Law of War: the territories in question can still be subject to the Law of War with regard to neutral rights and duties and, by a different construction, it could be said that their very status of being neutral or neutralised, is itself part of the Law of War.

It has been suggested that theatre and regions of war are obsolete concepts.[140] On the other hand, there are special zones proclaimed by a belligerent, especially at sea, which serve as a special warning to neutrals: if they enter such a specific zone they do so on their own peril. This was the practice in the Second World War when Germany proclaimed large areas where neutral ships had to resort to specified lanes to avoid emplaced minefields.[141]

War zones are allowed if they are defensive and if they do not extend more than 12 miles offshore; they must also be effectively supervised.[142] United States has, at times claimed 'defensive zones'.[143] At present, China claims extensive 'defensive sea areas' and on 1 April 2001 Chinese military aircraft shot down a US reconnaissance plane, claiming that it had the right to do so under international law within the special zone.[144] On the other hand, 'offensive' zones, in which merchant ships are sunk, are illegal even if warnings are provided.[145]

War zones were claimed in the Falklands War in 1982. The 'Maritime Exclusion Zone' of 200 miles operated initially as a war zone in which Argentine warships or naval auxiliaries would be 'treated as hostile'.[146] From 30 April 1982 the zone was amplified to a 'Total Exclusion Zone' which covered 'all ships and aircraft, whether military or civilian, operating in support of the illegal occupation of the Falkland Islands'.[147] The British zone conflicted with territorial limits claims by Argentina,[148] as the British zone came well within the limits of Argentine waters. Argentina

140 Above, Chapter 6, section A ii.

141 See *e.g.* Stone, J., *Legal Controls*, *op. cit.*, 572.

142 Schmitt, J., *Die Zulässigkeit von Sperrgebieten im Seekrieg* (Hamburg: Metzner, 1966), 135.

143 See, for example, 1981–88 (II) *Cumulative Digest of United States Practice in International Law*, 1751.

144 Kirgis, F.L., 'United States reconnaissance aircraft collision with Chinese jet', *ASIL Insights*, 2005

145 *Ibid.*, 122. *Cf.*, GA Res. 2749 (XXV) 1970.

146 HC, *Hansard*, 7 April 1982, col. 1045.

147 *Ibid.*, 28 April, col. 980.

148 Under law no. 17,094 of 29 December 1966, *Boletin oficial*, 10.1.1967, Argentina claims a 'nautical zone' with full sovereignty of 200 miles offshore. On 28 July 1982, after the end of the hostilities, Britain still insisted on a 150 mile zone around the islands; this zone was called a 'Protection Zone'.

declared a 'counter-zone', a fire-free zone, also comprising 200 miles around the islands.[149] The sinking of *The General Belgrano*, with the loss of several hundred lives of Argentines, took place some 36 miles outside the Total Exclusion Zone, on 2 May 1982. It is highly questionable whether the sinking was compatible with international law, especially as *The Belgrano* was heading for its home base and posed no threat to the British armed forces.

The nature of war zones entails the presumption that not only is the Law of War applicable fully within such a zone but also that actual hostilities will take place and that any neutral subject, ship or aircraft enters such a zone at its own risk. State practice allows for such zones although some commentators question the legality of 'offensive' war zones in which ships may be sunk after warning.[150]

ix Distinction between Zones and Internal Application

Attention on application of war in geographical terms was earlier focused on the 'theatre' or 'region' of war.[151] The distinction between those two concepts has certainly been blurred by the development and use of modern weapons. But the other geographical rules of application, established by positive or negative zones, represents but a partial picture of the problem of spatial application.

Furthermore, as has been indicated,[152] the spatial connotations of various zones concern more the limitation, albeit by legal regulation, of the physical effects of war; but the application of the Law of War itself in such zones is not restricted but applies in full and even lends legitimacy to the very establishment and regulation of such zones.

Nowadays the main difficulty is to establish whether and to what extent the Law of War is applicable to non-States and inside States as well as 'between' them.

B EXTENDED APPLICATION IN INTERNAL CONFLICTS

i Application in Internationalised Conflicts

a Declarations of Adherence

In the first section we will consider the question of application of the Law of War to liberation movements. This problem may initially seem not to concern a 'spatial' application. Yet, liberation movements will be present on some State's territory and we are therefore faced, in the final analysis, with a question of application in the internal sphere of States.

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149 Coll, A.R., and Arend, A.C., *The Falkland War* (Winchester: Allen & Unwin, 1985), 97.

150 Schmitt, J., *Die Zulässigkeit*, *op. cit.*, 122.

151 Above, Chapter 6, section A ii.

152 Above, Chapter 6, section viii.

In the Spanish Civil War there were early declarations, by both sides, that they would respect the Geneva Convention of 1929.[153] It must be in the humanitarian interest to allow as extensive application as possible of such Conventions. The 1949 Geneva Conventions now provide a much more comprehensive regulation than the earlier 1929 Convention, and it is even clearer that their application would enhance humanitarian interests.

However, because of their lack of statehood, numerous liberation movements could not adhere to these Conventions, nor could they enjoy protection thereunder. Liberation movements have sometimes sought to apply the Conventions *mutatis mutandis*. For example, in Algeria the Provisional Government in Exile in Cairo made a Declaration of Accession to the Geneva Conventions in June 1960 to Switzerland, the appointed depository. However, Switzerland issued a declaration declining to regard the accession as effective as the provisional government had not been formally recognised.[154]

On the other hand, liberation movements can accede if and when they are successful for then they have themselves attained statehood.[155]

But before an entity reaches statehood, a 'declaration' may be made to the effect that the Conventions 'apply'. Such declarations are not directed to the depository, who would probably not accept them in the absence of recognition, but sent to ICRC. For example, Algeria made such a declaration when the instrument of accession had been rejected by the depository.[156]

A considerable practice has evolved to notify the ICRC that a group involved in war will 'apply' the Geneva Conventions. Thus, in Hungary, in 1956, the National Committee of Gyŏr was swift to make a declaration of adherence to the Conventions.[157] Numerous declarations were made by, for example, the African National Congress (ANC),[158] SWAPO,[159] the PLO,[160] the Eritrean Peoples' Liberation Front (EPLF),[161] the *Union national pour l'indépendence totale d'Angola* (UNITA),[162] by the Afghan groups, ANLF,[163] HESLI ISLAMI,[164] ISA,[165] and by the Moro National Front in the Philippines (MNLF).[166]

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153 Declaration by Madrid, 3 September 1936; by Burgos 15 September 1936; ICRC, *General Report*, 1934–1938, 131.

154 Bedjaoui, M., *Law and the Algerian Revolution* (Brussels: International Association of Democratic Lawyers, 1961), 183, 189.

155 *Cf.*, accession by Guinea Bissau in 1974, Notification to the Swiss Federal Department, 26 February 1974.

156 Bedjaoui, *Law and the Algerian Revolution*, *op. cit.*, 215.

157 ICRC, *Report on Relief Action in Hungary 1956–1957*.

158 Declaration to the ICRC, 29 November 1980.

159 *Ibid.*, 25 August 1981.

160 On numerous occasions, for example, *ibid.*, 7 June 1982.

161 *Ibid.*, 25 February 1977.

162 *Ibid.*, 25 July 1980.

163 *Ibid.*, 24 December 1981.

164 *Ibid.*, 7 September 1980.

165 *Ibid.*, 6 January 1982.

166 *Ibid.*, 18 May 1981.

Declarations were also made in major wars, some of which were unsuccessful for a secessionist movement, like for Biafra in Nigeria,[167] and in those where a new State did emerge after the originally 'internal' war, like in Bangladesh.[168] In the Congo crises all parties agreed that the Geneva Conventions applied.[169] Other liberation movements have made statements that they would 'respect' the Geneva Conventions. For example, FRELIMO made such a declaration in 1968.[170]

In the Vietnam War all parties allegedly 'recognised' the Geneva Conventions[171] In Vietnam the ICRC appealed to the belligerents to apply the Geneva Conventions.[172] The United States did not make clear whether it considered itself bound but affirmed the Conventions would be applied.[173] The Saigon government declared itself willing to apply the 'Geneva Accords'[174] which leaves some doubt as to which instruments they had in mind. The NLF stated that for its part it was not bound by the Conventions. As it had not succeeded to the Conventions formally,[175] the NLF held that it was not bound by the accession of the Bao Dai government although the ICRC claimed that it was.[176] However, the NLF declared it would, in any event, 'follow a humane and charitable policy' towards prisoners of war.[177]

The ICRC insisted that the 1949 Conventions applied in Vietnam, at least after the escalation that had taken place by 1965.[178]

b Express Provisions on Applicability to Liberation Movements

Article 1(4) of Protocol I of 1977 extends the application of the Protocol to all armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

The Conference took a long time over discussions of this particular paragraph and it may well be the most important one of the whole First Protocol as it extends the application to liberation movements.

167 Declarations by both sides, ICRC, *Report*, 1967, 37.

168 Declaration by the popular Republic of Bangladesh to ICRC, 4 April 1972. At the time Bangladesh was only recognised by India and Bhutan.

169 CICR, *Rapport annuel d'activites*, 1961, 48.

170 See, Rosas, A., *The Legal Status of Prisoners of War*, *op. cit.*, 161. See, further, Mondlane, E., *The Struggle for Mozambique* (London: Longman, 1969).

171 5 *IRRC*, 1965, 477, 636.

172 *RICR*, 1965, 385.

173 *Ibid.*, 1965, 441; 1966, 130, 360.

174 *Ibid.*, 1965, 165, 442.

175 The Democratic Republic of Vietnam had formally acceded to the Conventions in 1957. Schindler, D. and Toman, J., *The Law of Armed Conflict*, *op. cit.*, 482.

176 5 *IRRC*, 1965, 477, 636.

177 *Ibid.*, 360.

178 CIRC, *Rapport annuel d'activités*, 1965, 8; *RICR*, 1965, 385.

The so-called Martens clause,[179] which had been included in the Preamble of the 1899 and 1907 Hague Conventions, has been given a higher status in the 1977 Protocol I by being included in the main text of article 1.[180] The clause provides that in situations not covered by the 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'.

By the inclusion of the Martens clause in article 1, Protocol I extends the application of the clause specifically to the armed conflicts referred to in 1(4), *i.e.* also to all types of liberation wars. The implication of the Martens clause is thus that it fills a supplementary function in cases when there are no clear rules.

The discussions on article 1(4) took up the most part of the first session of the Diplomatic Conference. There were naturally many problems of definition. If the article included 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes' it is obviously important to establish to what level the 'armed conflict' must have developed. The delegation of the United Kingdom made it clear that, in their view, 'armed conflict' implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than that required for the application of Protocol II, by virtue of Article 1 of that Protocol[181] By this cross-reference the United Kingdom indicated that 'armed conflict', for the purposes of Protocol I, must have reached the level where a faction of dissident forces were organised under responsible command and in control of a part of the territory to enable them to carry out sustained and concerted military operations.[182]

There were numerous objections at the Conference with regard to the terms of article 1(4) and many delegations claimed that concepts like 'colonial domination', 'alien occupation' and 'racist regimes' lend themselves to arbitrary, subjective and politically motivated interpretation.[183]

c Informal Adherence of Liberation Movements

The legal implications of declarations of adherence by *e.g.* liberation movements have not been analysed by international lawyers in any detail. Since liberation movements are not adhering formally, they do not become parties to the Conventions. Do their undertakings have no legal effect? It is submitted here that

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179 See in detail above, Chapter 5 C v a.

180 Article 1(2); in Protocol II, however, the Martens clause is again moved to the Preamble.

181 Declaration made upon signature by the United Kingdom.

182 See article 1 of Protocol II and further *infra*, in this Chapter, section B ii g.

183 Federal Republic of Germany, CDDH/SR.36, vol. 6, 61; *cf.*, New Zealand, *ibid.*, 63 and Spain, *ibid.*, 64; *cf.*, the statement by the United Kingdom that the language of article 1(4) is 'political' rather than 'legal', *ibid.*, 46.

it is a valid unilateral undertaking binding on the groups making it, provided that group fulfils the condition of being a belligerent.[184] This is the only possible effect in law which is compatible with contemporary political realities. The reluctance to allow legal effect of unilateral rules and promises and the urge to construe undertakings as 'treaties' is still noticeable in international law.[185] But such strained constructions become even more untenable when, on the one hand, jurists maintain that groups cannot, in any event, conclude 'treaties'. The more flexible notion of unilateral undertaking, which, after all, carries significance in most internal legal systems, must be accepted if it is clear that, for example, a group wishes to enter into a binding arrangement. To deny any legal obligation of such undertakings would eventually damage interests of States too – apart from limiting the effect of the instruments – as a lopsided situation would result in which States, but not guerrillas, are bound by the Law of War.[186]

d Formal Adherence of Liberation Movements

The idea that liberation movements are international bring them, for many purposes, near the ambit of the 1949 Geneva Conventions.[187] But since these Conventions apply only in armed conflict between the High Contracting Parties and liberation movements are not able to accede to the instruments, a formalisation must take place to extend the application of rules of the Law of War beyond what was possible under Common article 3.[188]

The formalisation process has been carried out by the Protocol I of 1977 with regard to armed conflicts involving liberation movements fighting against colonial domination, alien occupation and racist regimes. By formal declaration under article 96, liberation movements can accede to Protocol I of 1977;[189] and by similar process to the Conventional Arms Convention.[190] Other conflicts are still considered as internal and therefore hitherto only regulated by Common article 3. For such conflicts Protocol II of 1977 ensures additional safeguards for the respect of specific rules of war.

The Conferences elaborating the two Protocols between 1974 and 1977 made a considerable distinction between liberation wars and other internal conflict although it is clear that the factual situation in the two types of conflict may be extremely similar which, in turn, would warrant a uniform application of internal rules.[191] Arguments were put forward during the 1980 Conference on Conventional

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184 Above, Chapter 4, section C.

185 For theories refuting such constructions, see my *Law Making, op. cit., passim* and my *Concept, op. cit., passim* and my *International Legal Order, op. cit., passim*.

186 See, below, Chapter 12, section B ii on reciprocity.

187 Common article 2.

188 Below, in this Chapter, section B ii e.

189 Above, Chapter 1, section D ii b and below, in this Chapter, section e.

190 Below, Chapter 7, section ii.

191 The Swiss Federal Department published in 1977 a 17-volume series on the Conferences and it is this publication which is quoted below in the context of statements made during the Conferences. For a commentary see, Bothe M., Partsch, K.J. and Solf, W.A.,

Weapons[192] that rules on weapons should not only bind States[193] but also apply to wars of national liberation[194] and thus coincide with the ambit of the new 1977 Protocols to the 1949 Geneva Conventions.[195] It would be consistent with political realities if the application of the Conventional Weapons Convention extended to liberation movements. The latter view was eventually accepted at the Conference but it was agreed to provide special conditions for the application of the Convention to liberation wars.[196]

Consequently, the Convention provides[197] that, in cases where a party to the Convention is also bound by Protocol I of 1977, the provisions of the Conventional Arms Convention, and those of its annexed Protocols, will apply to a conflict with an 'authority' if that 'authority' has made a declaration under Protocol I of 1977,[198] provided the 'authority' has undertaken to apply the Weaponry Convention. Even if a State is not a party to Protocol I of 1977, the Conventional Arms Convention will apply,[199] if an 'authority' declares it will apply the Geneva Conventions and the Weaponry Convention. It is interesting to note that in that case, for example, an insurgent group would be bound by the Geneva Convention and by the Weaponry Convention, with Protocols, but not necessarily by Protocol I of 1977 which is not mentioned by the article.

A much discussed question was whether 'any' liberation movement could enhance its own standing to that worthy of protection under article 1(4) by a mere notification under article 96(3). This article provides that 'the authority' leading a liberation movement 'may undertake to apply the Conventions and this Protocol in relation to the conflict by means of a unilateral declaration addressed to the depositary' and such a declaration will have the effect that the Conventions and the Protocols are brought immediately into force to protect the members of the movement.

Some commentators objected strongly that to confer

> 'belligerent status on all liberation movements despite the absence of recognition and heedless of the actual dimension (of the conflict is) palpably absurd'.[200]

However, article 96(3) seems to indicate that at least the liberation movement must have an 'authority' to represent it and this, in itself, would indicate a certain level of organisation. Furthermore, the article speaks of *the* authority, and not *an* authority,

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New Rules on Victims of War (The Hague: Martinus Nijhoff, 1982), which, however, does not refer to the volumes.

192 Below, Chapter 7, section A ii c.

193 As the Western bloc claimed, A/CONF.95/WG/L.1.

194 As argued by non-aligned and socialist States, *ibid., loc. cit.*

195 Below, Chapter 7, section i.

196 A/CONF.95/15 and below, Chapter 7, section A ii c.

197 Article 7(4)(a).

198 Article 96(3) and below, Chapter 7, section A ii c.

199 Under article 7(4)(b).

200 Dinstein, 'The New Geneva Protocols', *op. cit.*, 267.

which appears to exclude a plurality of liberation movements.[201] But, above all, the whole point of conferring a status on liberation movements is to subject them, at the same time, to far-going obligations.

On balance, however, it appears that most of the alleged problems caused by the inclusion of liberation wars in article 1(4) were grossly exaggerated. The wording may be rightly criticised for having a focus on short-term political problems and, for this reason, perhaps not suitable to be included in a legal instrument intended to be of long-term value.[202] But, on the other hand, such formulation of the article must also reduce any objections to the extended ambit of its application as such extension would, in practice, be a mere transitory phase: there are, for example, few colonial regimes left. The Holy See expressed the view that article 1(4) 'clearly reflects a particular historical situation undergoing rapid development'.[203] On the other hand, if both Protocols were adopted the chances of achieving the application of a uniform humanitarian law in all conflicts would be greatly enhanced.[204]

Some commentators claim that the actual ambit of article 1(4) is extremely narrow: it is argued that it applied only to the peoples of South Africa and of Palestine.[205] However, the article seems to have much wider scope in its general formulation. On the other hand, the extension of the application of humanitarian rules to liberation movements by article 1(4) is not as far-reaching as has been alleged. For those who wish to extend humanitarian rules to a uniform network applicable in all armed conflicts, the article does not go far enough, but is, on the other hand, supplemented by Protocol II. Yet, the article could not be held to be excessively demanding to those who question the rights and status of liberation movements as such movements could always claim, in law if not always in fact, a certain standard of humanitarian treatment.[206]

e Recognition of Belligerency and Statehood

It has been shown that recognition of belligerency in internal war does not amount to recognition of statehood.[207] Similarly, attendance at conferences,[208] adherence to the Geneva Conventions, or declarations to adhere to their principles, do not imply recognition of any statehood.

Nor does application of Common article 3 of the Geneva Conventions imply the recognition of a party as State, or as an 'emerging' State: article 3(4) provides

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201 *Cf.*, Bretton, *Le droit de la guerre*, *op. cit.*, 134.

202 *E.g.*, statement by Germany, CDDH/SR.36, vol. 6, 61.

203 CDDH/Sr.36, vol. 6, 62.

204 *Ibid.*, *loc. cit.*

205 Kalshoven, F., 'The reaffirmation and development of international humanitarian law applicable in armed conflicts, The Diplomatic Conference Geneva 1974–1977', 8 *NedTIR*, 1977, 122. *Cf.*, the assessment by Bothe et al., *New Rules on Victims of War*, *op. cit.*, 52.

206 See below, in this Chapter, section B ii e, on Common article 3 of the Geneva Convention.

207 Above, Chapter 1, section D i c.

208 Above, Chapter 1, section D ii b.

specifically that its application will 'not affect the legal status of the parties to the conflict'.

Declarations under article 96 of Protocol I or under article 7 of the Weaponry Convention do not imply recognition of statehood, as has been indicated above.[209] On the other hand, this does not mean that all these situations and acts are devoid of all implications for statehood. For example, liberation movements may not be recognised as States, but they are, as far the application of the Law of War is concerned, more and more treated as some similar units.

It has occasionally been suggested that recognition by the ICRC would be of any significance of statehood and it may be useful to place such recognition too in its proper legal and factual context to clarify the political repercussions of recognition by the ICRC.

The ICRC rightly treats States as 'important' units[210] but, it must be emphasised, the treatment the ICRC may afford to non-State by no means indicates that these units, in the opinion of ICRC, are approaching statehood: the ICRC, as a humanitarian agency, is not competent to pronounce itself on such issues. Nor does recognition of the ICRC of specific Red Cross Societies in various territories indicate that there are any implications for statehood of such areas. On the contrary, in many cases the ICRC has acknowledged the existence and functioning of Red Cross Societies in countries which were not commonly recognised as States at the time of the ICRC action. For example, it was the Red China Red Cross Society, not that of Taiwan, that was recognised *before* the Peoples' Republic of China had been accepted as a State, for example, in the United Nations.[211]

The IRCR has furthermore sometimes refrained from recognising a Red Cross Society if that society represented or supported a government whose views appeared contrary to the spirit of humanitarian law or basic human rights. Thus, the ICRC did not recognise a Society in Burundi as the ICRC did not wish to associate itself with an organisation with as pro-Tutsi and anti-Hutu views as the government itself.[212] Similarly, in Bangladesh the ICRC did not wish to recognise a Society furthering the Bengali majority views as this would not be in the interest of the Bihari minority.[213]

ii Direct Application of the Law of War in the Internal Sphere of States

The general problem of effectiveness of rules of international law inside States concerns the relationship of different legal orders, the international system and internal legal systems. Many are led to believe that these systems are entirely separate. The prevailing view of writers is certainly that areas governed by these systems are distinct and different. While it is certainly true that international

209 Above, Chapter 1, section D ii b.

210 Forsythe, D.P., *Humanitarian Politics: The ICRC* (Baltimore, 1977), 45.

211 Draper, G.I.A.D., 'The Peoples' Republic of China and the Red Cross', in Cohen A. (ed.), *China's Practice of International Law: Some Case Studies* (Cambridge, MA: Harvard University Press, 1972).

212 Forsythe, *Humanitarian Politics, op. cit.*, 16–17.

213 *Ibid., loc. cit.*

law and internal law *emanate* from different sources, and are applied, *primarily*, between different subjects, it is certainly clear that, in a number of cases, rules of international law are directly effective in the internal legal systems. If they were not – without any intervention of the 'host' government – it would be impossible to explain why individuals are bound by obligations in the field of human rights and humanitarian law and, conversely, enjoy rights in these two fields. It would be even more difficult to explain how the international society can proceed to try, convict and punish 'war criminals', who, as in the case of wartime Germany, may, even scrupulously, have followed and obeyed national legislation.

The prohibition of force as laid down in the United Nations Charter can also be viewed as breaking through the national wall of a State. In numerous situations it has been clear that a State cannot, for example, escape the consequences of prohibition of force by refusing to recognise another 'territory' as a State.[214] For example, the international rules on self-determination of Croatia and Slovenia prevailed in 1991 over the national legislation of the federal government of former Yugoslavia.

The distinction between international and national legal rules, sometimes dismissed by writers as a 'theoretical' problem of 'monism' and 'dualism', is thus of immense practical importance, often ignored by academics as well by statesmen.[215]

a Variability of Constitutional Provisions

The traditional attitude of international lawyers is that international law does not operate inside States unless the constitutional machinery allows for such direct application. In England general rules of international law – but not treaties – are immediately applicable,[216] whereas certain treaties concluded by the United States are 'self-executing' and, as such, directly applicable in the internal legal sphere. In France every ratified and duly published treaty forms part of French law and in the Netherlands any published treaty even takes precedence over both previous and later national legislation.[217]

The position thus varies from country to country but it can be said, *grosso modo*, that general rules of international law and/or treaties are either automatically incorporated in the internal system of a State, or, which is more common, they have to be 'converted' or 'transformed' into internal law.[218]

Some commentators claim that completely different rules apply in international and in internal conflicts (or other non-State disputes)[219] and, in view of the above position of the operation of rules of international law, one may understand such

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214 Bowett, *Self-Defence*, *op. cit.*, 134.

215 See, for further discussion of practical implication of these views, *Concept*, *op. cit.*, 1–5, and my *International Legal Order*, *op. cit.*, 165–174.

216 *Trendtex Trading Corporation v the Central Bank of Nigeria* (1977) 1 QB 529 (CA).

217 On these and other examples, see my *Law Making*, *op. cit.*, 274–285.

218 There are then numerous subsidiary questions for example concerning the 'overriding' effect of later international rules or treaties or of subsequent internal legislation, see, for example on *lex posteriori derogant*, my *Law Making*, *op. cit.*, 274 *et seq*.

219 Above, Chapter 1, section D i b.

consequences of the entrenched State paradigm.[220] The traditional doctrine on transformation is by far the most common one to be applied by municipal courts. Only rarely are there systems by which international law is wholly part of the land, as in the Netherlands since the 1952 Constitution, or partly, for example with regard to general rules as in England, or with regard to certain treaties as in the United States.

b Application by Municipal Courts

The fact that municipal courts, under the particular constitutional rules of their own country, take a specific line on the applicability of international law in the internal sphere does not prove that international Law of War permeates into all internal systems: it is a sovereign right not to import any rule with the exception of certain rules of *jus cogens*.[221]

The universality of the legal system in the internal sphere of States is hampered by different views of the rights and duties of individuals in the legal system. Very few agree that individuals are bearers of rights and duties under international law, at least in certain situations.[222]

But if individuals are not subjects of the international order, human rights that have not been 'transformed' by national legislation cannot protect them. Yet, we know that this is not the case in political realities; whenever there is abuse or neglect of human rights in a country, there are international repercussions, such as the introduction of sanctions and condemnation of other States. However, few have, it seems, commented on the application of the Law of War in the municipal sphere, although similar issues exist with regard to this body of law as well as to human rights.

Yet, there is a similar reaction when there are violations of humanitarian law or of other rules of the Law of War in a specific country. When Saddam Hussein of Iraq wished to stock, or employ, forbidden weapons, or was suspected of doing this, there was immediate reaction in the form of condemnation, or economic sanctions.[223] It is therefore futile to insist, in textbooks for students, that international law has no force in the internal law of States as this is not borne out by political realities.

On the other hand, there is a vast difference in court practice in the 200 States of the world and national perception of the Law of War is often founded, in the majority of these legal systems, on general principles rather than on case law which is only dominant in Anglo-Saxon countries.[224] This is sometimes not borne in mind

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220 But it is argued by some that the Geneva Conventions of 1949 and the protocols of 1977 are 'self-executing' and need only be ratified to be effective in most States, de Mulinen, F., 'Law of war and armed forces', *Forces armées et développement du droit de la guerre* (Brussels: Société international de droit pénal militaire et droit de la guerre, 1982).

221 See Detter, I., *International Law and the Independent State*, 2nd edn, *op. cit.*, *passim*.

222 But see Detter, I., *Concept*, 2nd edn, *op. cit.*, and Detter, *The International Legal Order*, *op. cit.*

223 The legality of pre-emptive military sanctions, like the bombing of certain sites by the United States and by the United Kingdom in December 1998. could be questioned. See below, Chapter 7, section D.

224 See comments on the 'questionable reliability of internal case law' in Chapter 5 C v e.

as most books on international law appear in English and cite mainly authorities from the Anglo-Saxon legal systems.

c The Rationale Behind Applicability and Non-Applicability

Is there then anything which the Law of War contains which is so controversial that States would have reason to dispute its applicability in their internal spheres? As we have seen,[225] the Law of War consists largely of rules on weapons, rules on methods and targets of warfare and humanitarian rules. The first two sets are normally phrased as a series of restraints whereas the last set of rules, on humanitarian issues, involve both restraints (to refrain for attacking or harming) and positive duties of action (to assist and help). Such rules seem to deserve the widest application, by all individuals and groups on a State's territory, especially if the State itself is bound by them after having acceded to a specific convention.

If we examine the sets of rules in turn we shall find that certain rules on weapons, in the first set, are most likely to apply to internal groups if a State has adhered to a weaponry convention, at least in cases where weapons have been abolished or destroyed, or otherwise been made unavailable in the particular State.[226] But the situation would be different in case of certain types of conventional weapons, like, for example, booby-traps. Such weapons have been gradually forbidden by international agreements, under, for example, Protocol II to the Conventional Arms Convention of 1981[227] as many cause unnecessary suffering or have indiscriminate effects.[228] But a liberation movement or dissident group would still find it easy to produce some such weapons.

It is stipulated that application of the Weaponry Convention will entail equal rights and duties for the authority as those assumed by State Parties.[229] The adherence mechanism to the Weaponry Convention,[230] by which liberation movements can be formally found by an instrument of the Law of War, is an important step on the way to allow for application, in a State's own interest, of prohibitive rules in the internal municipal sphere. But the wording only covers 'liberation movements', which is thought to be a less wide title applicable only to a few groups. It may be in a State's interest to allow prohibitive rules on weapons to apply to guerrilla or other non-State units, as well as to citizens in general.

The second group of rules of the Law of War, concerning methods and targets of warfare would, for example, if guerrilla warfare is considered, imply more benefits than drawbacks for the State, if such rules were applied by insurgents, or by guerrillas and freedom fighters; although on the other hand it must be admitted that that may be a situation where a State would wish to apply forceful methods which are not allowed under the Law of War.

225 Above, Chapter 5, section C.

226 Below, Chapter 7, section A ii e, on different conventions.

227 *Ibid.*

228 Above, Chapter 5, section C v and below, Chapter 7, section B i b.

229 Article 7(4)(b)(ii).

230 Above, in this Chapter, section B i e, and below, Chapter 7, section A ii e.

Therefore, by claiming that 'there is no war' or that the Law of War does not apply in the internal sphere in internal situations, the State can take coercive action 'to quell a rebellion' and apply measures of a degree that would not be allowed under the Law of War.

On the other hand, a number of prohibitions of methods in warfare, restrictions which could only benefit the State, do not, according to many writers,[231] apply to non-State groups engaged in war. For example, the taking of hostages is a prohibition of Geneva Convention IV on Civilians[232] which only applies to States.[233]

With regard to the third group, it would, again, seem advantageous to a State if internal fighting groups were bound to respect such rules.

Yet, States have been extremely reluctant to allow any application, of any part of the Law of War, to other than State entities. Why? The answer is probably that there is one area, and one area alone, where the State will not let go of its prerogatives: that of treating detainees as they wish. Such treatment follows from the sensitive question whether captured persons are 'rebels' against the established legal order of the State or 'freedom fighters' striving for a specific 'cause', usually independence or autonomy for their 'people'.[234] But whether a captured person is considered to fall into one of these categories should not necessarily exclude humane treatment to which perhaps all have a basic right.[235]

The turning point in the development of the Law of War in recent years is precisely the hotly disputed question whether detainees are entitled to prisoner of war status. In Northern Ireland other complications enter the field: United Kingdom is bound by the European Convention on Human Rights, and must afford prisoners of all kinds, even political prisoners, certain treatment.[236]

d The Attitude of the ICRC

The International Committee of the Red Cross does not make any distinction between the two types of strife as there may be suffering in either case warranting assistance. This has been the attitude since the relief given to Argentina in 1890.[237]

The ICRC has assisted in numerous internal wars and often applied the same rules for such disputes as for international wars. It offered assistance in 1872, largely through the national society, in the Second Carlist War in Spain between 1872 and 1876. In 1865 the ICRC gave direct relief help in Herzegovina during the revolt against the Turks and to the refugees from that country in Montenegro at the request of the sovereign. Later followed help to the victims in the internal wars in a number of States. Thus, during 1880, 1890, 1893 and 1895 the ICRC gave assistance in Argentina; 1890 in Transvaal; 1882 in Bosnia; 1885 in Peru; 1894 in Brazil; 1895,

231 See, for example, Lauterpacht, H., *Recognition in International Law* (Oxford: OUP, 1947), 246.

232 Article 34.

233 Greenspan, M., *The Modern Law of Land Warfare, op. cit.*, 413.

234 *Cf.*, above, Chapter 1, sections A and D ii.

235 See, in detail, on treatment and minimum rights of detainees, below in Chapter 8 B iv.

236 European Court of Human Rights, *Ireland v. United Kingdom*, Judgment, 1977.

237 Moreillon, J., *Le comité international de la Croix-Rouge, op. cit.*, 31.

1897 and 1912 in Cuba; 1896 in Rhodesia; 1897, 1903 and 1904 in Uruguay; 1903 in Macedonia; 1909 in Armenia; 1909 again in Spain; and 1911 in China.[238] The ICRC has also assisted in most later wars, international or internal.[239]

e Article 4A of Geneva Convention III

Geneva Convention III on Prisoners of War contains a provision which suggests that the drafters of the Convention might have had in mind the application to combatants of non-States. Article 4A(3) thus provides that 'members of the regular armed forces who profess allegiance to a Government or an authority not recognised by the Detaining Power' will be given prisoner of war status.[240] Some commentators have deduced from this provision that the Convention II on Prisoners of War applies to internal wars.[241] However, the drafters of the article probably had the situation Free France against Germany in mind,[242] and it is likely that the Convention was not to apply to internal situations in general under this article.

On the other hand, article 4A(2) may cover resistance movements under certain conditions.[243] The article may also extend, at least according to literal interpretation construed regardless of the intention of the drafters, to two types of internal warfare, both to consolidated resistance movements and to guerrillas.

f Common Article 3 of the Geneva Conventions in Internal Conflicts

The broadening of the notion 'international conflict'[244] is obviously one way to achieve the application of *all* the provisions of the Geneva Convention; but as things stand, at least Common article 3 covers internal conflicts. Article 3, which is included in all four Geneva Conventions and therefore usually referred to as 'Common article 3', provides that certain basic humanitarian rules must be respected in internal disputes.[245]

g Analysis of Provisions of Protocol II of 1977

(1) General Background

At the Conference for negotiation of the 1977 Protocols there was much discussion about which rules should apply in internal conflict. An ambitious project to adopt an extensive, detailed set of rules to govern internal conflicts which are not liberation

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238 *Ibid.*, 24–39.

239 Above, Chapter 5, section A and below, Chapter 11, section A ii b.

240 On such status, see below, Chapter 5, section B iii f and *supra*, Chapter 4, section D.

241 Falk, R., *Legal Order in a Violent World* (Princeton: Princeton University Press, 1968), 123; Seyersted, *United Nations Forces in the Law of Peace and War, op. cit.*, 200; Farer, 'The humanitarian laws of war in civil strife: towards a definition of international armed conflict', 7 *RBDI*, 1971, 29.

242 Rosas, *The Legal Status of Prisoners of War, op. cit.*, 256.

243 See note 231.

244 *Cf.*, above, Chapter 1, section D i d on internationalised conflicts.

245 See, in detail, above, Chapter 5 C v b.

wars covered by Protocol I of 1977 failed, much due to a swift intervention by Pakistan.[246] Pakistan had been 'concerned' about a lengthy text which ventured into the reserved domain of States. Other Third World States soon became convinced that any such regulation of internal conflicts inside their national territories would infringe their rights of sovereignty and self-determination.

The developing States were quite content to have liberation wars subsumed under Protocol I but any other internal conflicts should not be regulated by any international documents, at least not in any detail, for any such regime would be 'tantamount to interference with sovereign rights'.[247] Some even claimed that it is a 'sovereign right' of every State 'to deal with rebel movements within its territories in any manner it deems fit'.[248]

Not all Third World States were hostile to Protocol II[249] but they were certainly in a great majority. Many such countries may have unstable governments which need consolidation and they appeared worried that Protocol II, in spite of its reassurances that it does not affect the rules on nonintervention,[250] would entitle other States to interfere in their domestic affairs. They would, in this context, care little about the treatment of individuals in their territories. On the other hand, European States who had suffered the plight of civil wars became the staunchest supporters of Protocol II.[251]

However, the discussion at the Conference shows that the developing countries, much under the pressure of Pakistan[252] and India,[253] found that many humanitarian rules of the proposed Protocol II were unacceptable to them as the implementation of such rules would be in violent conflict with their right of self-determination, in the sense of a right to behave as they wish within their own territory.

Many States claimed that the legislation of States is so advanced that any protection under Protocol II would be 'unnecessary'. Thus, the Indian delegate claimed that 'the Indian delegation does not need any lessons or lectures in humanitarianism from anyone. In fact, all provisions of Protocol II are, in one form or the other, embodied in the national laws of [India]'. The Protocol would be unacceptable also because it interfered with the reserved domain. Thus, 'the provisions of Protocol II will only militate against the sovereignty of States and will interfere in their domestic affairs. The internal law and order situations are the sole concern of sovereign States and these problems are to be dealt with according to the domestic laws of the country'.[254] India went on to explain that newly independent countries which are endeavouring to consolidate their sovereignty are 'jealous of their sovereignty and will guard against any

246 CDDH/427 and Corr.1; *cf.*, CDDH/I/SR.23, 58, vol. 8, 225.

247 India, CDDH/I/SR.23.48, vol. 8, 224.

248 Philippines, CDDH/SR.56, Annex, 11, vol. 7, 243.

249 See, *e.g.*, Guatemala, *ibid.*, 241. *Cf.*, Egypt which spoke of 'selective humanitarianism', CDDH/I/SR.24,26 vol. 234.

250 Article 3. *Cf.*, Egypt, CDDH/I/SR.24, vol. 8, 234.

251 *Cf.*, Forsythe, D.P., 'Legal management of internal war', 72 *AJIL*, 1978, 294–295.

252 CDDG/427 and Corr. 1.

253 CDDH/SR.49, vol. 7, 80–81.

254 India, CDDH/SR.49, vol. 7, 78.

action which might constitute an interference in their internal affairs under whatever form or guise' particularly as developing countries, to some extent, are vulnerable victims of pressure by the super-powers. Third World countries 'are aware of the powerful means of communication and propaganda which the powerful countries of the world possess. The developing countries cannot rule out the possible misuse of Protocol II in this ideologically divided world'.[255] Some claimed that 'it is incongruous for the international society to play on internal dissensions of sovereign States' and that the Protocol would, in fact, provide 'opportunity for misinterpretation in countries endeavouring to consolidate their political and territorial sovereignty and this would accentuate such dissensions'.[256] In this context it may be important to underline that attitudes to intervention has changed in recent years, at least with regard to humanitarian intervention. It may be that the 'illegal area' has become increasingly smaller and that now only interventions to assist unrepresentative rebels or unrepresentative governments, or just to preserve one territorial unit of a State, are prohibited.[257] Those categorically against unilateral intervention are now in a pronounced minority[258] and others claim that the international legal system, in this respect, has changed.[259]

It has been demonstrated[260] that intervention often furnishes rebel forces with aid.[261] For these reasons, one must be wary of any misuse of such intervention.

However, it is quite possible to support the uniform humanitarian regulation of internal armed conflicts without condoning any such intervention efforts by third States.

There are obvious and compelling reasons for affording similar protection to victims in both international armed conflicts as well as victims in internal conflicts, such as victims in civil wars. There is certainly no logical reason for the introduction of a differentiated humanitarian regime for the two types of conflict covered by the Protocols, for liberation wars (and international armed conflicts) covered by Protocol I and for armed conflict and civil wars covered by Protocol II.[262] How could humanitarian rules be denied to one type of conflict? Some thought that 'public opinion would be astonished at such discrimination'.[263]

255 *Ibid.*, 81.

256 Ghana, CDDH/SR.49, vol. 7, 80.

257 Higgins, R., 'International law and civil conflict', in Luard, E. (ed.), *International Regulation of Civil Wars* (London: Thames and Hudson, 1972), and in Black, C. and Falk, R. (eds), *The Future of the International Legal Order* (Princeton: Princeton University Press, 1971), 81.

258 Brownlie, I., 'Humanitarian intervention', in Moore, J.N. (ed.), *Civil War in the Modern World* (Baltimore, 1974), 217;

259 Lillich, R.B., 'A reply to Ian Brownlie and a plea for constructive alternatives', *ibid.*, 229.

260 Above, Chapter 2, section A iii c.

261 See above, Chapter 2, section A iii e.

262 *Cf.*, Austria, CDDH/I/SR.23, vol. 8, 216.

263 *Ibid.*, *loc. cit.*

(2) The Ambit of Article 1

According to article 1(1) of Protocol II the few humanitarian rules that remain in the final version will apply to conflicts in the territories of the contracting parties between the armed forces of such parties and 'dissident armed forces or other organised 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'. Such a text naturally evokes many problems of interpretation, as does Protocol I with its references to liberation wars.[264] One problem is how to distinguish internal conflicts covered by Protocol II from those covered by Protocol I. One would at least have expected an exclusion clause in the second Protocol, referring to the conflicts covered by Protocol I, to avoid duplication of rules for liberation movements.[265] The distinction is important as substantially higher protection is enjoyed under Protocol I.

A further problem in Protocol II is to determine, more particularly, when riots, tensions and 'sporadic acts of violence' are exempted from the first part of the article, thus from article 1(1). Such intermittent acts, caught by the second part of article 1, often develop into armed conflicts, properly so called, which are governed by the first part of the article.

Third World States, supported by the then socialist bloc, were responsible for raising the threshold of application of the Protocol. The Protocol is thus not activated until dissident forces control a part of the territory. But such a notion is relative[266] and it is therefore not clear when the Protocol will enter into force in a particular conflict. Some even understood the requirement of territorial control to imply an encouragement to further fighting: such a requirement would be 'dangerous' as such determination is likely to heighten the risks and suffering of the population.[267]

Other concepts are also hazy: who will determine whether forces are 'under responsible command' or what constitutes 'sustained' military operations?[268] Some suggested that the government side should expressly reaccept the Protocol in any concrete situation.[269] Numerous States claimed that only the State in whose territory the conflict takes place can decide on whether the conditions mentioned in article 1(1) are fulfilled.[270]

Many States were thus concerned that the actual application of Protocol II would not be entirely in their hands but automatically enter into application; such automatic activation of the Protocol could not be tolerated in the opinion of these States. For example, Argentina sponsored article 1(4) of Protocol I[271] which, it stated, recognised the 'final liquidation' of the colonial era, emphasising that the international society has a 'duty' to protect those who take part in liberation

264 See above, Chapter 6, section B e.

265 Australia, CDDH/I/SR.23, vol. 8, 219.

266 *Cf.*, Forsythe, 'The legal management of internal war', *op. cit.*, 286.

267 United Republic of Cameroon, CDDH/SR.49. vol. 7, 84.

268 Colombia, CDDH/SR.49, vol. 7, 78.

269 See Brazil, CDDH/I/SR.29, vol. 8, 286.

270 *E.g.* Chile, CDDH/SR.47, vol. 7, 232; Colombia, *ibid.*, 77–78; Ecuador, *ibid.*, 79; Philippines, *ibid.*, 83; Tanzania, *ibid.*, 84.

271 Above, Chapter 6, section B i e.

struggles by applying humanitarian rules of the 1949 Conventions and the Protocol.[272] However, when it came to Protocol II Argentina could not support the regulation as the Protocol provided no safeguard clause providing for, in each case, whether the conditions for application have been met.[273] Others were worried about whether conditions would not be assessed by government or dissident forces but by third States and in this way violate the principle of non-intervention.[274]

Some delegates considered that the level at which the Protocol would enter into effect would be related to the level of organisation at which the dissident forces were able to implement the Protocol on their part.[275] However, such a reference would seem only to complicate matters further: the Protocol would appear apt to be implemented by anyone at anytime, provided the factual situation had arisen which warranted a decision on how to treat individuals covered by the Protocol.

The threshold of application, especially with regard to control of territory, may well be unrealistic in view of the tactics of modern guerrilla warfare which involves great mobility which means that there is continuous change of territorial control.[276] Some delegates found that the way the text was phrased, Protocol II would really only apply to full-scale civil war.[277] However, many lower levels of violence would be excluded although terrorist attacks and kidnapping, which often form part of the pattern of certain warfare,[278] are specifically prohibited by the Protocol.[279] Such prohibitions are of importance as they often save civilians who are not taking part in hostilities[280] and they also constitute an important limit to a special type of warfare. But it is not only the acts which should not be perpetrated by insurgents that are relevant for the application of Protocol II but also, and perhaps more so, the treatment of individuals once they are taken by the other side.[281]

The ambit of article 1 thus raises numerous questions, many of which are not possible to answer in objective terms, but which, on the other hand, may be fairly self-evident in practical terms in each individual case.

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272 CDDH/SR.36, vol. 6, 50.
273 CDDH/SR.49, vol. 7, 75.
274 Brazil, CDDH/SR.49, vol. 7, 76.
275 Canada, CDDH/SR.49, vol. 7, 77.
276 *Cf.*, Egypt, CDDH/I/SR.24, vol. 8, 235.
277 Australia, CDDH/I/SR.23,22, vol. 8, 219.
278 *Cf.*, Forsythe, 'Legal management of internal war', *op. cit.*, 293.
279 Article 4.
280 See below, Chapter 9, section B i.
281 See further below, Chapter 9, section B iii g on detainees.

PART II: RULES ON BELLIGERENCE

Chapter 7
Restrictions on Weapons

A THE AMBIT OF RELEVANT RULES

i Weapons and Methods

Suffering in war can be reduced by prohibiting certain weapons or regulating their use and, secondly, by forbidding certain ways weapons are used and prohibiting specific methods of warfare. In this section we shall deal with prohibitions with regard to weapons.

ii The Historical Background

Treaties on weapons have developed in the light of the basic ethical principles of warfare.[1] Thus, the St Petersburg Declaration of 1868,[2] forbidding certain types of ammunition, was primarily designed to avoid unnecessary suffering. It was followed by other instruments recognising similar principles, such as the Declaration of 1874.[3] This Declaration states[4] that 'the laws of war do not recognise to belligerents an unlimited power in the adopting of means of injuring the enemy'.

The 1899 Hague Conventions further emphasised this principle. The first one of the 1899 Conventions sought to encourage States not to resort to war.[5] A 'Declaration', fulfilling all the characteristics of a Treaty, was also enacted at the 1899 Conference. By this document contracting Parties undertook, on the understanding that the provisions would only apply in wars in which all the

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1 Above, Chapter 5, section A and C iii (2)vi.

2 18 *NRGT* 474.

3 4 *NRGT* 2 série 219; *BFSP* 1873–4, 4 1005; *cf.*, 'The laws of war on land', Institut de droit international, *Annuaire*, 1881–2, 156 ('*The Oxford Manual*').

4 Article 12.

5 International Convention I for the Pacific Settlement of International Disputes, 26 *NRGT*, 2 série, 920; but Hague Convention II regulates the very conduct of war. International Convention II with Respect to the Laws and Conduct of War by Land, 26 *NRGT*, 2 série, 949.

participants were contracting parties, to refrain from the use of certain gases[6] and certain ammunition, so-called dum-dum bullets.[7]

The Hague Conventions of 1907[8] were also inspired by the thought that it was important to prevent unnecessary suffering war. Most of the 1907 Conventions regulate *methods* of warfare[9] and have been, and will be, discussed in other contexts. But at least two Conventions of 1907 have *weapons* in mind. Thus, Convention VIII Relative to the Laying of Contact Mines[10] does regulate the use of naval mines. Furthermore, Hague XIV Prohibiting the Discharge of Projectiles and Explosives from Balloons[11] at least attempted to regulate the use of bombs discharged from the air.[12] The rules laid down in Convention VIII on Naval Mines are still applicable today and probably enunciate general precepts of international law.[13] Rules on bombardment, on the other hand, are more akin to other rules on methods and will be discussed in that context.[14] Conventional types of bombs are not forbidden as weapons by international law, but they can still be used in a prohibited manner, for example by area bombing.[15]

A series of studies in the United Nations, and two special Conferences on Conventional Weapons in Lucerne and Lugano in 1974–1976, a further Convention on Excessively Injurious Conventional Weapons was concluded in 1980.[16] There have been attempts for further treaties prohibiting certain chemical and bacteriological weapons,[17] and numerous declarations in the General Assembly showing concern for 'biological' weapons[18] and for weapons of 'mass destruction'.[19] Some attempts have resulted in the 1977 Convention on the Prohibition of Environmental Techniques.[20] Apart from specific treaties reducing

6 Declaration I Prohibiting the Use of Asphyxiating Gases, 26 *NRGT*, 2 série, 998.

7 Declaration II Prohibiting the Use of Expanding Bullets, *ibid.*, 1002.

8 Above, Chapter 5, section A.

9 Below, Chapter 8, section A ii.

10 *NRGT*, 3 série, 580.

11 *Ibid.*, 745.

12 See also Hague IX Respecting Bombardments by Naval Forces in Time of War, *ibid.*, 604.

13 Below, in this Chapter, section A iii.

14 Below, Chapter 8, section A ii.

15 Below, Chapter 8, section A iii. On prohibited unconventional bombs, see below, Chapter 7, section D i c (2).

16 Convention on Prohibitions on Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 19 *ILM*, 1523; the Convention, and its Protocols, prohibit certain weapons which cause non-detectable fragments (Protocol II) or which are incendiary (Protocol III). Another Protocol deals with certain prohibited mines and booby-traps (Protocol III). See *in extenso*, below, in this Chapter, section A i.

17 See *Report by the Secretary General*, 1969, A/7575 Rev.1, S/9292 Rev.1, and the Conferences in Lucerne and Lugano, see below, in this Chapter, section A i.

18 *E.g.* Resolution 3465 (XXX) and 2936 (XXVII). *Cf.*, *Report by the Secretary General*, A/7575 Rev.1, S/9292, Rev.1, 1969.

19 *E.g.* Res. 3479 (XXX). See further, below, in this Chapter, section B i.

20 Convention on the Prohibition of Military and Any Other Hostile Use of Environmental Modification Techniques, *ILM*, 1977, 88.

or controlling the use of certain weapons, parties to Protocol I of 1977 are bound by a general undertaking to verify whether *any* new weapon and its use will be compatible with the provisions of the 1949 Geneva Conventions and with the Protocol.[21] Some writers have commented that this is a surprising provision in the Protocol in the context of its other articles as the obligation to consider the use of certain weapons is more to be expected in a disarmament treaty.[22] But surely rules on weapons cannot be separated from what many call 'humanitarian';[23] both sets of rules are designed to improve the conditions of individuals in war.

B CONVENTIONAL WEAPONS

i The Meaning of Conventional Weapons

'Conventional'[24] weapons have been said to be all weapons which are not 'dealt' with in 'other contexts', *i.e.* they do not include namely nuclear, chemical and biological weapons, radiological weapons and other weapons of mass destruction.[25] The Resolution of the United Commission for Conventional Disarmament stated to the Security Council that the Commission would cover 'all armament and armed forces, except atomic weapons and weapons of mass destruction'.[26]

Such definitions are obviously unsatisfactory, relying as they do on non-areas which are unclear in turn. For the Aristotelian method of defining A by reference to non-A, obviously only works if non-A is fairly clear. Yet, there is a hazy area of weapons of 'mass destruction'[27] against which conventional weapons can be set, at least as a working hypothesis. Another delimitation one may be tempted to suggest, is that 'conventional' means the kind of weapons that have been used for some time in traditional wars, that is to say the 'old type' of weapons. But that is not correct either. 'New' weapons need not necessarily be weapons of 'mass destruction'. For example, laser-guided, particle beam or other directed energy weapons are considered, by relevant expert bodies, as 'conventional weapons'.[28]

Furthermore, anything can become a 'weapon' or be used as a 'weapon': the terrorists of 9/11 used civilian aeroplanes to ram into buildings to kill a large number of civilians.[29]

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21 Article 36.

22 Bretton, P., 'Le problème des 'méthodes et moyens de guerre ou de combat' dans les Protocols additionels aux Convention de Genève du 12 août 1949', *RGDIP*, 1978, 61.

23 See below, Chapter 9, section A, on the meaning.

24 *Cf.*, note 1 to Chapter 3, above, for the various meanings of the term and the significance attributed to it in the Law of War.

25 Group of Experts, A/39/349, 1985, 6.

26 S/C.3/32/Rev.1, 1948.

27 Below, in this Chapter, section B.

28 United Nations, Group of Experts, A/39/349, 1985, 7.

29 See in the next Chapter on illegitimate targets. The terrorists purposely attacked exempt and protected civilian targets the Twin Towers; the Pentagon might be perceived as a military target.

Remembering that nowadays 'anything' can become a weapon – as the aeroplanes in 9/11 – in a sense we have see a reversal to the Middle Ages when anything could also be used as a weapon. What may be even more important to regulate than weapons may be the targets that may be attacked.[30]

ii The 1981 Weaponry Convention

a The Lucerne and Lugano Conferences

The General Assembly of the United Nations requested the Secretary General in 1972 by Resolution 3032 (XXVII) to make a specific survey of existing rules on the restrictions of specific weapons. The Report[31] formed some basis for further discussions among experts.[32]

Following the International Conference on Reaffirmation and Development of International Humanitarian Law in Armed Conflict in 1972, two important specialist Conferences were held to consider the use of certain conventional weapons. At the request of Resolution XIV of the XXnd International Conference of the ICRC in Tehran in 1973, a Conference of Government Experts was held in Lucerne 1974, on Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects. A second Conference by Government Experts was convened by the ICRC under the decision on follow-up of the Lucerne Conference[33] and was specifically endorsed by the *ad hoc* Committee of the Second Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict in 1975.[34] The second Conference of Government Experts was held in Lugano in 1976.

The General Assembly of the United Nations decided on a à of the Diplomatic Conference of 1977 and decided by Resolution 32/152 to convene a Conference in 1979 on Conventional Weapons and, in advance of delegates meeting, a Preparatory Conference.

After the main Conference which produced the 1980 Conventional Weapons Conventions there has been great interest on the part of the General Assembly to promote further research in the conventional arms area.[35]

30 See Chapter 8 on rules of belligerence and legitimate targets.

31 A/9215, vols. 1 and 2.

32 *Cf.*, General Assembly Resolution 3319 (XXIX) 1974.

33 *Lucerne Report*, 1975, para. 282, 79.

34 CDDH, 2nd sess/./220 Rev.1, para. 56 *et seq.*

35 See Res. 36/97 A 1981 on the establishment of a special Group of Experts on Conventional Weapons; *cf.*, Res. 35/156 1980; see also Res. 38/188 A 1983 whereby the General Assembly requested the Group to continue its study; *cf.*, United Nations, *Guidelines for the Study of Conventional Disarmament*, GAORT, 12th Spec. sess., Suppl. No.3, A/S12/3. Annex III, 1982; Group of Experts on All Aspects of the Conventional Arms Race and on Disarmament Relating to Conventional Weapons and Armed Forces, A/39/348, 1985.

b The Structure of the Convention

A Convention on Prohibition and Restriction of the Use of Certain Conventional Weapons that Cause Unnecessary Suffering or Have Indiscriminate Effects, together with three Protocols, was eventually concluded in 1980.[36] The Convention itself is of a formal character and contains only provisions on entry into force, dissolution and review Conferences, whereas substantive provisions are relegated to the three separate Protocols.

The State Parties agreed to a major revision in 2002 so that it also applies to situations of non-international armed conflict, as noted earlier in this work.[37] The amendment to article 1 entered into effect in 2004.

The Conventional Weapons Convention, normally called the Weaponry Convention, provides for an interesting mechanism of indirect obligation.

c Mechanism of Indirect Obligation

The commentary to the Convention suggests that the principle of reciprocity has been adopted in the provisions. Thus, a State is only bound vis-à-vis another party which accepts and applies the Convention.[38] But the wording adopted does not provide for such reciprocity.[39] The question of factual application will add some vagueness to the obligations as it is difficult to ascertain implementation *in casu* of such rules. It would even seem that if a third party enters the conflict the original disputing parties will be bound between themselves even if the third party is not bound.[40] In this area the Convention itself is of great importance and presents a great landmark in international law. The mechanism by which a party is bound is not only the traditional signature and/or ratification procedure[41] but by what we in this work call 'indirect obligation': if a State is not a party to Protocol I of 1977 and an 'authority', for example, a liberation movement,[42] 'accepts' and 'applies' the obligations of the Geneva Conventions and the Weaponry Convention, then the Geneva Convention and the Weaponry Convention, together with the 'relevant' Protocols, are brought into force at once.[43] There is not even a provision that the relevant State itself is a party to the Geneva Conventions.

Nor is there any provision that *all* Protocols have been adhered to by that State: by the wording *any* relevant Protocol will come into effect by the declaration of the liberation or other 'authority'. As now there are hardly any liberation movements, one may raise the question whether, for example, the Taliban or Al-Qaeda one day may be considered to be an entity for negotiations.

36 19 *ILM* 1523.

37 See above, in Chapter 3 C iii b (2) on disarmament of conventional weapons.

38 A/AC.206/10, p. 22; *cf.*, article 7(2) and 7(4).

39 See further below, Chapter 12, section B ii.

40 Article 7(1).

41 See further, my *Essays*, 15 *et seq.*

42 As under Protocol I of 1977, article 96(3); *supra*, Chapter 6, section B d.

43 Article 7(4)(b)(i) and above, Chapter 6, section B d; *cf.*, below on reciprocity, Chapter 12 B ii.

According to the literal wording of the Convention,[44] the Geneva Conventions, the Weaponry Convention (with 'relevant' Protocols) comes into force for *all* parties to a dispute which means that even third States will be bound in this indirect way.

d Protocol I on Fragmentation Weapons

Fragmentation weapons usually produce a symmetrical pattern of fragments, with high velocity impact, around the bursting munition or, sometimes, along a linear trajectory, especially in the case of anti-personnel mines.[45] Some such fragments are not detectable by X-ray, thus making medical assistance difficult, and some fragments contain toxic substances such as uranium or zinc.

'Flechettes', small arrows or needles, also hit their target with high velocity, and do not often kill but cause multiple injuries and a very high degree of pain. Some of these weapons are constructed with cluster warheads or other devices with many bomblets.[46] Such weapons tend to be indiscriminate in their effect over a large area and they also tend to cause much unnecessary suffering by dispersal of tiny fragments.[47] 'Flechettes' can be used in ammunition for rifles but are more common in warheads.

It is questionable whether military necessity[48] is ever great enough to outweigh the suffering caused by fragmentation weapons. Many military manuals also prohibit some of these weapons, for example projectiles filled with glass.[49]

A proposal at the Diplomatic Conference was remitted to the Second Conference of Government Experts in Lugano in 1976. Following further negotiations leading up to the Weaponry Convention in 1981, it was agreed to include a comprehensive prohibition. It was decided to adopt Protocol I, annexed to the Convention, forbidding all weapons whose 'primary' effect it is to injure by fragments which cannot be detected in the human body.

It may be noted that the prohibition in Protocol I to the 1981 Convention only covers fragmentation weapons 'designed' to injure by undetectable fragments but not those which contain fragments, and which, on an incidental basis, may contribute to such fragments entering the human body. It is, for example, not uncommon for mines to have plastic casings in order to evade being found by mine detectors.[50] Although mines are thus often made nowadays with plastic components or casings, they are not caught by the Protocol.[51]

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44 Article 7(4)(b)(iii).

45 SIPRI, *The Law of War and Dubious Weapons* (Stockholm: SIPRI, 1976), 70–71.

46 On cluster bombs with numerous bomblets, BLU (bomb live units), see, Krepon, M., 'Weapons potentially inhuman: the case of cluster bombs', in Falk, R. (ed.), 4 *The Vietnam War and International Law* (Princeton: Princeton University Press, 1976), 266.

47 *Lugano Report, op. cit.*, 204; *cf., Lucerne Report, op. cit.*, 49–61.

48 *Cf.*, below, Chapter 12, section B i a.

49 *Lugano Report, op. cit.*, 204.

50 A/AC.206/10, 1981, 4.

51 *Report of the Diplomatic Conference*, vol. 16, 526.

Nor does the Protocol cover fragmentation weapons whose fragmentation are detectable, such a steel flechette weapons.[52]

e Protocol II on Treacherous Weapons

In spite of horrendous injuries caused by landmines, especially to civilians, such mines are still permissible under the Law of War as a defensive weapon. It is difficult to distinguish between defensive and offensive use of landmines. However, as an offensive weapon it clearly becomes indiscriminate, liable to kill also civilians and other protected persons and therefore might be prohibited as weapons used for advancing forces.

Protocol II was amended in 1996 to extend the restrictions on landmine use to internal conflicts. The amendment also established reliability standards for remotely delivered mines. Finally the amendment prohibited the use of non-detectable fragments in anti-personnel landmines (APL). The amendment became effective in 1998.

The main reason for condemning certain mines is that they are indiscriminate by nature. If a house is booby-trapped by a retiring army, the victims may not necessarily be enemy forces but the returning inhabitants.[53] Thus, the basic criterion for legality of mines is that of discrimination. If mines can be designed to be aimed at the enemy, distinguishing between the enemy and civilians, between enemy warships and merchantmen, then there is no reason why mines should not be allowed, as much as ordinary weapons which are aimed at their target by soldiers.

New rules for landmines had been proposed as early as in the ICRC Draft Rules of 1956.[54] There had been further interest on the part of the ICRC.[55] There has been a sudden interest in landmines in recent years due to the fact that booby-traps and similar contraptions constitute a favourite weapon of terrorists.[56] There is no doubt that these practices explain why Protocol II to the 1981 Convention was adopted.[57] The Mines Protocol to the 1981 Convention covers only landmines but not mines at sea.[58]

(1) General Provisions

Protocol II to the 1981 Weaponry Convention defines mines as

> 'munitions placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle.',

52 *Cf.*, GAOR, 33rd sess., Suppl. no. 44, A/33/44, Annex, ss. F and G.

53 Greenspan, *The Modern Law of Land Warfare*, *op. cit.*, 367.

54 Articles 14–15. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, Schindler and Toman, *Documents*, *op. cit.*, 2nd edn, 1981, 187.

55 See Res. XIII at the Istanbul Conference of 1969; *cf.*, Res. XIV at the Tehran Conference in 1973.

56 *Cf.*, above, Chapter 1, sections B iii c on terrorism, and D iv on terrorist warfare.

57 Carnahan, B.M., 'The law of land mine warfare, Protocol II to the UN Convention', 105 *MilLR*, 1984, 73 at 75.

58 See below, in this Chapter, section A iii, for rules on mines at sea.

A 'remotely delivered mine' means any mine so delivered 'by artillery, rocket, mortar or similar means or dropped from an aircraft'.[59] This definition covers only landmines; the Protocol excludes specifically anti-ship mines at sea or in inland waterways.[60]

The Mine Protocol attempts to protect 'civilians', including UN mission and peacekeeping forces,[61] but does not define this term. Some commentators[62] assume an automatic reference to Protocol I of 1977 where 'civilians' are defined[63] as anyone who is not a member of the armed forces. But in view of the considerable difficulties of defining precisely the term 'member of the armed forces' we are not any wiser even if such cross-reference is allowed by implication. The notion of 'combatants' is, as has been demonstrated,[64] a highly controversial and fluctuating term, and conversely, so is the concept of 'civilians'.

Bearing in mind the recurring problems of the notions 'combatants' and 'civilians', the ambit of Protocol II to the Weaponry Convention provides certain restrictions on landmine warfare.

As has been mentioned, anti-personnel mines are a common way of impeding advances of the enemy in specific territory. The Protocol stipulates that no mines or booby-traps may be used against civilians.[65] The Protocol also prohibits the indiscriminate use of mines and defines 'indiscriminate use' as any placing of weapons which is not directed against a military objective; or which uses a method of delivery which cannot be directed against a specific military target; or which may be effected to cause incidental loss of life of civilians, or injury to civilians[66] or damage of civilian property or a combination thereof, provided finally that such injury (or damage) is excessive in relation to the direct military advantage anticipated.[67]

The article thus introduces several, conjunctive or successive, subjective tests. Who is to decide whether there is 'direct' military advantage? Views on such a matter in the opinion of the attacker and of the attacked may not necessarily coincide. Secondly, it is not even the imminent military advantage which is weighed up but the 'anticipated' military advantage. Are there any time limits or any organic connection of any other form linking the subjective assessment of 'military advantage' to a point in time near to action or can it also cover advantage which will accrue later? These questions appear to be pertinent but do not seem to have attracted much attention at the Conference or by writers.

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59 Article 2.

60 Article 1.

61 *Cf.*, above, Chapter 3, section C vii.

62 Carnahan, 'Land mine warfare', *op. cit.*, at 76.

63 See Protocol I of 1977, article 50.

64 Above, Chapter 4, section C.

65 Article 3(2).

66 Note that UN forces are specially protected under the Protocol, see article 8.

67 Article 3(4).

(2) Remotely Delivered Mines

At the Lucerne Conference it had been suggested that what was then called 'scatterable' mines would be covered by a future Convention. Such mines were later renamed 'remotely delivered mines', *i.e.* they are those which are delivered at long range by aircraft, guns, rockets or mortar.[68] Indiscriminate injuries to civilians may follow on remotely delivered mines, which are often laid in very large numbers by aircraft. There are several hazards connected with such practice: the limits of the minefield will be uncertain for no actual soldiers will have been there to demarcate any lines. Furthermore, there will be inevitable indiscriminate injuries to civilians and combatants alike, if the mines are not equipped with self-destruction devices and remain after the end of hostilities. At Lugano it was suggested[69] that all minefields with more than 20 mines should be recorded, as was already the case in most armies with regard to manually delivered mines.

The final compromise understanding at the Weaponry Conference between those who wanted to forbid remotely delivered mines and those who advocated their permissibility, was that general restrictions on warfare would apply to such mines.[70] This meant that the provisions of Protocol I of 1977 would, *mutatis mutandis*, apply, for example with respect to advance warning of attacks that might affect civilians.[71] It is indicated that by 'long range' is meant a distance greater than 2,000 metres; mines within that distance are equated to 'manually' delivered mines.[72]

The conditions which make such mines permissible are that they are fitted with neutralising devices or they are delivered within a distinctly marked field.[73]

But the provisions in Protocol II to the Weaponry Convention[74] that remotely delivered mines may not be used in towns or other places of civilian population is limited by the clause providing for an exception concerning imminent ground combat. Another exception which also hollows out the legal contents of the Protocol concerns authorised use of mines if a party finds itself in 'close vicinity' of a military objective of the other party. Finally, a third exception is designed to cover the case where civilians have been adequately 'warned'.[75]

The section about remotely deliverable mines in Protocol II was amended in 1996 to enforce reliability standards for such weapons.

(3) Booby-Traps

Booby-traps are defined as 'any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person distributes or approaches an apparent harmless object or performs an apparently

68 *Lugano Report, op. cit.*, 50.

69 *Lugano Report, op. cit.*, 50.

70 *Report of the Committee of the Whole*, A/CONF/95/11, 1980/2; *cf., Lugano Report, op. cit.*, 20.

71 See article 37(2) of Protocol I of 1977 and below, Chapter 8, section A iii (1).

72 Protocol II, article 2(1), 3, 5.

73 *Lugano Report, op. cit.*, 50–51; see COLU/203 on distinction between anti-tank and anti-personnel minefields.

74 Article 4.

75 Article 4(2)(b).

safe act'.[76] It may not always be easy to distinguish between booby-traps and other mines but the Protocol provides, however, for special and 'unconditional' prohibition of certain so-called 'perfidious' booby-traps. By such booby-traps one usually understands explosive devices concealed in innocuous objects like children's toys, or in connection with protective emblems.[77] Many such devices may already be forbidden under of the Hague Regulations.[78]

Protocol II distinguishes between booby-traps which are specifically treacherous or perfidious[79] and those which are designed to cause superfluous injury or unnecessary suffering.[80] The first group is subdivided into devices which are 'pre-fabricated' and encased in harmless objects and those which are attached or associated with protective emblems, sign or signals.[81] Other types of booby-traps are only allowed if 'due precautions are taken to protect civilians' as such devices expose civilians to particular risks.[82]

(4) Delayed Action Devices

Other devices which are remotely or automatically detonated by delayed action pose special dangers to civilians and are prohibited by the Protocol unless special provisions are taken to safeguard civilians from their effects.[83]

(5) Recording of Minefields

The Protocol provides that all 'pre-planned' minefields are to be recorded[84] and parties must 'attempt' to record other minefields as well. But the term 'pre-planned' is not defined.[85]

(6) Remnants of Mines

General Assembly Resolution 36/71 emphasised the hazards posed by 'material remnants' of war, especially by mines. Libya proposed this Resolution in the Assembly as that country had had the experience of numerous casualties caused by mines left after the Second World War.[86] Protocol II of 1981 consequently incorporates a provision for such cases. The Protocol provides for agreements after hostilities with other States and with organisations for information and

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76 Article 2.

77 See list of example in Protocol II to 1981 Weaponry Convention, article 6(1)(b); *cf.*, Annex I of Protocol I of 1977, for list of protective signs and signals.

78 Article 23(e); *cf.*, below, Chapter 8, section A iv d on ruses.

79 Article 6(1).

80 Article 6(2).

81 *Cf.*, article 35(2) of Protocol I of 1977 and below, Chapter 8, section A iv d on perfidy.

82 Article 6, 3 and 4. See, *Lugano Report*, *op. cit.*, 51 and COLU/203, 2145,219; *cf.*, COLU/206 on a proposal to forbid camouflage of devices among the civilian population.

83 Article 4. *Cf.*, *Lugano Report*, *op. cit.*, 51. *Cf.*, COLU/213 and CDDH/IV/201 proposing a total ban.

84 Article 7(1).

85 It is uncertain whether the term 'pre-planned' implies any more planning than the word 'planned': Glynn, T., 'Land mine warfare', Lecture at British Institute of International Law, 27 July 1985.

86 Working Group, 1980, 6.

technical assistance to remove or neutralise mines and booby-traps emplaced during a conflict. This is already common practice and there have been numerous agreements to dispose or reduce the risks of mines.[87] The Protocol provides for information to be pooled to the Secretary General of the United Nations[88] and this may be a useful coordinating system to safeguard all persons after the end of hostilities. The obligation to supply information is the only substantive provision in this part of the Protocol for agreements 'to be made' are naturally not more than *pacta de contrahendo* and the Protocol does nothing more in that respect than encouraging, and perhaps providing a framework, for such agreements.

But the provision on information gave rise to ample discussion as the Protocol, in that part, entailed a legal duty. Under the original proposal[89] an occupied, but not an occupying, force would be required to supply information although minefields laid by the occupied party might have constituted the only defensive means of 'counterbalancing' the occupation. The final text provides that disclosure of information is mandatory only in cases where the forces of neither party are in the territory of the adverse party.[90]

There is a technical Annex to Protocol II on Treacherous Weapons with guidelines. However, this Annex is merely explanatory and non-binding and entails no legal obligations.

f Protocol III on Incendiary Weapons

There were some early attempts to outlaw certain incendiary weapons. Flame throwers were forbidden in several peace treaties after the First World War.[91]

The Geneva Disarmament Conference in 1978 discussed the prohibition of incendiary weapons along with chemical and biological weapons[92] in plans for qualitative disarmament.[93]

In more recent times, especially in connection with the Vietnam War, there has been further evidence that massive spread of fire by incendiary weapons is indiscriminate in its effects. Furthermore, injuries resulting from either direct use of the weapons or from fire caused by them, are intensely painful, requiring assistance by medical resources far beyond the means of most countries.[94] The use of napalm

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87 *E.g.* Korea Armistice Treaty, 1953, 4 *UNTS* 234, article 2; Vietnam Treaty, 1973, 24 *UNTS* 148, article 5; Egypt Israel Treaty, 1979, 18 *ILM* 362, article 6(4) Annex.

88 Article 7(3)(a).

89 A/ASC.206/10, 1981, 6.

90 Article 7(3)(a).

91 See, Treaty of St. Germain, article 135; Neuilly, article 82; Trianon, article 119 and Sèvres, article 176.

92 Below, in this Chapter, section D.

93 SIPRI, *Law of War, op. cit.*, 65.

94 United Nations, *Report by the Secretary General on Napalm and Other Incendiary Weapons and All Aspects of their Possible Use*, UN, 1972, A/8803 and E.73.1.3; *cf., Replies from Governments*, 1972, A/9207.

in particular has been repeatedly condemned.[95] Another new type of incendiary weapon relies on the release of a thickened pyrophoric agent.

The ICRC included prohibition in the Draft Rules of 1956 for the Limitation of the Dangers Incurred by Civilian Population in Time of War.[96] The ICRC gave the question of incendiary weapons further attention at several of its Conferences.[97] The International Human Rights Conference in Tehran in 1968 also gave the matter special focus.[98]

Incendiary weapons have been defined as those which depend for their effects on the action of incendiary agents; such agents are substances which act through flame and/or heat derived from exothermic chemical reactions, *inter alia*, normally combustion reactions.[99] There are four broad categories: metal incendiaries (*e.g.* magnesium); pyrotechnic (*e.g.* those igniting when exposed to air); and the oil based types (*e.g.* napalm). All weapons based on these types are indiscriminate in their effects and cause injuries which require exceptional medical resources for treatment.[100]

At the first session of the Diplomatic Conference in Geneva in 1974 the question of incendiary weapons was discussed in an *ad hoc* Committee. A proposal by one group of States[101] was expanded and supported by others.[102] These efforts[103] were later supplemented by detailed analysis by the two Conferences of Government Experts on the use of Certain Conventional Weapons.

The Expert Conferences at both Lucerne[104] and Lugano[105] further suggested prohibitions of incendiary weapons.

(1) General Provisions

The definition, as suggested by the Lugano Conference, and adopted by the Protocol, excludes munitions which have secondary, or incidental, incendiary effects, for example illuminants, tracers, smoke or signalling systems.[106] Prohibitions include, on the other hand, those which combine incendiary effect with other

95 *E.g.* A/9215; A/9207 Corr.1 and Add.1; *cf.*, A/8803/Rev.1, Report of the Secretary General; see also, United Nations Secretariat, *Report on Existing Rules of International Law Concerning the Prohibition or Restriction of Specific Weapons*, A/9215, vols 1 and 2. *Cf.*, General Assembly Resolutions on incendiary weapons, Resolutions 2444 (XXIII) 1968; 2852 (XXVI) 1971; 2932 A (XXVII), 1972; 3076 (XXVIII) 1973 urging the Diplomatic Conference to reach agreement to forbid napalm; 3255 AB (XXIX), 1974; 3464(XXX) 1975; 31/64 1976; 33/70 1977; 34/82 1978; 35/153 1979.

96 ICRC, Draft Rules, Geneva, 1956, article 14.

97 See *e.g.* Resolution XVII at XXth Conference 1965.

98 See Resolution XXIII of the Conference.

99 United Nations, *Report by the Secretary General on Napalm and Other Incendiary Weapons and All Aspects of their Possible Use*, 1973.

100 SIPRI, *Law of War*, *op. cit.*, 64–65.

101 Austria, Egypt, Mexico, Norway, Sudan, Sweden, Switzerland and Yugoslavia.

102 Algeria, Iran, Ivory Coast, Lebanon, Lesotho, Mali, Mauritania, New Zealand, Tunisia, Tanzania, Venezuela and Zaire.

103 CDDHDT, 1975.

104 *Lucerne Report*, *op. cit.*, 15–35.

105 *Lugano Report*, *op. cit.*, 44–49, 128–129, 176, 193-198 and 202.

106 *Lugano Report*, *op. cit.*, 203.

destructive effects, *inter alia*, shaped charge effect, designed, for example, to pierce armour or as defence against aircraft.[107] The Protocol thus affects most incendiary weapons in most circumstances.[108]

The Protocol states that it is forbidden, in all circumstances, to make the civilian population *per se* the object of attacks by incendiary weapons[109] or to attack any military objective located within a concentration of civilians.[110] Such attacks may already be forbidden under international law[111] but the Protocol usefully goes on to define what 'concentration of civilians' signifies. Such a concept is said to be the permanent or temporary concentration in inhabited parts or cities, towns or villages, camps or columns of refugees or evacuees or group of nomads. The wording was chosen to convey a 'word picture' rather than exact mathematical criteria.[112] The definition as phrased seems to cover a wider sphere than normally subsumed under 'civilian population', for other references to concentration of civilians usually rely on its more static nature whereas Protocol III especially mentions those who are on the move, either as refugees, evacuees or nomads.

'Military' and 'civilian' objectives are, on the other hand, defined by traditional provisions in 1949 Geneva Conventions and in the 1977 Protocols.[113] The Protocol forbids attacks not only on civilian population by incendiary weapons[114] but also on military targets within a concentration of civilians, as defined above, by all air-delivered incendiary weapons.[115] Furthermore, other than air-delivered incendiary weapons may only be used against military objectives with any concentration of civilians if military targets are separable from civilian objectives and all precautions have been taken to save civilians from attack.[116]

(2) The 'Jungle Exception'

Under article 2(4) Protocol III to the Weaponry Convention it is forbidden to attack forests or 'other kind of plant cover' *except* if such 'natural elements' are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

The meaning of the exception is that a State naturally covered by jungle vegetation will not have any protection under the Protocol against attacks by, for example, napalm weapons. Nor will any civilian target be protected for an attacker cannot know whether or not the jungle conceals a 'military' or 'civilian' objective.

The surprising clause, which we may name the *'jungle exception'* as that expression conveys the type of territory the negotiators primarily had in mind, is

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107 *Ibid., loc. cit.*

108 *Ibid., loc. cit.*

109 Article 2(1) of Protocol III to the 1981 Convention.

110 Article 2(3).

111 Below, Chapter 8, section A ii on targets.

112 5 *United Nations Disarmament Yearbook* 1980, 320.

113 *Cf.*, below, Chapter 8, section A ii.

114 Article 3(1).

115 Article 3(2). There was a last minute compromise on this point by the United States and the other parties, A/AC.206/10, 16.

116 Article 3.

designed to undermine the functioning of Protocol III in a number of countries with dense tropical vegetation.

It is clear that the clause was devised to cater for situations as that encountered by the United States in Vietnam when fighting the Viet-Cong was hampered by the tropical vegetation which concealed soldiers and arms. Under Protocol III as it now stands it would seem that it would not be illegal for a State to use, for example, Agent Orange, in such a battle situation. There is every reason to encourage a revision of this Protocol in view of recent knowledge of the environmental and genetic damage by such chemical weapons.[117]

g Protocol IV on Blinding Laser Weapons

The legality of laser weapons has been discussed for over 35 years.[118] A new Protocol IV was adopted at the Review Conference in 1995 on so-called 'blinding' laser weapons. Such weapons are defined as those which are designed to cause 'permanent blindness to un-enhanced vision, that is to the naked eye or to the eye with corrective eyesight devices'. The Protocol prohibits the *use* and *the transfer* of such weapons,[119] and admonishes States to take care that their laser systems do not cause permanent damage. However, the Protocol does not prohibit the production of weapons specifically designed to cause such blindness.[120]

iii The Landmine Convention of 1997

There were in 1999, more than 110 million landmines scattered across the world in some 63 countries, killing or maiming at least 26,000 persons every year.[121] Twelve years later the figures appear to be the same.[122] The reason for this curious coincidence is clearly that it is totally impossible to know how many landmines there are in the world and how many of these are unexploded. This is nothing of which States can possibly keep statistic records. Even men in the field will not be able to know which mines are left and which are unexploded, either of their own or those of the enemy. Efforts to introduce an obligation of mapping mines have not been successful as there are other priorities in military operations.

One may estimate that there are about 10 million landmines in Afghanistan and some eight to ten million landmines in Cambodia. Other countries also riddled with landmines after recent conflicts are Mozambique, Angola, Nicaragua and Bosnia.[123]

As mentioned above,[124] landmines have, for a long time, been accepted as legitimate defence weapons. As anti-personnel mines (APMs) these weapons

117 See further, below, in this Chapter, section D.

118 *Lucerne Report*, 73; *Lugano Report*, 1980–1.

119 Article 1 of the Protocol.

120 Article 3 furthermore provides that 'Blinding as a collateral effect of the legitimate military employment of laser systems ... is not covered ... by the Protocol'.

121 SIPRI *Yearbook*, 1997, 495ff.

122 http://www.landminesurvivors.org/what_landmines.php.

123 Canada, *Banning Landmines, The Indiscriminate Killers*, 1999, 9ff.

124 See above, in this Chapter, section ii e.

cause death but most often loss of limbs, usually feet and legs. Concerns about anti-humanitarian aspects of their use, reflected in the Ottawa process described below, were largely superseded in the United States by the legitimate necessity to use sophisticated mines, so-called 'smart mines' with self-destructing devices, in Korea.[125] Russia and China were also reluctant to ban landmines, useful as they are to defend long borders and to provide early warning of attacks and incursions. As has been shown before, Protocol II to the 1980 Convention does contribute to some restrictions in the use of landmines, but is not adequate for preventing civilians, especially children, from being killed and maimed by landmines. Obtaining general agreement for a revision of Protocol II to enlarge and deepen the prohibition proved difficult and little progress was made in the Disarmament Conference (CD) where the United States would have preferred to negotiate new restrictions. In view of this passivity,[126] a movement later to win the Nobel Peace Prize was started: the International Campaign to Ban Landmines (ICBL). Other NGOs joined forces as well as some noted individuals, among them Diana, Princess of Wales, who did much to raise the awareness of the tragedies that followed the use of landmines.

A plea was made by Human Rights Watch in 2001 to the Defence Ministers of NATO to at least use 'smart bombs' in attacks in areas with civilians as 'dumb bombs' cause more damage and injury. Gravity or 'dumb' bombs cause more injury and especially those which are cluster bombs. Cluster bombs present a hazard to civilians similar to landmines. The 'bomblets' they release have been consistently shown to have a high initial dud rate. This leaves many highly volatile explosives that, by their nature, cannot distinguish between combatants and civilians. The problem is compounded by the large number of sub-munitions contained in each cluster bomb. Even if their initial dud rate were reduced, cluster bombs are typically dispersed over wide areas, and thus can be indiscriminate if used near areas populated by civilians. 'Smart bombs', on the other hand, are those which are precision-based and thus able to reach a specific target without causing collateral damage to surrounding areas.[127]

Through the initiative of the Canadian government, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction, was signed in Ottawa in December 1997. The signatures of 122 States marked the end of a negotiated multilateral convention in record time: after an initial meeting in Vienna in February 1997, attended by 111 States, some 97 countries indicated their support for a Convention for a total ban in the Brussels Declaration. Final negotiations took place in September 1997 and the Convention was ready for signature three months later. Ratified by a large number of States, the Convention came into force on 1 March 1999. In May 1999, there was a follow-up meeting in Maputo, Mozambique, with a major landmine problem, which ratified

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125 US, *Defense News*, 20 June–6 July 1997, 11.

126 However, the United States announced in 1997 that it would observe a permanent ban on the export and transfer of APMs and initiated new negotiations in CD aimed at banning the use, production, stockpiling and transfer of APMs.

127 *Open letter*, by Kenneth Roth, Director of Human Rights Watch on 17 January 2002 to the Defence Ministers of NATO.

the Convention, now adhered to by 159 States. Among the non-signatories, as could be expected, are the United States, Russia, China and Israel.

The Convention provides that contracting parties will ban the transfer and stockpiling of anti-personnel mines (APMs), destroy existing stockpiles, clear minefields and cooperate with a compliance regime. The time limit was set to four years from the entry into force of the Treaty.

An APM is defined by the Convention as a mine, designed to be exploded by the presence, proximity or contact of a person and that will 'incapacitate, or injure one or more persons'.[128] This definition thus excludes anti-tank and other anti-vehicle mines.

The greatest problem is obviously mine clearance, given that maps of minefields are rarely available, or rarely established. It is also a very costly exercise which countries in the Third World can rarely undertake without major assistance from international agencies. However, through various UN agencies, coordinated by the United Nations Mine Action Service (UNMAS), progress has been made: some 23 per cent of landmines and some 64 per cent in Afghanistan have been cleared.[129]

By 2008, 11 States had cleared all known mined areas from their territory: Bulgaria, Costa Rica, El Salvador, France, Guatemala, Honduras, FYR Macedonia, Malawi, Suriname, Swaziland and Tunisia. At the November–December 2009 Cartagena Summit for a Mine-Free World, Albania, Greece, Rwanda and Zambia were also declared mine-free. On 2 December 2009, Rwanda was declared free of landmines. The announcement was made at the Cartagena Summit on a Mine-Free World in Colombia.[130] In 2010, Nicaragua was declared free of landmines and, a year later, in 2011, Nepal was declared a landmine-free zone. In 2011, Burundi was also declared landmine free.[131]

The United Nations Office for the Coordination of Humanitarian Assistance to Afghanistan (UNOCHA) has devised a programme for developing mine awareness among civilians, especially children, and has contributed to mine clearance.

Canada has provided much financial assistance as well as expert help for mine clearance and has established a Canadian Landmine Fund and special Canadian Landmine Action Programmes for numerous countries. The whole process of the Ottawa Convention, instigated by Canada, shows that individual initiatives from a single government can snowball support from NGOs and individuals, as well as from other States, enabling international society to deal with difficult weapons problems which so far had escaped effective regulation.[132]

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128 Article 2.

129 UN, *Fighting Landmines, First Meeting of States to the Convention Banning Landmines, 3–7 May 1999, Maputo 2.*

130 http://www.icbl.org/index.php/icbl/Library/News-Articles/Work/pr-4dec2009.

131 http://www.maginternational.org/usa/news/burundi-country-declared-landmine-free/.

132 This may be an example of 'international democracy' in full play when numerous persons in numerous States, as well as their governments, perceive a situation which must be condemned as intrinsically 'wrong'. See, on such other situations as, for example, the condemnation of *apartheid* in Detter, I., *International Legal Order*, *op. cit.*, under Natural Law, 197–212.

Mali may have a new contamination problem resulting from the laying of mines by a non-state armed group in 2011 as reported at the 11th Annual Meeting.[133] This may alert the State Parties to consider extending the application to non-State actors as has been done with the various Protocols to the 1980 Weaponry Convention which now applies in internal conflicts.

In 2012 there were serious incursions by the Tuareg nomads into the southern part of Mali. Many of these had joined the AQMI terrorists (the group known as Al-Qaeda Maghreb Islamistes), a movement that rapidly conquered nearly half of the northern part of Mali. They came from the north with arms acquired from the Libyan rebels who had overthrown the Gaddafi government during the Arab Spring in 2011. The Libyan rebels had been seriously over-armed and had sold their arms. The landmines posed, in this context, a serious hazard to civilians in the area.

iv Naval Mines

The 1907 Hague Convention VIII on the Laying of Automatic Submarine Contact Mines[134] forbids unanchored mines unless they are made harmless one hour after control over them has been relinquished.[135] It is furthermore prohibited to anchor mines unless they are neutralised if they break loose from their mooring.[136] The same guidelines as apply for legality of landmines are relevant to mines at sea: it is the security of non-combatants and of civilians that are at the core of prohibitions.[137]

But different problems are raised by naval mines than by land mines: at sea mines often pose enhanced risks to neutrals, both if they interfere with the freedom of the high seas and if they move, by currents or wind, to a place away from where they were emplaced.[138] Therefore, Hague Convention VIII provides that security of 'peaceful shipping' must always be safeguarded whenever automatic contact mines are emplaced.[139] On the other hand, Hague Convention VIII reflects the view that naval mines are not, *per se*, illegal, but their use has to be regulated. Yet, the Regulation of Hague Convention VIII was, in the opinion of a number of States, so unsatisfactory that the United Kingdom made a specific reservation[140] to the effect that it reserved the view of the legitimacy of practice *not* prohibited by the Convention.[141] The United Kingdom thus sought to restrict mines to the territorial sea and to prohibit altogether mines on the high seas.[142]

133 11th Meeting of States Parties to the Mine Ban Treaty.

134 For reference, see, *NRGT*, 3 série, 580; 2 *AJIL*, 1908, 138.

135 Article 1.

136 *Ibid.*

137 *Cf.*, Bock, I., *Die Entwicklung des Minenrechts von 1900–1960, Hamburg*, diss. (Universität Hamburg), 1963, *passim*.

138 *Cf.*, Institut de droit international, *Annuaire* (Paris, 1910).

139 Article 3.

140 Schindler and Toman, *Documents*, *op. cit.*, 720; *Parliamentary Papers*, Misc.No.5, 1909.

141 Such a measure is not a reservation properly so called as it does not restrict, but possibly extends, obligations assumed under a treaty: see Detter, I., *Essays*, *op. cit.*, 50.

142 Thorpe, A.G.Y., 'Mine warfare at sea, some legal aspects for the future', Lecture at the British Institute of International Law, 17 July 1985, MS, 5.

The problem of discrimination is, as stated above, of primary importance to naval mines. The reason for regulating the use of contact mines in Hague Convention VIII was precisely that such mines do not, by definition, distinguish between ships and would pose particular hazards to neutral shipping. But other types of mines known at the time of the Hague Convention, for example command mines, were not forbidden by the Convention in 1907. Nowadays highly sophisticated mines have been developed, sometimes with discriminatory sensors, which can distinguish between different types of ships. Some mines are magnetic, acoustic or rely on a pressure effect or a combination thereof. They can usually be operated at a distance with great accuracy and have a high reliability factor. However, the provisions of the Hague Convention VIII of 1907 on neutralising mechanisms[143] and information of danger zones[144] could usefully form a foundation of basic concepts for further regulation of mine warfare at sea.[145]

But the compatibility of some modern mines with other treaties than the Hague Conventions may be questioned. For example, the tethered Continental Shelf Mine with a nuclear rocket propelled warhead has such sensors for anti-submarine warfare.[146] If new discriminatory mines are designed their legality may be judged differently from the old type of contact mine. It would be highly questionable to consider the tethered nuclear Continental Shelf Mine compatible with the provisions of the Sea-Bed Treaty[147] but writers have suggested that, since it is not anchored or emplaced but 'suspended' it might escape the prohibition of the Sea-Bed Treaty.[148] Authors who take this line are usually also influenced by the factor that the Continental Shelf Mine is not a weapon of 'mass destruction' but only designed for anti-submarine warfare and that, for this additional reasons, it is, it is claimed, not prohibited under the Sea-Bed Treaty.[149] Yet, as we shall see, weapons may be illegal under international law for reasons other than being weapons of mass destruction and, for other reasons, mines for anti-submarine warfare (ASW) may thus be incompatible with international law.

The importance of any obligation to notify neutral shipping of any minefield was made obvious in the *Corfu Channel Case*.[150] A duty to warn neutral ships today derives both from Hague Convention VIII and from Geneva Convention 1958 on

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143 Article I.

144 Article 3.

145 United Nations, *Study of the Naval Arms Race*, Geneva, 27 July 1985, 63.

146 Thorpe, A.G.Y., 'Mine warfare', *op. cit.*, at 20.

147 Above, Chapter 6, section A v.

148 The Treaty refers to 'implantation' or 'emplacement' on the sea-bed which leaves it open whether mobile or suspended mines are permissible. The tethered shelf mine has a rocket-propelled nuclear warhead.

149 O'Connell, D.P., *Influence of Law on Sea-Power*, *op. cit.*, 157. The Treaty does not apply to the Sea-Bed beneath territorial waters.

150 ICJ *Reports*, 1949, 71.

the High Seas[151] and the 1982 Law of the Sea Convention,[152] all of which lay down already existing rules of international law.[153]

But even if shipping of third parties must be safeguarded in a dispute, there remains a possibility for the use of mines on the high seas for defensive purposes.[154]

Mines at sea are not made illegal by the Conventional Weapons Convention of 1981.[155] However, certain principles in the Mine Protocol to that Convention lay down certain general rules which, *mutatis mutandis*, also apply at sea.[156]

v Small Calibre Weapons

Weapon research has developed lighter weapons, with lighter ammunition of high velocity. Some of such high velocity projectiles disintegrate on impact. Due to their high velocity small calibre bullets also tumble on impact in the human body and therefore present a broad face to tissues. The passage of such bullets also create intense hydrodynamic shock waves which cause severe injury and mutilation of tissue outside the actual trajectories.[157] The only regulation in treaty law so far of munitions because of their shape and function is the prohibition of munitions weighing less than 468 grams in the St Petersburg Declaration of 1868[158] and of dum-dum bullets in the Hague Declaration 1899.[159]

Field manuals of some major countries go further than the Hague Declaration and forbid 'irregular shaped bullets'.[160] Effective prohibition should, said the Lugano Conference, aim at all small calibre projectiles which cause injuries beyond those necessary to disable the enemy, whether such excessive injuries are due to the bullets' flattening, expansion, velocity or tumbling.[161]

The regulation of small calibre weapons did not form part of the 1981 Weaponry Convention or its Protocols. The Conference produced, however, a special declaration, 'appealing' to States to exercise 'care' in developing such systems and encouraged further research in this area.[162] However, the Weaponry Convention of 1981 provides a useful framework wherein a further Protocol on small calibre weapons can be included.

151 Article 15.

152 Article 24.

153 See above, Chapter 6; sections A v and vi on provisions of these instruments on the use of the high seas for peaceful purposes.

154 *Cf.*, Christol, C.Q. and Davies, C.R., 'Maritime quarantine: the naval interdiction of offensive weapons and associated material to Cuba, 1962', 57 *AJIL*, 1963, 525.

155 Above, in this Chapter, section A ii.

156 Below, Chapter 8, section B.

157 *Lucerne Report, op. cit.*, 37–47; *Lugano Report, op. cit.*, 61–69, 116–119, 194–195 and 205–206.

158 18 *NRGT* 474.

159 26 *NRGT*, 2 série, 1002.

160 *Lugano Report, op. cit.*, 205.

161 *Lugano Report, op. cit.*, 205.

162 Resolution adopted by the Conference, 7th Plenary meeting, 23 September 1979, Appendix E to Convention 1980.

vi Other Unregulated Weapons: Drones and Robots

Some new weapons may not necessarily be forbidden or questionable but might, in due course, be ripe for regulation. The most dramatic change in weaponry may be the unmanned aerial vehicles (UAVs), also known as unmanned aircraft systems (UAS), remotely piloted aircrafts (RPAs) or unmanned aircrafts. A simple type of these weapons are the drones.

Drones have been used in armed conflict for some time but the devices are now becoming highly sophisticated. Drones have recently been used in frequent cases of target killings.[163]

Simple drones-are remotely piloted aircrafts but autonomous control is increasingly being employed in UAVs to allow them to fly autonomously based on pre-programmed flight plans, using more complex dynamic automation systems.

Some drones are used as target practice for anti-aircraft crews. This is, for example, the case with the ULTIMA target drones used by the Belgian Army. These drones are now used at the yearly Mistral firing campaign at the NATO Missile Firing Installations on the island of Crete in Greece. The drones are equipped with smoke flares for visualisation and infrared flares to act as a heat source for the heat-seeking missiles.

Other new weapons are the Scout robots, a device which can be used to detect and disarm mines[164] but which can also be used in military attack operations. Measuring just two feet wide and less than four feet in length, the Gemini-Scout Mine Rescue Robot packs a set of gas sensors, a thermal camera and a two-way radio, allowing it to detect and locate dangerous underground materials and relay critical information to above-ground rescue workers.

Drones have been used extensively to attack Al-Qaeda terrorists. In 2011, a US drone killed master bomb maker Ibrahim Hassan al-Asiri, the inventor of plastic and liquid bombs which cannot be detected at security controls. On 5 May 2012 a drone killed Fahd Mohammed Ahmed al-Quso, believed to have constructed a new 'undetectable' bomb, designed to bring down aeroplanes by suicide terrorists.[165]

In the summer of 2011 Libyan rebels ordered a Scout to find out Gaddafi's troop positions. The Zariba Security Corporation,[166] in cooperation with the Libyan Transitional National Council, delivered a Scout to frontline troops making the push on Tripoli. Within minutes, the rebels had their Scout airborne and an overhead view of the battlefield.

There are now multiple versions of drones some of which are for civil and peace time use. There is, for example, the A.R. Drone, built by the French company Parrott,

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163 See above, Chapter 2 B iii on Target killings.

164 Drones have also been used in civilian public sector. Such robots supplied by the Airfoil Company, in Lorraine, Illinois, surveyed tornado damage in Joplin, Missouri, using drones for search and rescue scenarios. Overhead photos by drones have also been used to reconstruct accidents, evaluating structure fires, or surveying power transmission lines.

165 Al-Quso had been indicted in the United States for his role in the 2000 bombing of the USS *Cole* in the harbour of Aden, Yemen, in which 17 American sailors were killed. On other uses of drones to attack members of Al-Qaeda see above, Chapter 2 B iii c.

166 See above on military companies, Chapter 4 C ii (2) (ii).

a four-rotored recreational drone with an HD camera, controlled by a tablet or a smart phone and the Draganflyer X6, convenient for law enforcement.

The Bush administration started using hostile drones, mainly for target killing, but the subsequent government under President Obama greatly expanded their use.[167] Weaponised drones have long been the weapon of choice for US counter-terrorism operations.

The main types of drones for military use are the Predator equipped with weapons and operating at least since 2001; the Switchblade which can be carried into battle and be hand-launched into, for example, a sniper's hide-out where it can be programmed to detonate; the SeaFox which operates under water and can seek and destroy mines; the Raven which can deliver real-time intelligence to soldiers in the field; the LEMV or the Long Endurance Multi-Intelligence Vehicle, which is a helium filled airship which can hover around for weeks; and the Nano Air Vehicle which mimics a hummingbird, weighs a mere 19 grams, and carries a video camera.

But most of these unmanned aircraft were not able, until very recently, to operate from the sea and/or hit targets at sea, except the SeaFox which had some limited capability. However, in November 2011 the design of the Fire Scout had been improved so that it could also be used at sea. The US Navy then decided to start using the Fire Scout drone for maritime operations. An armed Fire Scout will dramatically cut the time it takes to identify, track and eventually sink an enemy target. The unmanned drone can also prove useful in anti-terrorist operations where targets may be numerous small, fast moving boats..

The armed version of the Fire Scout, manufactured by Northrop Grumman, was combat ready by March 2013, Naval Air Systems Command will handle the weapon integration onto the Fire Scouts. The helicopter-like Fire Scout is able to operate entirely in a maritime environment. It is fitted with BAE Systems' Advanced Precision Kill Weapon system. The system is essentially a Hydra 70 rocket tied to a laser seeker that can take out targets on land and, now, at sea. The US Marines already use this weapon on their AH-1W Super Cobra attack helicopters. The armed Fire Scout will still retain its ability to be used for intelligence, surveillance and reconnaissance missions.

Other new types of weapons are quad rotors. Advanced Tactics (AT), a company established in 2007, is funded by the US government to develop next-generation air and ground mobile vertical take-off (VTOL and VSTOL) systems. AT secured a contract with the US Air Force for a large quad rotor that would serve as a battlefield MEDEVAC, to develop small UAVs with a variety of capabilities. One type of quad rotor is not only able to visually relay a picture of the battlefield, but can also be weaponised.

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167 In February 2013 the Pentagon announced that a special Distinguished Warfare Medal will be reserved for those who greatly assist a war effort by piloting Predator or Reaper drones from a remote locale, for 'recognition of extraordinary achievements that directly impact on combat operations but that do not involve acts or valour or physical risk that combat entails', see Statement by Defense Secretary Leon E. Panetta, IHT. 13 February 2013.

The advantage of a quadrotor over using a fixed-wing or single-rotor drone is that the quadrotor has the ability to hover, take off and land vertically and is significantly easier to fly than the aforementioned drones.

But there have been some technical problems: the Watchkeeper surveillance drones that were intended for use against the Taliban in Afghanistan in 2009 had not yet passed the safety tests of the British MoD in 2013. Inspectors of the Military Aviation Authority have been unwilling to allow the use of these drones over populated areas before further safety checks have been made.

Scientific research indicate that even more sophisticated weapons are being develop beyond the limits of conventional limits. Weapons operated by thought control and helmets that stimulate soldier's brains for more accuracy could become a reality in the not-too-distant future, according to a leading scientist, professor Flower, a biochemist at the William Harvey Research Institute, at Queen Mary's College, University of London. A Royal Society working group produced a report on the potential military impact of recent scientific advances in neuroscience, stating that pilotless attack planes controlled by an operator's thoughts are entirely feasible. Much of the use of neuroscience for military purposes involve serious ethical problems.[168]

vii Other Questionable Weapons

Parties to Protocol I of 1977 are under obligation to consider whether the use of 'new' weapons is compatible with the Protocol and with general international law.[169] Naturally, even non-parties are obliged to consider whether employment, or even possession, of any new weapon is prohibited by any rule of general international law, although the wording of the relevant article in the Protocol indicates that rules may not bind all States but that certain prohibitive rules might affect only a certain party.

Certain relatively new[170] weapons, for example fuel explosive weapons, kill by air shock waves. Fuel-air explosives cause extensive damage and painful injury by detonation of gaseous hydrocarbons.[171] But the Conference which elaborated the 1981 Convention was not able even to take a resolution with respect to fuel-air explosives, in spite of insistence by Sweden, Switzerland and Mexico.[172]

Some weapons, known as 'flame blast' munitions, combine the fuel-air explosive effect with radiation in chemical fireball munitions.[173] Other chemical fireball munitions produce thermic radiation.[174]

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168 The Royal Society and the Wellcome Trust, *Do No Harm: Reducing the Potential for Misuse of Life Science Research*, 2004, available at http://www.royalsoc.ac.uk/displaypagedoc.asp?id=13647.

169 Article 36.

170 Developed in the 1970s and 'refined' during the following decade.

171 *Cf.*, Blomqvist, B., 'Fuel air explosives', *Atomnytt*, 1976.

172 GAOR, 33rd sess., Suppl. no. 44, A/33, Annex E.

173 *Lugano Report*, *op. cit.*, 82.

174 *Ibid.*

Laser weapons cause burns and blindness,[175] as do light flash devices.[176] Directed-energy weapons rely on laser systems.[177] High-intensity microwave radiation causes internal burns.[178] Infrasound devices, alone or in combination with stroboscopic light flashes, cause damage to the central nervous system.[179]

One may deplore the scientists who used their talents and knowledge to develop such weapons, and, even more, the companies and States which encouraged them to do so. However, the use of any of these or similar weapons are clearly incompatible with the basic principles of ethics of warfare,[180] with ensuing individual responsibility for war crimes for those who employ such weapons in combat as well as for their superiors.[181]

C WEAPONS OF MASS DESTRUCTION

i General Rules

One of the first institutional decisions taken by the General Assembly was to establish a Commission for, *inter alia*, the 'elimination of major weapons adaptable to mass destruction'.[182] Interest in prohibiting these weapons has been maintained, and has considerably intensified over the years. In 1980 the Disarmament Commission considered the question of weapons of mass destruction and recommended the negotiation of agreements for their prohibition as a priority for the Second Disarmament Decade.[183] There have been discussions also in the Committee on Disarmament,[184] in the Conference for Disarmament[185] and in the General Assembly.[186]

a Definition of Weapons of Mass Destruction (WMDs)

The Commission for Conventional Armaments in 1948, in considering its own mandate, defines weapons of mass destruction to include 'atomic explosive weapons, radioactive material weapons', certain 'lethal' chemical and biological weapons, and weapons developed in the future with similar destructive effects and 'any weapon developed in the future with characteristics comparable in

175 *Lucerne Report, op. cit.*, 73; *Lugano Report, op. cit.*, 1980–1.

176 Some milder stroboscobis types are already used for riot control, see *Lucerne Report, op. cit.*, 75.

177 Fessler, E.A., *Directed-Energy Weapons: A Juridical Analysis* (New York: Praeger, 1979). 'Laser' stands for 'light amplification by simulated emission of radiation'.

178 *Lucerne Report, op. cit.*, 75.

179 *Ibid.*, 74.

180 Above, Chapter 5, section C v.

181 Below, Chapter 12, section C.

182 GA Res. 1(1) of 24 January 1946.

183 A/CN.10/PV.2540; GAOR, 35th sess., Suppl. 42, A/35/42, para. 19, sect. C, para. 14.

184 GAOR, *ibid.*, Suppl. No. 27, A/35/27, para. 57 *et seq.*

185 CD/732, 1986, iii *et seq.*

186 GAOR, 35th sess., Plenary mtgs, 433rd mtg, 94th mtg and First Committee 438th mtg.

destructive effect to those of the atomic bomb or other weapons mentioned above'.[187] The General Assembly has reiterated this expanded notion of weapons of mass destruction, defining such weapons as 'atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, any weapons developed in the future with similar destructive effects to those of the atomic bomb or other weapons mentioned above'.[188]

The General Assembly expressed repeated concern for the use of these weapons.[189] Nuclear weapons are certainly the main type of weapons of mass destruction. The Sea-Bed Treaty clearly implies that nuclear weapons are weapons of mass destruction by referring to and prohibiting the emplacement of 'any nuclear weapons or any other types of weapons of mass destruction'.[190]

There are thus also other weapons of mass destruction which are not nuclear weapons. Which are they and what are their hallmarks?

The United Nations Commission for Conventional Disarmament characterised weapons of mass destruction both in terms of certain physical characteristics on which such weapons are based and in terms of the scale of the destructive effect of the weapons.[191] But this does not mean that new weapons of mass destruction, based on other physical principles, could not be invented, nor that any weapons of mass destruction hitherto classified as weapons of mass destruction could become 'conventional', *e.g.* by being made smaller. The fact that some new conventional area weapons, such as cluster bombs,[192] fuel-air explosives[193] and incendiaries[194] might cause greater damage than 'small' nuclear weapons 'should not be permitted to blur the fundamental qualitative distinction between weapons of mass destruction and other types of weapons'.[195]

With such a static view one is compelled to ask why weapons should be grouped in a way that *a priori* excludes any future reclassification. Surely, criteria must be identified for a group called 'weapons of mass destruction' and when weapons no

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187 UN, S/C 3/32/Rev.1; *cf., UN Study on Conventional Disarmament* (New York, 1985), 6–7.

188 Res. 32/84 B 1977.

189 See, for example, GA Resolutions 3479 (XXX), 1975, 31/74, 1976; 32/84A, 1977, 33/66B, 1978, 34/79 1979; 35/149 1980; 36/89, 1981; 37/77, 1982, requesting CCD and CD respectively to intensify negotiations for an agreement to stop development and manufacturing of such weapons. *Cf.*, GA Resolution 32/84 B, 1977 urging States to cease developing new weapons of mass destruction.

190 Article 1 (emphasis added). See further above, Chapter 6, section 5, and below in this Chapter, section B ii d.

191 S/C.3/32/Rev.1, 1948.

192 See the previous section.

193 *Ibid.*

194 *Ibid.*

195 United Nations, Group of Experts, A/39/349, 1985, 6. See, McDonald, A., *The International Legality of Depleted Uranium, International Coalition to Ban Uranium Weapons*, (The Hague: TMC Asser Press, 2004), on the surprising suggestion that depleted uranium is to be classified as a conventional, and not as a nuclear, weapon; and on the claim that the use of depleted uranium as a weapon is not prohibited under international law.

longer fulfil such criteria, they must either be declassified from this group, or we must redefine the essential criteria.

What are then the relevant intrinsic features of weapons of mass destruction? It may be desirable to interpret a text as it stands using the words in their normal context.[196] 'Mass' might just mean 'mass' even though some commentators have introduced the curious use of the participle 'massed',[197] but most other texts, like for example, the Outer Space Treaty,[198] use the word 'mass destruction'. And 'weapons of mass destruction' might just mean 'weapons designed to destroy masses'.[199] Is it not precisely that such weapons are designed not to destroy one combatant at the time, not even groups of them, but the great part of (or the entire) population in an area that make such weapons 'weapons of mass destruction'? Any more complicated formula does not seem to serve much purpose for the reason for the patent illegality of these weapons is the absence of discrimination, the lack of use of the basic rule of distinction.[200] It must be these considerations that render weapons of mass destruction 'different' from other weapons which are aimed at the enemy, perhaps as individual soldiers, or battalions, but not aimed at and able to wipe out entire towns,[201] provinces or countries. On the other hand, the physical criteria of such weapons, adopted by the above definition,[202] are not necessarily helpful. If nuclear weapons could be reduced to have an impact which could be directed at a combatant alone there is legally no reason why such a weapon should be prohibited, unless it causes any unnecessary suffering. But it is, at present, unthinkable that nuclear weapons could have such limited effect and it is their indiscriminate effect rather than the physical principles on which they are founded that must form the guidelines for their illegality.

If indiscriminate attacks are forbidden under international law it could readily be deduced that indiscriminate weapons, which cause precisely such attacks, must be forbidden too. But such a conclusion, however justified to the student of logic, has not, in general, been accepted.[203] The British view at the Lucerne Conference in 1974 was that indiscriminate weapons should mean those which 'cannot' be accurately directed against military targets but not necessarily include those which, in the past, had been used indiscriminately.

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196 *Cf.*, Vienna Convention on the Law of Treaties, article 31, on interpretation.

197 'Massed' thus refers to 'destruction', perhaps implying 'intense destruction', rather than being the object of destruction.

198 Above, Chapter 6, section A v.

199 Thomas, A.W. and Thomas, A.J., *Legal Limits on the Use of Chemical and Biological Weapons* (Dallas: Southern Methodist University Press, 1970), 118, suggest that if 'mass' means 'people' weapons of mass destruction cannot include chemical weapons, *op. cit.*, 118. The basis for this reasoning seems ill founded.

200 On this, above, Chapter 4, section C.

201 On bombardment, see below, Chapter 8, section A iii a.

202 That is, the definitions adopted by the General Assembly, see above, in this section.

203 On indiscriminate weapons, *cf.*, Institut de droit international, 52 *Annuaire*, 1967, Report by v.d. Heydte, F.A.; *cf.*, *Lucerne Report*, *op. cit.*, 1974, 10: all experts agreed on prohibition of indiscriminate attacks but not on prohibition of indiscriminate weapons.

However, the ICRC experts held that both weapons which 'by nature' are indiscriminate and those whose normal and typical use had indiscriminate effects, should be forbidden.[204]

Others argued that 'area weapons' may not necessarily be indiscriminate and that conventional weapons could be designed to be indiscriminate unless following a random course but, on the other hand, all weapons could be used, to some extent, indiscriminately.[205]

b Identification of Weapons of Mass Destruction (WMDs)

The decision whether or not a specific weapon is to be included in the group of weapons of mass destruction depends entirely upon how that group is defined. But if the above suggestions are accepted, that such weapons are designed or capable of destroying parts or whole populations, or other large groups in certain areas, the following weapons must be included.

First, the nuclear weapons for they are all, at this stage of development, capable of such damage, even the Continental Shelf Mine[206] and, perhaps more questionably, nuclear 'hand' weapons. Furthermore, 'lethal'[207] chemical and biological weapons are also included.[208] Geophysical and environmental warfare is indiscriminate by implication.[209] Radiological weapons, as akin to nuclear weapons, are also included and, probably, infrasound weapons.

The 1977 CCD session considered a USSR Draft Convention[210] which provided for an umbrella arrangement whereby a general prohibition of weapons of mass destruction could be supplemented by special agreements on prohibition of specific weapons. The Draft contained a list of weapons to be prohibited and there are special provisions for amendment of the list.

But the United States has traditionally preferred specific, rather than general, prohibitions. The United Kingdom has also emphasised that general treaties dealing with hypothetical weapons cannot provide for verification.[211] On the other hand, in the past, arms control treaties have often dealt with areas of future concern as did the Outer Space Treaty.[212]

In 1978 the former communist States in Eastern Europe submitted in 1978 a Draft Convention to the CCD on nuclear neutron weapons as a particularly inhumane weapon of mass destruction[213] and Poland suggested in the First Committee that

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204 ICRC, *Weapons That may Cause Unnecessary Suffering or Have Indiscriminate Effects* (Geneva: ICRC, 1973), para.27, 244.

205 *Lucerne Report, op. cit.*, 10–11.

206 Above, Chapter 7, section A iii and *infra*, in this Chapter, section B ii d.

207 On the relevant degree, see this Chapter, section D.

208 The United Nations Commission for Conventional Armaments suggested this in 1948, see, *United Nations and Disarmament 1945–1970*, No.70, ix.1, Ch.1.

209 *Lucerne Report, op. cit.*, 75–76; *cf.*, below, section E.

210 CCD/511, Rev.1 and GAOR, 32nd sess., Suppl. No. 27, A/32/27/vol.ii.

211 CCD, 1980, GAOR, 35th sess., Suppl. No.27, A/35/27.63.

212 Above, Chapter 6, section A iv and v, and GA Resolution 2222 (XXI), 1966.

213 CCD/559, and GAOR, 33rd sess., Suppl. No.4, AS10/4, 111, para.77.

such weapons should be prohibited, if not generally, a least on a 'contractual basis'.[214] But the United States considered neutron weapons, or others involving enhanced radiation, as nuclear weapons which should be dealt with separately in the context of nuclear disarmament.[215]

It may be futile to group weapons in different types and reserve a category like 'weapons of mass destruction' *unless* such classification has some legal consequences. The point which must be made is thus that weapons of 'mass destruction' are *prima facie* illegal under international law and any State, or party, that uses such weapons is guilty of war crimes, with ensuing individual and collective responsibility.[216]

It is important to retain the distinction, on the one hand, between conventional weapons, 'non-lethal' chemical and biological weapons, which together with radiological weapons form another group, and environmental weapons, which, again, are of a different type, and, on the other hand, weapons of mass destruction. Weapons of mass destruction *may* be weapons of any of these groups but do not *necessarily* have that character. Weapons of mass destruction are thus more indicating *the way* these weapons will be used. Not even nuclear weapons are necessarily weapons of mass destruction if we consider hand-held tactical weapons. But atomic bombs are certainly within the category of weapons of mass destruction. The same can be said for all other types of weapons which may be *used in a way which eliminates the quality of distinction*, that is to say when the weapons no longer distinguish between military and non-military targets. One may also speak of weapons with *uncontrollable effects*.[217] Thus, *some* weapons, like the atom bomb, are *always* weapons of mass destruction whereas biological and chemical weapons *may* have such a quality. We should thus distinguish between weapons that intrinsically are *unable to distinguish*, like the atom bomb, and other weapons which may be *capable* of such distinction, depending on their use.

In law, it may be that this second type of weapon is illegal *on other grounds*[218] but not because they are weapons of mass destruction.

In the late 1990s it became fashionable, even among experts, to blur the vocabulary and the chemical and biological weapons of Saddam Hussein of Iraq, which international society was anxious to 'eliminate' following reports of the UN arms inspectors, were repeatedly referred to as 'arms of mass destruction'. It is clear that *some* of the chemical and biological weapons held are such weapons of mass destruction, *i.e.* those which are 'lethal'. And, as mentioned, other types of weapons held may be illegal on other grounds.

On the other hand, States must not outlaw weapons for one party unless they are prepared to face similar consequences themselves for use of such weapons;

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214 GAOR, 35th sess., 1980, First Committee, 438 mtg.

215 See GS Resolution 33/66 A & B 1978.

216 Below, Chapter 12, section C.

217 The ICRC considered weapons with 'uncontrollable effects' in connection with their 1956 Draft Rules for Limitation of Dangers incurred by the Civilian Population in Time of War, article 14.

218 Below, section D.

there were reports that tactical nuclear weapons were used by the Western powers in the Gulf War and there is ample evidence that most Western powers have chemical and biological weapons of at least the 'non-lethal' type.

It is, for these reasons, useful to retain the distinct categories referred to above.

ii Nuclear Weapons

a The Special Case of Nuclear Weapons

There is no shortage of evidence of the disastrous effect of nuclear weapons on health[219] and on the environment.[220] The destructive power of nuclear armouries, even as early as in 1967, far exceeded all the conventional explosives used since the discovery of gunpowder.[221]

But it may be emphasized that *all* WMDs are, *prima facie*, illegal: we may reiterate the Preamble of the 1977 Protocol that 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, *has been justly condemned by the general opinion of the civilized world*'.

b Reduction of Hazards?

Actual use presupposes possession of such weapons and, therefore, the network of treaties prohibiting production and possession of nuclear weapons[222] reduces the number of parties who can develop such weapons.

Other treaties, like the Non-Proliferation Treaty,[223] restrict the number of States which can obtain nuclear weapons. Other agreements, such as the Test-Ban

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219 For example, WHO, *Effect of Nuclear War on Health and Health Services*, 1984; Chiviam, E., Chivian, S., Jay, R., and Mack, J.E.,(eds), *Last Aid: The Medical Dimension of Nuclear War* (New York: W.H. Freeman and Company, 1982); Glasstone, S. and Doland, P.J. (eds), *The Effects of Nuclear Weapons*, 3rd edn (Washington: US Government Printing Office, 1977).

220 For example, SIPRI, *Weapons of Mass Destruction and the Environment* (Stockholm, 1977) with extensive bibliography. London, J. and White, G. (eds) *The Environmental Effects of Nuclear War* (Washington and Boulder: Westview Press, 1984).

221 United Nations, *Effects of the Possible Use of Nuclear Weapons and the Security and Economic Implications for States of the Acquisition and Further Development of these Weapons*, Report by the Secretary General, 1967, republished in United Nations, *Basic Problems of Disarmament*, 1970, 70.I.14, p. 79.

222 Such as the Peace Treaties with Finland, Hungary, Bulgaria and Romania and Italy in 1947 (the obligation on Italy in this respect was annulled by the Allies in 1951); The Paris Agreement with Germany of 1954; The Austrian State Treaty of 1955, see above, Chapter 6, section A iv; and the Treaty of Tlatelolco, and the other treaties on Nuclear-Free Zones, above, *ibid.*

223 729 *UNTS* 161 and above, Chapter 3, section C iii b (1); SIPRI (ed.), *Internationalisation to Prevent the Spread of Nuclear Weapons* (London: SIPRI, 1980).

Treaty,[224] the Outer Space Treaty of 1967[225] and the Antarctic Treaty,[226] restrict the use of nuclear weapons in certain geographical areas.

According to the introduction to the Draft Protocol to the Geneva Conventions,[227] what became Protocol I of 1977, the Protocol was never intended to deal with nuclear, bacteriological or chemical warfare. In spite of this clarification, certain States felt obliged to make specific statements during the negotiations to emphasise that, with regard to nuclear weapons, the Protocol must not impair their right of sovereignty. France, for example, argued that Protocol I merges humanitarian law[228] with the Law of War in a way which is 'not without danger'. Any instrument which sets out to govern the conduct of warfare must, said France, take scrupulous care to respect the sovereignty of States and their inalienable right to self-defence in case of aggression. Some provisions of Protocol I might well, insisted France, impair that right.[229] One such provision concerned the protection of civilians against hostilities;[230] another was related to the principle of distinction between military targets and civilian objectives.[231]

Both such provisions would be prejudicial to the exercise of France's national right of legitimate defence and, as a result, France made a specific declaration when acceding to Protocol II that it had found itself unable to ratify Protocol I as this instrument ostensibly impaired France's right to use nuclear weapons whether in defence or as a deterrent.

However, Protocol I of 1977 does not explicitly forbid the use of nuclear weapons. But since such weapons are by nature indiscriminate and have effects which cannot be isolated from the civilian population in an attacked territory, nuclear weapons are indirectly prohibited by the Protocol's provisions of indiscriminate or area attacks.[232]

Other States also made statements to similar effect, considering that ratification of Protocol I of 1977 would not be possible if it in any way restricted the right to use nuclear weapons.[233]

There may be a network of treaties and conventions today which all further reduce the field of who may use nuclear weapons and where nuclear weapons might be used. But these agreements do not necessarily reduce the likelihood of such weapons being used, especially in the light of the pronouncements by States of their 'sovereign' right to nuclear weapons. It may well be that the risk of nuclear

224 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963, 480 *UNTS* 43 and above, *ibid.*

225 610 *UNTS* 161 and above, *ibid. Cf.*, GA Res. 2222 (XXI) 1966 endorsing the Draft Treaty; *cf.*, GA Res. 1962 (XVIII) on nuclear activities in Outer Space.

226 Above, *ibid.*

227 ICRC, 1973, 2.

228 For meaning see below, Chapter 9.

229 A/C.6/37/SR.18.3; France CDDH/Sr.41, vol. 6, 186.

230 *Cf.*, article 43 of the Draft and article 48 of the Final Protocol.

231 Draft article 47, adopted as article 52 of Protocol I.

232 Below, in this Chapter, section B ii d.

233 For text of United States declaration on signature, see Schindler and Toman, *Documents, op. cit.*, 636: for a declaration by the United Kingdom, see *ibid.*, 634. On the nature of such declarations, which do not constitute 'reservations', see Detter, I., *Essays, op. cit.*

conflict actually escalates in proportion to the reduction of the nuclear arsenal of the now few nuclear States. The strategic situation was possibly more stable during the time of polarisation of two super-powers. After the disintegration of the Soviet Union and the demise of communism, it may be that risks for nuclear attacks have increased as certain weapons and fissile material have passed to States, often in the Third World, which might not consider themselves bound by the restrictions of the Law of War in the field of nuclear weapons. Such attitudes, however, will not release them from responsibility for war crimes were such weapons ever used.[234]

c Criteria for Legality

It has been shown earlier[235] that the question of nuclear arms and war is normally discussed in the context of disarmament negotiations. There have been several treaties restricting the actual use of nuclear weapons and such prohibitions will, especially if combined with actual reduction of the arms supplies, affect the war-waging material of a State.[236] There is a further question of great importance going to the core of the use of nuclear arms: that is the question of their alleged inherent illegality under international law. The test for legality of weapons has been said to be that they 'must not cause a destruction of value which is disproportionate to the military advantage gained through its use'.[237]

(1) Basic Restrictions

The use of nuclear weapons – and all other weapons – are subjected to three basic principles: the necessity to use them; the proportionality of their use; and the obligation not to cause unnecessary suffering.[238] But it has been suggested that these principles only regulate the use of weapons and that nuclear weapons are legal in the absence of any customary rule of international law or by any convention restricting their employment.[239] But any reference to 'customary law' in this context invariably leads to difficulty: one would have to rely on an unacceptable fiction of 'negative custom'.[240] The first time an atom bomb was used in war all these principles were violated as shown in the *Shimoda Case*.[241] The District Court of

234 Below, Chapter 12, section C.

235 Above, Chapter 3, section C iii b.

236 Above, Chapter 4.

237 See below, Chapter 12, section B i a on military necessity. Legality cannot depend on the wording of treaties, *cf.*, Falk, R., Meyrowitz, L., and Sanderson, J., *Nuclear Weapons and International Law* (Princeton: Princeton University Press, 1981), 22. *Cf.*, Mallinson, W. and Mallinson, S., *Studies in the International Humanitarian Law of Armed Conflict* (New York, 1978), 157.

238 *Cf.*, United States Field Manual 2710, *The Law of Land Warfare*, 1956, para. 3(a), 41, 35.

239 *Ibid.*, para. 35.

240 See further above Chapter 5 C vi. For a rejection of the notion of customary law in its traditional form, see also Detter, I., *Concept, op. cit.*, 107 *et seq.* and Detter, I., *International Legal Order, op. cit.*, 185 *et seq.*

241 See the *Case of Shimoda v. Japan*, 1963, 8 *Japanese Annual of International Law*, 1964–1965, 212.

Tokyo in that case also emphasised that if the use of a weapon is contrary to the customs of civilised countries and the principles of international law, its use must be prohibited even if there is no express provision to this effect.[242]

But then, some claim that the aforementioned principles cannot not be applied 'strictly' in view of political 'realities'.[243] Others have been worried that any condemnation of nuclear weapons[244] may lead to a new tradition of 'nuclear pacifism' which could present a serious challenge to, for example, the US armed forces by making recruitment less attractive.[245]

(2) Narrowing Down the Criteria

Because of the moral implications of any use of nuclear weapons there is a danger that one may confuse what appears to be desirable in the international society *de lege ferenda*, with what is actually prohibited or outlawed, that is to say with what exists *de lege lata*.

Nuclear weapons cause, as General Assembly Resolution 1653 (XVI)[246] reminds us, indiscriminate suffering and destruction and, as such, their use is 'contrary to the rules of International Law and to the laws of humanity'. Such weapons cannot be directed only against the enemy but are aimed at mankind in general. Third parties not involved in a war would be subjected to all the consequences by the use of nuclear weapons.

Writers, too, have deduced that nuclear weapons are of questionable legality as they are 'different' from conventional weapons.[247] But it has not been adequately established exactly what criteria lead to such illegality. Various grounds of illegality have been suggested.

Nuclear radiation may thus, according to some, come under the prohibition of the Hague Regulations[248] and nuclear weapons would consequently be illegal as the Regulations forbid 'poisonous' weapons. A similar argument is that the Geneva Protocol,[249] by forbidding 'all analogous liquids, materials and devices',[250] would also prohibit nuclear weapons. Even if the output of nuclear weapons is technically not a gas, radioactivity could 'as a poisonous weapon' be held to be prohibited by inference or analogy on the basis of the principles contained in the

242 *Ibid., loc. cit.*

243 McGrath, M.E.E., 'Nuclear weapons, a crisis of conscience', 107 *MilLR*, 1985, 205.

244 Like the one by American Roman Catholic Bishops in a Pastoral Letter of 1983, *Challenge to Peace: God's Promise and Our Response*, 19 May 1985. The letter declares that States have a right to defend their territory but not by nuclear weapons: 1.C.1,9; deterrence based on balance of forces of nuclear stocks can only be morally acceptable if it remains a step in progressive disarmament, II, A, 14; II.D.2,17–18; III A,3,21.

245 McGrath, M.E.E., 'Nuclear weapons', *op. cit.*, at 231.

246 Above, in this Chapter, section B i a.

247 Brownlie, I., 'Some legal aspects of the use of nuclear weapons', 14 *ICLQ*, 1965, 437.

248 Article 23(a) on poisonous weapons, see *supra*, in Chapter 5, section A. *Cf.*, Singh, N., *Nuclear Weapons and International Law* (London: Stevens and Sons, 1959).

249 Below, in this Chapter, section D i c (2). See Brownlie, I., 'Some legal aspects of nuclear weapons', *op. cit.*, at 442.

250 Greenspan, *The Modern Law of Land Warfare*, *op. cit.*, 372–373.

Geneva Protocol.[251] Another ground for illegality may be found under the Genocide Convention,[252] as nuclear weapons are inevitably directed against large groups of the population.

One element relevant for the assessment of illegality is obviously the lack of discrimination of nuclear weapons,[253] akin to all weapons of mass destruction.[254] Weapons of such range and intensity cannot, and are not designed to, distinguish between military and civilian objectives. This is a major argument in the assessment of illegality of nuclear weapons. But, on the other hand, it may entail the lessened validity of some other arguments, such as, for example, the alleged illegality under the Genocide Convention.[255] For violation of that Convention entails the singling out of groups whereas the employment of nuclear weapons intrinsically does not distinguish between anyone or anything within, and outside, the impact area.

The most serious threat by the use of nuclear weapons is clearly the potential use by terrorists. The UN Security Council adopted Resolution 1373 on 28 September 2001, some two weeks after the terrorist attack on the United States of 11 September 2001. The main objective was to devise ways to prevent future terrorist attacks. Some measures were directed at suppressing and criminalising the financing of terrorism. But some important provisions concerned calling on States to exchange information on traffic in explosives and sensitive materials and especially on nuclear material. Resolution 1373 concerned, above all, the threat posed by the potential possession of weapons of mass destruction (WMDs) by terrorist groups. These concerns also led to the adoption of the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005.[256]

A horrified world also observed the irresponsible third nuclear weapons test by Kim Jong-Un, the dictator of North Korea in February 2013. What was most worrying in this test was that North Korea appeared to have access to highly enriched uranium and not merely plutonium that had been used for the previous two nuclear tests. But highly enriched uranium is more difficult to detect than plutonium which leads to the increased risk that North Korea might sell this commodity (that it appears to have fabricated at some more or less secret plant) to some other pariah regime or even to terrorists. After all, Kim Jong-Un's father, Kim Jong-Il, did not hesitate to sell nuclear bomb making technology to Syria's president Bashar Al-Assad. There is fairly reliable evidence that North Korea has already sold missiles to Iran, Pakistan and Syria. The scenario in this respect is becoming highly dangerous especially in view of futile efforts to persuade North Korea to cease such hostile policies.

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251 *Ibid.*, 373.

252 Brownlie, I., *Legal aspects, op. cit.*, 443.

253 *Cf.*, Institut de droit international, *Annuaire*, 1969, 48 *et seq.*; 358 *et seq.*; 2 *ibid.* 1967, 1 *et seq.* and 527 *et seq.*

254 *Cf.*, below Chapter 8, section A iii.

255 78 UNRS 278.

256 Practical work on the Convention had started long before 9/11 when the UN General Assembly Resolution 51/210 of 17 September 1996 created an *ad hoc* committee, asked to consider the terrorist threat; but after 9/11 the importance of this initiative intensified and led to the finalisation of the Convention, see Podvig, P., *Global Nuclear Security, Building Greater Accountability and Cooperation* (UNIDIR, 2011).

(3) Criteria Applied to Nuclear Weapons

To assess illegality it must first be asserted what precisely is alleged to be illegal: is it the possession, the placing, the first use or any use of nuclear weapons? The answer as to what is illegal would seem to differ according to the relevant category.

There were, in the 1970s and 1980s, intense discussions of the legality of nuclear weapons in the doctrine.[257] After the Second World War there were, on the one hand, some commentators who claimed that, in legal and moral terms, the atom bomb had been a 'good thing' and, had, in a way, saved countless lives by ending the war quickly.[258] But, on the other hand, in later years most writers would question the legality of nuclear weapons for offensive purposes[259] and claim that even for defensive purposes[260] the use of such weapons is not compatible with international law.

Drastic statements by politicians sometimes distort the contents of international law. Thus, a Minister of State in the West German Foreign Ministry claimed in 1983 that not even first use of nuclear weapons is banned by international law.[261] But there is overwhelming agreement that prohibitions exist in the international legal system against first use.[262] Legality of use in self-defence, however, is more problematic. On the one hand, there is considerable support for the view that such use is 'different from first use' but that it may still entail devastating effects, actually augmenting those caused by the first user. Thus, such use in self-defence could perhaps, precisely in juxtaposition with the first attack, cause the feared climatic change into 'nuclear winter'. Legality of counter-attack must then, considering duties to neutrals, other uninvolved countries, and perhaps to the international society as a whole,[263] depend on the scale and nature of nuclear force used.

If we further consider the alleged illegality of the use of nuclear weapons, there is considerable agreement that the use of such weapons against an aggressor

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257 Miatello, A., *La responsabilité international encourue en raison des activités liées à l'utilisation de l'énergie nucléaire* (Geneva: Europäische Hochschulschriften; Rechtswissenschaft, 1985); Falk, R., 'Toward a legal regime for nuclear weapons', in Miller, A.S. and Feinrider, M. (eds), *Nuclear Weapons and Law* (Westport, 1984), 107 *et seq.*; Almond, H.H., 'Deterrence and a policy oriented on the legality of nuclear weapons', in *ibid.*, 57 *et seq.*; Dunshee de Abranches, C.A., *Proseriçao das armas nucleares* (Rio de Janeiro: Livraria Freitas Bastos, 1964); Menzel, F., *Legalität oder Illegalität der Anwendung von Atomwaffen* (Tübingen: Mohr, 1960); Setalvad, M., 'Nuclear weapons and international law', *Indian Journal of International Law*, 1963, 383. On the problems on neutron weapons, see Meyrowitz, H., 'Problemès juridiques relatifs à l'arme à neutron', *AFDI*, 1981 1978, 87.

258 Stowell, E.C., 'The laws of war and the atomic bomb', 39 *AJIL*, 1945, 784, 786.

259 See, Draper, G.I.A.D., *The Red Cross Conventions* (London: Stevens, 1958), 99, for a view that the use of nuclear weapons is not legal against an aggressor who has not himself used them.

260 But see Schwarzenberger, G., *The Legality of Nuclear Weapons* (London: Stevens, 1958), who considers defensive use 'legal'.

261 Institute of Defence and Disarmament Studies, *The Arms Control Reporter*, 403 8, 189, Statement by Mr. Alois Mertes, 14 October 1983.

262 *E.g.* Blackaby, F., Goldblat, J. and Lodgaars, S., *No-First-Use* (London: SIPRI, 1984), and above in the previous section.

263 See Detter, I., *Concept*, *op cit.*, 37 *et seq.* and 121 *et seq.*

who has not himself used them, *i.e.* first use of nuclear weapons, is illegal.[264] There is furthermore a growing body of opinion suggesting that also the second use, i.e. use in self-defence against a nuclear attack, is illegal. One reason for such a standpoint is that there is never rational war aim to use nuclear weapons.[265] The General Assembly has also warned against the dangers of 'catastrophe' caused by any new such doctrine of limited or partial use of nuclear warfare.[266]

There is ostensibly no rational war aim[267] and the use of nuclear weapons would prevent obedience to further rules concerning the conduct of hostilities[268] and undermine respect for neutrals.[269] The General Assembly has emphasised that any use of nuclear weapons would amount to a violation of the Charter as against 'laws of humanity and constituting a crime against mankind and civilisation'.[270] This important Resolution, named the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, states that the use of such weapons is contrary to the United Nations 'spirit, letter and aims' and their use would 'exceed even the scope of war'.

Later, the General Assembly has referred to the use of nuclear weapons as being under a 'permanent prohibition' indicating that such weapons are forbidden in any circumstances, including self-defence.[271] In this Resolution the use of nuclear weapons was related to the use of force as outlawed by the Charter. Numerous subsequent Resolutions refer to the need for further safeguards.[272]

Some commentators suggest[273] that accepting the illegality of use of nuclear weapons does not necessarily lead to the conclusion that also nuclear deterrence policy is unlawful. Possession of nuclear weapons may constitute a lawful deterrence although they are possessed only to be *potentially* used.[274] But since use is an inevitable and non-excluded contingency it could be argued that even 'passive' possession is of questionable legality. Yet the trend in the 1980s was to

264 See Draper, G.I.A.D., *The Red Cross Conventions*, *op. cit.*, 99.

265 Fried, H.E., 'International law prohibits the first use of nuclear weapons', *RBDI*, 1981–2, 1, 33 at 35.

266 GA Res. 35/152 B 1980.

267 Fried, H.E., 'International law prohibits the first use of nuclear weapons', *op. cit.*, 33.

268 *Ibid.*, 37.

269 *Ibid.*, 42.

270 Res. 1653 (XVI) 1961.

271 Res. 2936 (XXVII) 1972. *Cf.*, Res. 1909 (XVIII) 1963. See, Singh, N., *Nuclear Weapons and International Law* (London, 1959); Charlier, R.E., 'Questions soulevées ^pour m'évolution de la science atomique', 91 *RCADI*, 1957, i, 213, 350; Brownlie, I., 'Legal aspects', *op. cit.*, 437.

272 *E.g.* Res. 34/83 J 1979; 34/85 1979.

273 Brownlie, 'Legal aspects', *op. cit.*, 444, who states that it is at least 'not clear if use only or also deterrence (is) illegal'. Brownlie also claims that 'the provision (on genocide) must create a presumption of the illegality of resort to nuclear weapons as part of a policy of deterrence', *ibid.*, *loc. cit.* Presumably the 'illegality' refers to 'use' rather than (also) to 'policy of deterrence'. *Cf.* ICJ, *Advisory Opinion on Use of Nuclear Weapons*, Reports,1996, 66.

274 See, on deterrence, *e.g.*, Miller, S.E., *Strategy and Nuclear Deterrence* (Princeton: Princeton University Press, 1984); Snow, D.M., *Nuclear Strategy in a Dynamic World* (Tuscaloosa: University of Alabama Press, 1981); cf. Jervis, R., *The Illogic of American Nuclear Strategy* (Ithaca: Cornell University Press, 1984).

view possession in terms of security and allow possession of a negotiated number of nuclear weapons for deterrence purposes.

The placing of nuclear weapons evoked considerable discussion during the last decade of a bipolar world, *i.e.* from 1981 to 1991. Much was couched in political terms. The Professor at the University of Moscow, and close to the Soviet government, Grigor Ivanovitch Tunkin, asserted, for example, that the placing of American missiles in Europe was 'contrary to international law'; but he did not specify which rules of international law such action would violate apart from indicating that there would be a breach of good faith: the positioning of the United States missiles would, said Tunkin, be contrary to the good faith in the arms talk negotiations.[275] By implication he claimed that there is a lack of symmetry: the United States could place missiles near the USSR frontiers whereas the USSR could not do the same near the United States.[276]

With regard to the placing of missiles in the territory of other States one may discern the following legal criteria. There must be the full consent of the territorial State.[277] Such agreement should, if one applies the rules insisted upon by the major powers, not only have the approval of the government but also democratic consent of the people in that territory.[278] It may be noted that in the United Kingdom there is little evidence of debate in Parliament of agreements concerning the placing of US missiles in the United Kingdom.[279]

Agreements on the stationing of foreign missiles, belonging to the group of treaties which restrict the exercise of the sovereignty of a State *in its own territory*, are probably only valid as long as the territorial States so wishes under the doctrine that could be called 'continuous consent'.[280]

d Nuclear Weapons and Recent Developments in the Law of War

There is no doubt that the Law of War applies to nuclear weapons.[281] The use of such weapons may even constitute the most important area of application of the rules relating to weapons in war.

There have been attempts to 'regulate' the use of such weapons. Eleven years after the first use of the atom bomb in war, the ICRC suggested a special prohibition of nuclear weapons; this proposal was put forward in its 1956 Draft Rules[282]

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275 Toukine, G.I. (Tunkin, G.I.), 'L'installation des missiles americains en Europe viole le droit international', in *Les conséquences juridiques de l'installation éventuelle de missiles cruises et pershing en Europe, Acte du Colloque*, Bruxelles, 1–2 October 1982, Brussels, 1984, 107.

276 *Cf.*, above, Chapter 2, section B viii on spheres of influence.

277 See Detter, I., *Independent State, op. cit.*, 197 *et seq.*

278 *Ibid.*, and above, Chapter 1, section C i on democratisation of the international society and on consent to territorial restrictions.

279 The only published treaties concern the stationing of visiting United States forces; on such agreements see Detter, I., 'Foreign warships', *op. cit.*, 54.

280 Such treaties imply the reduction of a State's power in its own territory and thus belong to a special category subjected to special rules on consent, see furthermore this theory, see Detter, I., *Independent State, op. cit.*, 197 *et seq.*

281 Res. XXVIII of the 20th Red Cross Conference in Vienna in 1965.

282 Article 14, *cf.*, above, in this Chapter, section A ii e.

and the 1973 Draft Protocols.[283] These documents referred to such weapons as being 'subject to international agreement or negotiations, circumstances which would make it impossible to regulate the use of nuclear weapons in the planned Additional Protocols[284] to the 1949 Geneva Conventions.

During the Diplomatic Conference for the negotiation of the Additional Protocols the United States,[285] the United Kingdom[286] and France[287] all made statements, repeated, with the exception of France, at the time of signature,[288] to the effect that they assumed the Protocols only to regulate conventional warfare as special agreements were needed on nuclear weapons.

According to the Introduction to the Draft Protocol[289] the Protocol of 1977 to the 1949 Geneva Conventions[290] was never intended to deal with nuclear, bacteriological, chemical warfare. In spite of such clarification certain States felt its provisions would impair their right of national policy with regard to the use of nuclear weapons. France, for example, argued that Protocol I merges humanitarian law with the Law of War in a way which is not without dangers. Any instrument which sets out to govern the conduct of warfare must, said France, take scrupulous care to respect the sovereignty of States and their inalienable right of self-determination in case of aggression. Some provisions in Protocol I may well, in the opinion of France, impair that right.[291]

The question of the Protocol's application to nuclear arms was raised in the context of provisions concerning protection of the civilian population during the Conference. France claimed that a provision[292] which is concerned with the general protection of the civilian population against the effect of hostilities went beyond the specific context of humanitarian law towards wider issues of the Law of War. Although the provision might have been drafted with a humanitarian purpose in view, it had, claimed France, direct implications as regards a State's organisation and conduct of defence against an invader.[293] The French delegation, although not having opposed the adoption of such rules, made it clear that if it had been put to the vote, France would have abstained.[294]

Furthermore, France stated in relation to the provisions dealing with distinction between military and civilian targets[295] that it is difficult in many situations of

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283 See, later, in this section.

284 See above, Chapter 6, section B i b.

285 CDDH/SR.56, para. 82.

286 *Ibid.*, para. 114.

287 *Ibid.*, para. 3.

288 See below, later in this section. The statements made at the time of signature were not in the form of reservations, see, Detter, I., *Essays, op. cit.*, 47 *et seq.*

289 See, ICRC, Draft Additional Protocol to the Geneva Conventions of 1949, 1973, 2.

290 Above, Chapter 6, section B i b.

291 A/C.6/37/SR.18.3.

292 Article 43 of the Draft now article 48 in the final version of the Protocol.

293 France, CDDH/SR.41, vol. 6, 186.

294 *Ibid., loc. cit.* Such incidents represent cogent proof that rules do not come into force in international society *ipso facto* by abstentions, see, *in extenso*, Detter, I., *International Legal Order, op. cit.*, Chapters III and IV.

295 Draft article 47, adopted as article 52.

armed conflict, if not impossible, to determine precisely what constitutes a military objective, especially in large towns and in wooded areas, either of which might harbour enemy military forces and groups of civilians more or less closely mixed together. France, therefore, could not 'accept' such a prohibition as included in the Protocol although intended to benefit the civilian population as the prohibition was too categorical and likely to be prejudicial to the exercise of France's national right of legitimate defence.[296] For the said reasons, France made a declaration when acceding to Protocol II[297] that it found itself unable to ratify Protocol I as it ostensibly impaired France's right to use nuclear weapons in defence or as a deterrent.[298]

It may be commented that Protocol I does not explicitly forbid the use of nuclear weapons or any particular types of conventional weapons. Some such weapons are, however, by nature indiscriminate and have effects which cannot be isolated from civilian population in an attacked territory, and as in this respect forbidden by Protocol I's provisions on indiscriminate or area attacks.[299] On the other hand, it is indisputable that restrictions on the use of indiscriminate weapons by the Protocol will promote humanitarian interests that must prevail over the right States may claim to have to defend themselves with 'any' means.

The effect in law of the statements of France and other States at the Conference for the 1977 Protocols regarding the national liberty to nuclear weapons[300] is doubtful. But some nuclear States, like France, have now ratified Protocol I. The Protocol will remain in force even in nuclear armed conflict and the Contracting Parties are bound by assumed obligations. But also here there might be obligations which are binding on third parties: the obligations under the Protocol supports further the argument that the use of nuclear weapons is not compatible with international law. The clarification on this point by the Protocol may indicate rules that exist outside the Protocol in general international law.[301] Similar arguments may be advanced to show that first use of nuclear weapons, even if not banned by treaties, is still illegal under general international law.

D RADIOLOGICAL WEAPONS

The United Nations and the Disarmament Bodies[302] have for some time taken interest in limiting or prohibiting the use of radiological weapons. By General Assembly Resolution 2602 C (XXIV) in 1969[303] the General Assembly invited CCD to consider radiological weapons. But the CCD had, at that time, other priorities

296 *Ibid., loc. cit.*

297 Above, Chapter 6, section B g.

298 See, *Declaration on Ratification of Protocol II by France to the Depository*, 24 February 1984 (unpublished).

299 See below, Chapter 8, section A iii.

300 Above, in this Chapter, section B ii.

301 On the overlap of underlying obligations, see above, and Detter, I., *Essays, op. cit.*, 116 *et seq.*

302 Above, Chapter 3, section C iii.

303 *Cf.*, GA Resolution 3479 (XXX) 1975; 34/87A 1979; 35/156 G 1980.

and did not proceed with any study. The General Assembly requested the CCD further[304] and later also CD[305] to proceed to work on an agreement to prohibit new weapons of mass destructions, *inter alia*, radiological weapons. CD has placed the item on the agenda for future negotiation.[306]

Radiological warfare may be conducted basically by two methods. First, such warfare may imply the use of 'dirty' nuclear weapons which maximise radioactive effects by increasing the radioactive fallout. Secondly, separate radioactive agents independent of nuclear explosions can be used as special weapons.

It is the second type of warfare or weapons that the General Assembly has invited CCD/CD to consider so that work could be initiated for the purpose of a 'prohibitive regime'.[307] Sweden insisted that 'dirty' nuclear weapons were also included in the mandate, as well as particle beam weapons which have not always come within the ambit of the term 'nuclear explosive device' as used in CCD/CD Working Groups,[308] but a decision limiting the scope of interest as indicated was preferred.

E BIOLOGICAL AND CHEMICAL WEAPONS

i CBW: The Common Background

Biological and chemical weapons are usually referred to in the reverse order as CBWs, an abbreviation from the time one did not know that agreement would be reached on biological weapons long before there was any *ad idem* on chemical weapons. Initially the two types of weapon had a similar history and evolution towards prohibition and were treated together in negotiations. CBWs are 'different' from other weapons and perhaps stand in a class of their own as armaments which exercise their effect solely on living matter.[309] They are 'aimed' at large groups and not at any individual soldier(s),[310] and for this reason, they, too, are considered as weapons of mass destruction.

The two types of weapons have formed the subject of numerous lengthy negotiations in recent years. The main reason why these weapons is that they have been developed and used extensively to combat guerrilla in modern conflicts by 'scientific' warfare;[311] such weapons have also been increasingly used in recent wars, such as in the Iran–Iraq War, the Gulf War and in numerous wars in Africa.

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304 Resolutions 31/74 1976; 32/84 A 1977; 33/66B 1978; 34/79 1979.

305 Res. 35/149 1980.

306 CD/732, 111 and CD/722, 1986.

307 *Cf.*, Netherlands, WP, CCD/291; Joint USUSSR Proposal, 1979, GAOR, 34th sess., Suppl. No.27, A/34/27 and Corr 1, Appendix III; CD/53 and Corr.1, vol.II; CD/31 and CD/32; Joint US USSR Draft Resolution 1979; and GA Res. 34/87 A 1979.

308 See, *e.g.*, Report of Working Group, GAOR, 35th sess., Suppl. No.27, A/35/27, para. 61.

309 United Nations, Chemical, Bacteriological (Biological Weapons and The Effects of their Possible Use, 1969, S.69.1.24.

310 *Cf.*, above, in this Chapter on weapons of mass destruction.

311 Beaufre, A., *La guerre revolutionnaire* (Paris; Fayard, 1972), 237.

a The Historical Background

It is not new to use poisoned arms or to poison the enemy's water supply. There are known instances of, for example, water poisoning around 600 BC when Solon of Athens poisoned water in Pleistos. And Frederick Barbarossa took Tortona by such strategy in 1155. Akin practices include throwing plague victims over city walls to spread disease, like the Tartars did in Caffa in 1343.[312] In later wars the practice continued and there were few attempts to stifle such practices which also caused great suffering to the civilian population.

b Modern Times

Gruesome practices were common in later times also in non-war situations: Europeans gave or sold infected utensils to poison the indigenous population of America[313] and many States resorted to such agents in their colonisation process.[314]After the establishment of colonies it became common to use CBWs against insurgents, for example to drive them out of caves or hiding places, like the French in Algeria in the middle of last century.[315] There was alleged, or proven, use of CBWs in both World Wars; in Abyssinia;[316] in the Chinese Japanese War;[317] in Vietnam;[318] and in the Iran–Iraq War.[319]

c Separate Treatment of Biological and Chemical Weapons

The reason for separate treatment of biological and chemical weapons was mainly that some States were more optimistic about reaching an agreement on biological weapons. But a special article was inserted in the 1972 Biological Weapons Convention when that treaty was concluded to the effect that the Committee on Disarmament (as it then was[320]) was urged to continue negotiations for a Chemical Weapons Convention. Thirteen years later there still had not been any agreement

312 It has been claimed the Great Plague started in this way. For list of early uses of CBW see Riche, D., *La guerre chimique et biologique* (Paris, 1982), 305. See also background examples in SIPRI, *The Problem of Chemical and Biological Warfare: A Study on the Historical, Technical, Military, Legal and Political Aspects of CBW and Possible Disarmament Measures* (Stockholm, 1971–8), 6 vols.

313 Rose, S. (ed.), *Chemical and Biological Warfare* (Boston, 1969), 49.

314 *Cf.*, Farrer, J.A., *Military Manners and Customs* (London, 1885), 173.

315 Proudhon, P.J., *La guerre et la paix. Recherches sur le principle et la constitution du droit des gens* (Paris, 1927), 241.

316 Rousseau, Ch., *'Le conflit italo-éthiopien', RGDIP*, 1937, 692.

317 See *LJOJ*, 19th session, 1938? Plenary Meeting, Spec. Suppl., 136, 307; for League Resolution see 378.

318 Verwey, W.D., *Riot Control Agents and Herbicides in War* (Leyden, 1977).

319 *E.g.* UN, CD/PV 130, 1981, 29; the Security Council condemned use of CBW and urged belligerents to abstain from resorting to such weapons without alleging that such use had occurred. Note that both belligerents are bound by the Geneva Protocol: Iran acceded on 5 November 1929 and Iraq on 8 September 1931. For allegations on the use of mustard gas and tabun by Iraq, see CD 1315, 16 April 1985.

320 See above, Chapter 3, section C iii, on the disarmament bodies.

on such weapons; then, in 1985, serious efforts were made in the UN Disarmament Conference to find an agreement. Finally, 19 years after the Convention on Biological Weapons, a Convention on Chemical Weapons was concluded in 1993.

d Efforts of Disarmament Bodies

The Eighteen Power Disarmament Conference (ENCD)[321] considered prohibition of CBWs. The USSR Draft Treaty on General and Complete Disarmament covered, *inter alia*, such weapons, and so did the more limited United States Draft Basic Provisions.[322] Later the Committee of the Conference of Disarmament (CCD)[323] considered a United Kingdom Draft submitted in 1969[324] and a Draft Convention by the then 'East European', *i.e.* communist, countries.[325] It soon became apparent that the treatment of the two types of weapons should be separated as there seemed to be reason to think that agreement could more easily be reached on biological, than on chemical, weapons.

e Regulation by Special Treaties

Some chemical weapons are forbidden in other treaties. Thus, the Hague Regulations and the Geneva Gas Protocol, discussed below, clearly cover some ground. Furthermore, toxins have been forbidden by the Biological Weapons Convention,[326] although they technically speaking are chemical, not biological, weapons.

ii Biological Weapons

a Provisions of the 1972 Convention (BTWC)

The Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (BTWC) was concluded in 1972.[327] By this Convention States bind themselves not to develop, produce or stockpile certain weapons, *i.e.*

> '(1) microbial or other biological agents, or toxins, whatever their origin or method of production, of types or in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.'

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321 Above, Chapter 3, section C iii.

322 DCOR, Suppl. 1961, Docs DC/203, Annex I, Sect.C; ENDC/2 and F; ENDC/30, DC 205, Annex 1, Sect.D; ENDC/2/Add.1 and E and F; ENDC/30/Add.1 and 2.

323 Above, Chapter 3, section C iii.

324 DCOR, Suppl. 1969, Doc. ENDC/225.

325 GAOR, 24th sess., item 104, A/7655.

326 Above, in this Chapter, section D ii.

327 *Cf.*, GA Res. 2826 (XXVI) 1971. The Convention entered into force on 23 March 1975. *Cf.*, for background, *Report by Secretary General*, 1969, A/7575, Rev.1, S/9292, Rev.1.

It is to be noted that toxins are included in the BTWC together with biological agents although they, strictly speaking, are chemicals.[328] All parties undertake to destroy not later than nine months after the entry into force of the Convention, all such agents, weapons or equipment.

Some have called this Convention the 'first' disarmament Convention[329] but it may be questioned whether such qualification adds much to its impact: since States are only obliged to destroy biological agents above a certain quantitative limit where stocks indicate non-peaceful purposes, the agents will still exist and hence constitute 'potential weapons', given time to grow the peaceful stocks of such agents.

The Convention prohibits the transfer, or assistance to other States, or groups of States or to international organisations of biological agents.[330] But the Convention is silent on transfer to individuals, groups of individuals or, for example, liberation movements or guerrilla groups. The Convention thus does not appear to prohibit export of any biological agents like, for example, herbicides in any quantities to any individual, group or body.

The States Parties to the Convention undertake[331] to implement the provisions of the Convention in their respective territories according to their constitutional provisions[332] but there is no obligation restraining States from transferring agents and toxins, weapons or equipment covered by the Convention to individuals, or group of individuals elsewhere if they buy from different sources. And what if they, in turn, transfer these agents to other States?

But 'use' of biological weapons is not prohibited, in spite of successive United Kingdom Drafts urging for such extension. Yet, if a biological weapons is 'used', prior violation of article IV (on developing, possessing and stockpiling) can be deduced from such 'use'.[333] Similar comments may be made with respect to transfer for someone else to 'use'.

Parties are also under some duty to 'facilitate' technical information for peaceful purposes and they shall, under the Convention, also be given the right to participate in such information. A vague obligation on cooperation in this respect is laid down in the Convention[334] but a more specific duty exists with regard to developing nations: the Convention shall be 'implemented' in a manner designed to 'avoid hampering' the economic or technological development of States Parties to the Convention.

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328 Sims, N., 'Biological and toxic weapons issues in the 1986 Review Conference', *Faraday Discussion Paper No. 7*, London, 1986, 6.

329 Rosas, A., *The Legal Status of Prisoner of War, op. cit.*, 32.

330 Article III.

331 Article IV.

332 On transformation, see above, Chapter 6, secion B ii.

333 Sims, N., 'Reform of the 1972 Convention on Biological and Toxin Weapons', issues Arising for the Second Review Conference, MS, 1985, 14.

334 Article X(1).

A considerable weakness of the Convention is the lack of verification methods.[335] States only bind themselves to cooperate and consult to solve any arising 'problems'.[336] It has been questioned whether 'clarification' of article V could ever be widened to include institutions to assess alleged violations or reciprocal on-site inspections.[337]

But here there are two distinct problems which entail different solutions. By the theory of 'implied powers' and/or the theory of '*competence de la compétence*' as understood and developed by some writers,[338] institutions can always be created to safeguard and implement the objectives of a treaty. Powers to 'assess' violations would certainly come within that scope. But on-site inspections, implying territorial access to a State, widens the framework of powers granted under a treaty. Therefore, for such an enlargement of powers further consent by States is required.[339] If States do consent, such inspections can be allowed on reciprocal or wider basis, and this would, from the point of theory of treaties, be construed as a *de facto revision*.[340]

The problem of verification has been a recurring theme in the Review Conferences: a different scenario emerged after the fall of communism but, even in this new world, hesitation to open up internal facilities to inspection remained.[341]

There is an interesting duty to uphold the rules of the Convention to assist another State Party whose rights under the Convention have been violated, provided the violated State requests assistance and the Security Council has pronounced itself to the effect that there has been a violation.[342]

But by an important additional agreement of 26 September 1986 the United States, the then Soviet Union and 101 other States agreed to strengthen the implementation of the 1972 Treaty. Parties have now assumed obligations to call prompt meetings to examine alleged violations, to initiate action under the United Nations, or to request assistance by the specialised agencies.[343]

An inquiry into alleged violations, as the claim by Iran that Iraq has used BWs in the Jofeir area and on the Madjnoum Islands, resulted in condemnation of BWs, even before any assertion of guilt of any of the belligerents.[344]

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335 See, for example, Sims, N.A., *The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975–85* (New York, 1988).

336 Article V.

337 Sims, 'Reform', *op. cit.*, 19.

338 See Detter, I., *Law Making, op. cit.*, 29 *et seq.*

339 See Detter, I., *Independent State, op. cit.*, 197.

340 See Detter, I., *Law Making, op. cit.*, 37 *et seq.* and Detter, I., *Essays, op. cit.*, 71 *et seq.*

341 Littlewood, J., *The Verification Debate in the Bio & Toxic Convention in 2011* (UNIDIR, 2011); Sims, N.A., *The Evolution of Biological Disarmament*, SIPRI Chemical and Biological Warfare Studies no. 19 (Oxford, 2001); Littlewood, J., *The Biological Weapons Convention: A Failed Revolution* (Aldershot: Ashgate, 2005); Sims, N.A., 'Midpoint between review conferences: next steps to strengthen the BTWC', *Disarmament Diplomacy* 91, Summer 2009. Pearson, G.S., 'The Biological Weapons Convention Meeting of States Parties, December 2009', Report from Geneva, Review no. 31, *The CBW Conventions Bulletin*, no. 86, February, 2010.

342 Article VII.

343 BWX/CONF.II/11, 1986.

344 *Report by a Delegation Sent by the Secretary General*, S/16433, 1984.

There is an interesting duty to uphold the rules of the Convention to assist another State Party whose rights under the Convention have been violated, provided the violated State requests assistance and the Security Council has pronounced itself to the effect that there has been a violation.[345] In other words, it is for the Security Council to decide whether violations have taken place, at least if they are to engender what may be called 'solidarity assistance' by other Parties.

Secondly, it is a rare provision in treaty law insofar as innocent Parties are under duty to assist another innocent Party, whose treaty rights have been violated. Such assistance increases the substantive obligations of other Parties although it must be queried as to how and in what form, and in what circumstances, such assistance would actually be given.

It is often wrongly assumed that the Convention prohibits research on toxins; but there is no provision in the Convention to this effect.[346] This is a general limitation of the Convention's impact as research and development are invariably interlinked. Even if verification is difficult with regard to research, a ban would have enhanced the effectiveness of the Convention.

b The Review Conference Mechanism

The Convention provides for Review Conferences[347] to analyse the operation of the Convention, especially in the light of new scientific and technical development. The First Review Conference in 1980 thus considered Ebola, Lassa and Marburg viruses as well as the *Legionella bacterium*; all these had been identified by medical research since the conclusion of the 1972 Convention.[348] But there was no need to revise the Convention.

iii Chemical Weapons (CW)

a The Question of Gas

(1) The Application of Early Rules

There is no doubt the British used gas in the Boer War.[349] However, the Hague Regulations of 1899 and 1907 prohibit[350] 'poison or poisoned weapons'. This is the first clear prohibition of CBWs and it is clear that it covers weapons deliberately contaminated with germs or poisonous agents. But it is unclear whether this prohibition covers gas. Some have interpreted the prohibition to mean only the

345 Article VII.

346 The United Kingdom Working Paper had proposed such prohibition. See, Sims, 'Reform', *op. cit.*, 5–6.

347 Article XII.

348 Sims, 'Reform', *op. cit.*, 30.

349 Kelly, J.B., 'Gas warfare in international law', *MilLR*, 1960, 5.

350 By article 23(e).

actual use of poisonous agents, alone or applied to weapons,[351] whereas other have held that the prohibition, by implication, also covers gas.[352]

It was not clear whether the Gas Declaration of 1899 implied only actually 'lethal' gas or also other 'control agents' like tear gas and herbicides as well.[353] The Hague Regulations of 1899[354] and of 1907[355] do not cover chemical warfare in the opinion of many.[356] But others have looked more to the spirit of the Regulations than to the letter and held that chemical weapons are covered by the provisions.[357]

Different interpretations depended largely on whether or not a 'policy' prohibition was intended by the Hague Regulations, *i.e.* an attempt seeking to prohibit chemical and biological warfare as envisaged as practically feasible at the time.[358] Another line would be to inquire whether one could rely on the analogy between, for example, contaminated water supply and the use of gas.[359] A third position would be to hold that only specific weapons, as indicated by the wording, were prohibited.[360]

Another Declaration had been issued in connection with the Hague Declaration in 1899 on the prohibition of dum-dum bullets.[361] This further Declaration concerned a pledge to 'Abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases'.[362] The question of 'sole object' would be assessed by comparing the proportion of gas and splinter effects of a projectile; but the Declaration left open as what 'gas' the Declaration applied.[363]

Certain States interpreted the Declaration literally and, since it prohibited dispersion of gas by projectiles, they saw themselves legally entitled to do so from stationary cylinders. This formulation of the prohibition had disastrous consequences in the First World War: Germany resorted to extensive use of gas dispersed from stationary containers, relying on the actual wording, rather than the spirit of the Declaration.[364] And other belligerents followed suit; even before the use of stationary cylinders of gas by Germany, France had already violated the

351 McDougal and Feliciano, *Law and Minimum World Order, op cit.*, 663.

352 Kelsen, H., *Principles of International Law*, 2nd edn (Oxford: OUP, 1966), 97.

353 Verwey, *Riot, op. cit.*, 224–225.

354 Article 23(a), Convention II.

355 Article 23(a), Convention IV.

356 *E.g.* McDougal and Feliciano, *Law and Minimum World Public Order, op. cit.*, 663.

357 Greenspan, *The Modern Law of Land Warfare, op. cit.*, 359. Bothe, M., *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen* (Cologne: Carl Heymanns Verlag, 1973); Kelsen, H., *Principles, op. cit.*, 117; van Eysinga, W.G.M., 'La guerre chimique et le movement pour sa répression', 16 *RCADI*, 1927, i, 347.

358 Greenspan, *The Modern Law of Land Warfare, op. cit.*, 359. *Cf.*, Neinast, 'United States use of biological warfare', 24 *MilLR*, 1964, 27.

359 Stone, *Legal Controls, op. cit.*, 557.

360 Kunz, J.L., *Gaskrieg und Völkerrecht* (Vienna: Julius Springer, 1927), 26.

361 Above, in this Chapter, section A iv on small calibre weapons.

362 Declaration IV (2) 1899, Concerning Asphyxiating Gases, 26 *NRGT*, 2 série, 1002; 1 *AJIL*, 1907, Suppl. 155. Like the other Hague Declaration, above, there were clear undertakings in the form of a treaty. Most military powers were bound by this treaty; United Kingdom ratified it in 1907.

363 Kunz, J., *Gaskrieg, op. cit.*, 81.

364 *Cf.*, Stone, J., *Legal Controls, op. cit.*, 556.

prohibition of projectiles by, in the first month of war in 1914, tear-gas grenades, filled with xylyl bromide, against Germany

On the other hand, it was claimed that, even before the 1899 Declaration, gas had already been prohibited. This followed, some argued, from an analogy with the 1868 St Petersburg Declaration[365] for all chemical and biological weapons.[366] It may be questionable whether one could stretch the wording of the St Petersburg Declaration that far[367] but it could be argued, on the other hand, that such analogy could be drawn with the prohibitions in the Hague Regulations.[368]

Reactions were fierce after the First World War when it became apparent what serious consequences the use of gas when used as a weapon has in war. The Versailles Treaty after the First World War stated, as a condition for Germany, that a prohibition would be introduced in that country and that

> 'the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.'[369]

The wording suggests that the 'use' of gas and 'analogous' substances would be prohibited previously everywhere for military purposes.

The Washington Conference of 1922 on Limitation of Armaments[370] drafted rules for a Treaty Relating to the Use of Submarine and Noxious Gases in Warfare, but the Treaty[371] never entered into force. The language chosen by the Draft Treaty suggests a similar attitude of mind in its provisions on this point. The Treaty provides that

> 'The use of asphyxiating, poisonous or other gases and all analogous liquids, material and devices, having been justly condemned by the general opinion of the civilised world and a prohibition of such use having been declared in Treaties to which a majority of the civilised Powers are parties, the Signatory Powers, to the end that this prohibition shall be accepted as a part of International Law binding alike on the conscience and practice of nations, declare their assent to such prohibition, and agree to be bound thereby as between themselves and invite all other civilised nations to adhere thereto. '(Emphasis added)[372]

On the one hand, the statement seems to indicate that the drafters refer to a previous condemnation of the use of gas (and analogous substances). Some find it

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365 Above, in this Chapter, section A iv.

366 Greenspan, *The Modern Law of Land Warfare, op. cit.*, 360.

367 *Cf.*, Castrén, E., *The Present Law of War and Neutrality, op. cit.*, 1954, 190.

368 Above, and article 23(e).

369 Article 171; *cf.*, the Treaties of St. German, article 135; Neuilly, article 82; Trianon, article 119.

370 16 *AJIL*, 1922, Suppl. 57.

371 25 *LNTS* 202; see further below, in this Chapter, section D ii, on biological weapons.

372 Article 5.

questionable whether general international law had, at that time, condemned the use of gas.[373]

But the statement also refers to 'treaties': which are they? The Peace Treaties, which had used a similar wording? Or the 1899–1907 Regulations? The reference to the intention to 'invite' others to 'accept' the prohibition as well probably contradicts the earlier half of the statement. This pronouncement, however, even if only in the form of Draft Treaty, is possibly indicative of attitudes, and appears to have some legal signification in that respect, especially as the wording is reiterated by the subsequent Geneva Protocol.

The question whether or not gas was prohibited under various regulations became, over the years, a most discussed and controversial question. The question of prohibition of gas and other similar chemical weapons has been at the core of legal discussions on CWs; but the Geneva Protocol was a milestone.

However, important new rules on the use of noxious gases were included in the 1925 Geneva Gas Protocol.[374] This Protocol, caused by the practices of the First World War, is an effort to prohibit further certain types of warfare and has recently been invoked in the Iran–Iraq War, as both States are bound by the Protocol.[375]

(2) The Geneva Gas Protocol

By the Geneva Gas Protocol of 1925,[376] the parties refer to a similar, chronologically earlier condemnation of the use of gas and similar agents. The Protocol provides that 'Whereas the use of asphyxiating, poisonous or other gases and of all analogous liquids, material or devices, has been justly condemned by the general opinion of the civilised world; and Whereas the prohibition of such use has been declared in Treaties to which the majority of the Powers of the World are Parties'.[377] The reference to a condemnation from sources outside the ambit of the Protocol[378] as to 'treaties' is, especially in conjunction with earlier statements,[379] a most important relevant element when assessing the ambit of the prohibition and/or when interpretation what the underlying 'treaties', presumably the Hague Regulations, implied in the opinion of the Contracting Parties of the Geneva Protocol.

The text is very short and consists in a Declaration to the effect that the Parties 'accept' insofar not already bound to do so, the (already existing) 'prohibition' (of the use of gas etc.) and 'agree to extend' this prohibition to 'the use of bacteriological methods of warfare'.

The text thus indicates, first, that the clause outlawing certain weapons in the Hague Regulations is to be interpreted, in the opinion of Contracting Parties, as covering also gas and associated substances. The Contracting Parties to the

373 Thomas and Thomas, *Legal Limits*, *op. cit.*, 66.

374 Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous and Other Gases and of Bacteriological Weapons of Warfare, 94 *LNTS* 65; it entered into force on 8 February 1928. See further below, in this Chapter, section D i c (2).

375 Iran acceded on 5 November 1929 and Iraq on 8 September 1931.

376 94 *LNTS* (1929) 65.

377 Preamble of the Protocol.

378 *Cf.*, comments above, Chapter 5, section C v on the ethics of warfare.

379 *Cf.*, Draft Treaty of Washington, 1922, above, Chapter 3, section C iii a.

Geneva Protocol include all the major military power who were bound by Hague Convention 1907 together with the Hague Regulations.

Secondly, the wording indicates that, since the prohibition is reiterated and strengthened, abuses of using stationary gas dispensers, or other use of gas, as in the First World War,[380] will discontinue.

The Protocol regime is riddled with a network of reservations.[381] Most of the reservations are modelled on the one made by France to the effect that application of the prohibitions will be on the basis of strict reciprocity.[382] Such reciprocity implies that a party is released from obligations under the Protocol the moment another party to a conflict ceases to respect its obligations. It is clear that such a system undermines the legal regulation of the Protocol.

There are different interpretations of the Geneva Protocol, especially to whether it covers herbicides and tear gas, *i.e.* agents which are not lethal to man. A semantic element has been of importance when assessing whether the Protocol covers tear gas and other riot agents. The English version of the Protocol indicates that the Protocol prohibits 'asphyxiating, poisonous and other gases', whereas the French text forbids '*gaz asphyxiants, toxiques ou similaires*'. The 'other' in the English version is probably wider than the '*ou similaires*' in the French text.[383]

But even the French text could be interpreted as extending the application of the Protocol to, for example, chemical agents which are not normally lethal to man: if '*similaires*' had no such extending function it would be a superfluous word.[384]

The usefulness of the Geneva Protocol[385] was greatly undermined by the absence of the United States among the ratifying parties. The United States did not adhere to the Protocol until 1975; even then, its adherence was marred by a reservation which exempts tear gas and herbicides from the application of the Protocol,[386] a clear reminder of their use in the Vietnam War.

Both the British and the French governments agreed at the 1930 Disarmament Conference[387] that the Protocol covered, for example, tear gas.[388] However, the

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380 But the Red Cross was less convinced that use of gas would cease. The ICRC reminded States signatories of the Geneva Convention of 1864 as revised 1906 that protection of civilians against 'chemical war' was a 'national matter'. National committees (of the Red Cross) should consider suitable protective equipment against gas attacks, *RICR*, 1930, 15.

381 For a fragmentation of obligations, see, Detter, I., *Essays*, *op. cit.*, 117.

382 See below, Chapter 12, section B ii.

383 Miramanoff, J., 'La Croix-Rouge et les armes biologiques et chimiques', *Revue CIRC*, Geneva, 1970, 344.

384 *Cf.*, Meyrowitz, H., 'Les armes psychochimiques et le droit international', *AFDI* 1964, 94.

385 *Cf.*, Baxter R. and Buergenthal, T., 'Legal aspects of the Geneva Protocol of 1925', *AJIL*, 1970, 853;

386 14 *ILM*, 1975, 49. *Cf.*, Moore, J.N., 'Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: a legal and political analysis', 3 *Virg.LR*, 1972, 419.

387 On the Conference, above, Chapter 3, section C iii.

388 League of Nations, Preparatory Commission, Disarmament Conference, 1931, X, 6th sess., 311.

United States disagreed stating that, since tear gas is legal in peace-time for riot control, it must also be legal in war.[389]

The United States considers that the use of chemical and biological weapons is a matter of 'national policy'.[390] Throughout the Vietnam War the United States emphasised that it is not a party to any treaty which prohibits the use of toxic or nontoxic gases or the destruction of crops by chemicals 'harmless to man'.[391] But the United States undoubtedly resorted to the use of anti-personnel gas in Vietnam.[392]

The United Kingdom, although more interested in having tear gas allowed than herbicides, took a similar position long after its adherence to the Protocol. Although no formal reservation had been made to this effect it was claimed by the United Kingdom that it was not bound by any prohibitions of tear gas. This was a change of attitude by the United Kingdom due to the need for tear gas for use to control unrest,[393] mainly in Northern Ireland. The reason for the alleged legality is, it was claimed, that 'modern' tear gas is so 'mild' that there is no reason why it should be prohibited. It does, for example, not come under any prohibition in the Geneva Protocol which was drafted when tear gas implied something different from today.[394]

An extensive interpretation of the Geneva Protocol is, by some, founded on the alleged existence of rules outside the Protocol, prohibiting all biochemical weapons. This view appears reasonable.[395] Such wide interpretation has been endorsed by Resolutions of the UN General Assembly,[396] some of which have specifically referred to the ambit of the Geneva Protocol as covering gas which affects not only human beings but also plants.[397] The Resolution thus prohibits

> '(a) any chemical agent of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effect on man, animals or plants;

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389 *Ibid.*, 312.

390 US Dept. of the Army, FM 310, *Employment of Chemical and Biological Agents*, 1966, 4.

391 US Dept of the Army, FM2710, *The Law of Land Warfare*, 1965, 18; United States Congress, Committee on Foreign Affairs, *Chemical and Biological Warfare: United States Policies and International Effects*, Washington, DC, 1970; US Congress, Committee on Foreign Relations, *The Geneva Protocol of 1925, Hearing Before 92nd Congress 1st sess.*, Washington, DC, 1972.

392 For a list of types authorised to General Westmoreland in 1965, see Weiler, H., *Vietnam* (Montreux: Frankenthal, 1969), 250–251.

393 The UK government has always emphasised that the use is limited to 'internal' affairs, in its own country.

394 Statement by the Foreign Secretary, 795 *HC*, 1970 col.18.

395 *Cf.*, Sandoz, Y., *Des armes interdites en droit de la guerre* (Geneva: CIRC, 1975), 88; Fischer, G., 'Les armes chimiques et bactériologiques', *AFDI*, 1969, 127; *cf.*, the view of the Secretary General.

396 For example, Res. 2162 B (XXI) 1966; 2454 A (XXIII) 1968.

397 For example the 21 Power Resolution 2601 A(XXIV) 1969 emphasised that the Geneva Protocol embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical development.

(b) any biological agents of warfare – living organisms, whatever their nature, or infective material derived from them – which are intended to cause disease or death in man, animals or plants and which depend for their effects on their ability to multiply in the person, animal or plant attacked'. (Emphasis added)

There were serious drafting ambiguities. Thus, 'intention' is required for biological weapons but not under (a) for chemical weapons. Furthermore, the threshold of injury appears to be higher for biological weapons than for chemical weapons: 'toxic effects' are surely less drastic than 'disease and death'?

In spite of drafting technicalities, the Resolution is an important expression for the attitude of a number of States on the ambit of the Geneva Protocol and must carry some weight in the interpretation of its provisions.

There was much interest in the United Nations to encourage further research into the use of CBWs with a view to prohibit such weapons by a Convention. The Secretary General carried out one study on the subject[398] and there were a great number of Resolutions on the subject by the General Assembly.[399] There have also been a number of relevant resolutions and comprehensive studies in the specialised agencies, like in the World Health Organisation.[400]

b Various Drafts

In 1972 a Draft Convention on chemical weapons was submitted to CCD, proposing a comprehensive approach based on a 'purpose criterion' which would establish whether or not the production of chemicals of certain types or in certain quantities had any peaceful justification.[401] Another proposal by 10 non-aligned States was put forward the following year elaborating proposals for verification, for example (as suggested by Sweden) involving simultaneous application of different verification methods to enhance compliance with the substantive obligations.[402]

Another Draft Convention was presented by Japan in 1974 based on the 'purpose criterion' and providing for a gradual elimination of chemical weapons;[403] and there were numerous Working Papers.[404]

A Draft Convention was produced by the United Kingdom in 1976 as an attempt to combine constructive elements of earlier drafts together with new suggestions for the initial stages of implementation. The Draft prohibits all lethal

398 *Report by the Secretary General on Chemical and Bacteriological (Biological) Weapons and the Effects of Their Potential Use*, 1969, E.69.1.24.

399 GA Res. 2262 (XXV) 1970; 2827 A (XXVI) 1971; 2933 (XXVII) 1972; 3077 (XXVIII) 1973; 3256 (XXIX) 1974; 3465 (XXX) 1975; 31/65 1976; 32/77 1977; S10/2. 33/71 A and 33/71 H 1978, 34/72 1979; 35/144 A.B,C 1980; 37/98 1982; 38/187 1983.

400 WHA, *Resolutions*, 2054.1967; 22.58.1969;23.53.1970; Exe. Res.EB45.R17 s.d.; see, WHO, Public Health and Chemical and Biological Weapons, 1970.

401 CDOR, 1972, CCD/361.

402 CCD/400, 1973 and GAOR, 28th sess., Suppl. No. 31, A/9141.

403 CCD/420, 1974 and GAOR 29th sess., Suppl. No. 27, A/9627. See modifications proposed by Japan, CCD/483 1976 and GAOR, 31st sess., Suppl. 27, A/31/27, Annex III.

404 See Working Papers by Canada, Finland, Federal Republic of Germany and Sweden, GAOR 29th sess., Suppl. No. 27, A/10027 Annex II.

chemical agents and toxic chemical agents that might cause long-term physical effects. Proposals for on-site verification would, as the United Kingdom delegation suggested, be subject to separate negotiations.[405]

A Joint Report by the USSR and the United States was elaborated in 1979,[406] on the basis of an earlier understanding between the two Powers in 1974[407] that the most dangerous lethal chemical weapons must be outlawed by a convention. A further Joint Report was elaborated in 1980.[408] A further Draft Convention was submitted to CD by the United States in 1984.[409] The United States Draft includes verification procedures which envisage inspection of all military or government owned 'localities and facilities'. Such a formula may appear both too broad, by including government owned establishments which have no connection with chemical weapons, and too narrow, by excluding the private sector of the chemical industry.[410]

c The 1993 Chemical Weapons Convention (CWC)

A Draft, elaborated in 1985,[411] was finally adopted, after numerous amendments, as a Convention. It is based, as numerous earlier proposals, on a distinction between the level of toxicity of certain chemicals. It also introduces some new categories in this respect. There is thus a distinction between 'super-toxic', 'other lethal chemicals' and 'other harmful' chemicals.[412]

It was easier to reach an agreement on the super-toxic chemicals,[413] which were prohibited outright, whereas there was more hesitation with regard to those of a lower toxicity that may be allowed for 'non-hostile' purposes, such as industrial, agricultural research, medical purposes as well as 'domestic law enforcement purposes'.[414]

The Convention also considers 'binary weapons' which have attracted much attention in recent years. Such weapons rely on substances which *per se* are not of any toxic significance but together generate an extremely toxic substance when combined, during delivery or upon impact.[415]

The Convention uses the term 'precursors' to mean chemical reagents which take part in the production of a toxic chemical and 'key precursors' to mean those precursors which pose a significant risk to the objectives of the Convention by

405 CCD/512 1976.

406 CD 53 and Corr. 1 and CD/48 1979.

407 CCD/431, GAOPR 29th sess. Suppl. No. 27, A.9627, Annex II.

408 CD/112 1980.

409 CD/500 1984.

410 Sims, N., 'Chemical weapons, control or chaos', *op. cit.*, 8; see further in detail, Robinson, J.P.P., 'Disarmament and other options for western policy making on chemical warfare', *International Affairs*, 1986–7, 65 *et seq*.

411 CD/636, 1985.

412 CD /636, 1985, Draft, Article 2(a), (b) and (c).

413 See already suggestion the in the Draft Convention submitted by Japan in 1974, CCD 420 1974.

414 *Cf.*, *ibid.*, article 3 which defines 'permitted purposes' or 'non-hostile purposes'.

415 *Ibid.*, article II (1).

virtue of their importance in the production of a toxic chemical.[416] The notion of 'precursors' can conveniently be used to describe both general CWs and certain binary weapons which will be prohibited.

Problems still remain with regard to non-lethal chemical weapons. There are several types of non-lethal chemicals which are used in war, either, as in the case of tear gas,[417] to control the movements of the enemy; or, as in the case of smoke and incendiary devices, for other strategic reasons;[418] in the case of LSD to reduce the enemy's capabilities;[419] and in the case of herbicides, to attack vegetation rather than the enemy forces.[420]

Great attention has been attached to the degree of lethal effect of chemical weapons. There has been little agreement on the above-mentioned types of non-lethal chemical weapons which many States consider essential to warfare. Another problem is that States often consider certain such weapons useful for riot control in peace-time and therefore insist on having certain such weapons available for 'peaceful purposes'.

Secondly, chemicals like herbicides are necessary for agricultural purposes and it is going to be difficult for any future Convention to regulate or restrict the use of herbicides as a means of warfare. The last comment may illustrate the particular difficulties of verification in this area. Yet, there has been a recent proposal to the effect that 'each State Party undertakes not to use herbicides as a method of warfare' and that 'such a prohibition should not preclude other use of herbicides'.[421]

Legal regulation of chemical weapons means little unless it is coupled with stringent verification procedures. The CWs Convention does provide for such effective verification, but years of negotiation preceded the willingness of States to allow inspection. The former Soviet Union agreed, in 1986, that it would be willing to allow on-site inspection of production sites. This was a new turning in the development of regulation of CWs: until then many States normally referred to sites of possession alone. However, any reference to on-site inspection of production plants is ambiguous: if complete destruction of the industrial base has taken place in accordance with international undertakings, there is no longer any 'site' to inspect.

With regular review conferences and monitoring of implementation, it became apparent that States, in principle, fulfilled their obligations. In 2010, a total of 43,131 tonnes or 60.58 per cent of declared chemical weapons (of Category 1, which is the main category) had been destroyed as well as all Category 3 declared chemicals.

416 Article II 4 (a). CD/636.

417 Above, in this Chapter, section D i c.

418 Thomas and Thomas, *Legal Limits*, *op. cit.*, 3. On policies advocating first use of CWs as 'legal', see Robinson, J.P., 'Disarmament', *op. cit.*, 69; see further Robinson, *Chemical Warfare Arms Control*, *op. cit.*

419 Meyrowitz, 'Les armes psychochimiques', *op. cit.*, 81.

420 Above, in this Chapter, section A, section ii f (2).

421 Proposal by the Chairman of the Open Ended Consultation, CD/836, 1985, Appendix I, 2, note.

F ENVIRONMENTAL WEAPONS[422]

i Specific Prohibition by General Treaties

There has been a marked trend in recent years to consider the importance of the human environment.[423] For example, 'material remnants' of war pose a threat to the environment[424] and formed the subject of special regulation in the 1981 Weaponry Convention.[425] Other harmful acts to the environment were prohibited by Protocol I of 1977 to the 1949 Geneva Conventions. The Protocol stipulates that it is prohibited 'to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'.[426] This provision is slightly duplicated by a later article which provides that

> '1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
> 2. Attacks against the natural environment by way of reprisals are prohibited.'
> (Article 55 on 'Protection of the Natural Environment)

A further relevant provision in Protocol I of 1977,[427] repeated in Protocol II,[428] is the prohibition against attacks on 'dangerous installations'.[429] These are, for example, dams and dykes, which when attacked can release dangerous forces to the detriment of the environment and to the civilian population. Of particular significance are attacks against nuclear installations which can cause considerable environmental damage. Attacks against such targets are prohibited by the 1977 Protocols[430] and

422 See below, Chapter 8, section A on the relationship between weapons and methods.

423 See *e.g.* the UN General Assembly Resolution on Environment 2849(XXVI) 1971 on the importance of the environment to mankind; the Declaration of the Stockholm Conference on the Human Environment in 1972; on this see Detter, I., 'The UN Special Conference on the Environment', in Taylor, P. and Groom, J. (eds), *UN Special Conferences* (London, 1987); later Resolutions of the General Assembly, e.g. 3154 (XXVIII) 1973 on the responsibility of the international society to preserve and enhance the natural environment; 3264 (XXIX) 1974, deploring pollution by ionising radiation from testing nuclear weapons.

424 Study by United Nations Environmental Programme (UNEP), UNEP/G.C./INF./5; and GA Resolution 3435 (XXX) 1975 and Resolution IV of the Lima Conference of Ministers of Foreign Affairs of Non-Aligned Countries, 1975, on Hazards of Material Remnants of War and Aggression; *cf.*, Herzegh, G., 'La protection de l'environment et le droit humanitaire', in Pictet, *Etudes et essaies sur le droit humanitaire et sur les principes de la Croix-Rouge; en honneur de Jean Pictet*, 1984, 725.

425 Above, Chapter 7, section A ii.

426 Article 35(3).

427 Article 56.

428 Article 15.

429 *Cf.*, below, in this Chapter, section A iii b (7).

430 *Ibid.*

had been at the recent attention of the Conference for Disarmament for further regulation.[431]

The 1982 Convention on the Law of the Sea is also relevant to environmental warfare: even if there are no explicit provisions on protection of the marine environment against consequences of armed attacks, it is necessary to assume such protection[432] in the context of the provisions of the Convention with regard to pollution.[433] Events in the Gulf War amply illustrate hazards to the marine environment.[434]

But it is above all warfare on land that has contributed to the urgent need for a comprehensive Convention on environmental techniques. Defoliant action in Vietnam,[435] although intended to have an impact on vegetation, also harmed combatants by chemicals, and, above all, had detrimental effects on the civilian population, both by exposing them to health hazards and by depriving them of crops and other means of survival.

ii The En-Mod Convention of 1977

There has been special concern about influencing the environment, for example, by artificial rainfall or droughts, possibly leading to the disruption of water and heat balance in a region and to the destruction of the ozone layer which protects the earth from the sun's ultraviolet rays.

During discussions in the Conference of the Committee on Disarmament, CCD, in 1974[436] Sweden emphasised the importance of preventing meteorological warfare.[437] The United States and the USSR urged, in a Joint Statement,[438] that effective measures were taken to prevent environmental modification for military or 'other' hostile use.

Geophysical warfare had already begun. An operation, known as Operation Popeye in Vietnam, had engineered cloud cover for military operations. Operation Popeye was a rainmaking operation akin to cloud seeding, which extended the monsoon season in the jungles of North and South Vietnam, Laos and Cambodia. Its military usefulness was to disrupt arms traffic by the Viet Cong. Its adverse effects included severe rains, flooding, mudslides and typhoons. This was the introduction of weather warfare. But there were concerns that the methods would endanger the human environment and by Resolution 71 in 1972, the US Senate decided to stop the en-mod warfare and to contact other States to draft a convention to regulate weather modification.

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431 See CD, *Report*, 1985. *Cf.*, SIPRI, *The Law of War*, *op. cit.*, 63.

432 UN, *Study of the Naval Arms Race*, *op. cit.*, 153.

433 Part XII.

434 *Ibid.*, *loc. cit.*

435 Above, Chapter 7, section A ii f (2).

436 GAOR, 29th sess., Suppl. No. 27, A/9627, paras 157 *et seq.*

437 A/9698, Annex 4.

438 A/9627, paras 158 *et seq.*

The United Nations General Assembly took Resolution 3664 (XXIX) in 1974[439] requesting CCD to adopt a Convention on the matter. New draft conventions, separate but identical, were submitted by the United States and by the USSR in 1975.[440] The text was discussed and revised[441] after discussions both in CCD and in the First Committee of the General Assembly.[442]

In 1976 Mexico had emphasised, in the form of a draft resolution[443] in the First Committee of the General Assembly, that article 1 in the Draft Convention only prohibited en-mod techniques which had widespread, long-lasting or severe effects; by such limitation there was an inference that techniques of lesser ambit would be permissible.

The final Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, normally referred to as the En-Mod Convention, was adopted in 1977.[444] The Convention was, when opened for signature,[445] signed by 34 States, including all the major military Powers, except France. The Convention consists of a preamble and six substantive articles and another four formal ones on temporal application of unlimited duration, on review conferences, ratification procedures, depositories and on authenticity of texts.

Article I deals with the area where most problems have been encountered and which goes to the root of the whole Convention; for article I controls its ambit of application. The final Convention adopted the unsatisfactory article 1 and prohibits thus environmental warfare which has 'widespread, long-lasting or severe' effects. The threshold of application of article 1 of the Convention is now at the centre of attention of further discussions. The main problem concerns further prohibition of environmental techniques which do *not* have widespread, long-lasting or severe effects. For there is clearly a large category of permissible environmental weapons subsumed under the wide formula of article 1 as it stands. Secondly, as always is the case with concepts involving latitudes, there is a further problem as to *who* is to assess whether the relevant threshold has been crossed, *i.e.* whether environmental damage, in a specific case, is 'widespread', 'long-lasting' or 'severe'.[446]

An interesting technique for interpretative 'understandings', separated from the main text, has been adopted. Thus, CCD reached an 'understanding' that, for the purposes of the Convention, 'widespread' would mean encompassing an area of the scale of several hundred square kilometres; 'long-lasting' would imply

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439 On the basis of a revised USSR Draft Resolution and Convention, endorsed by 23 States; *cf.*, A/C.1/l,675 and Rev.1.

440 CCD/471 and CCD/472; GAOR 30th sess., Suppl. No. 27, A/10027, para. 45.

441 See *e.g.* Working Paper by Canada, CCD/463, GAOR, 30th sess., Suppl. No. 27, A/10027, Annex II; by Sweden CCD/465 and GAOR 31st sess., Suppl. No. 27, A/31/27, para. 277 for revisions, and paras. 91–370 on text.

442 *Cf.*, GA Resolution 3475 (XXX) requesting CCD to agree on a text.

443 The Resolution was sponsored by 11 Latin American States and by Haiti and Cyprus, A/C.1/31/L.4, and, for comments, GAOR 31st sess. A/31/27, para. 297–333; GAOR 37th sess., First Committee, 45th mtg. (Mexico and Argentina) reiterating the need for a resolution.

444 The Convention entered into force on 5 October 1978. Most States of military significance are parties except France and Israel.

445 See GA Resolution 31/72 1977.

446 On similar subjective tests, see above, Chapter 5, section C v.

a period of months or approximately a season; and 'severe' would mean serious or significant disruption or harm to human life, natural and economic resources or other assets.[447] Such 'understandings' are clearly relevant to the interpretation of the treaty, especially as they form part, in this particular case, of the *travaux préparatoires*, which always guide the interpretation of a text in the absence of clear wordings.[448] But if on the one hand, such 'understandings' indicate the ambit or article 1 of the En-Mod Convention in a fairly conclusive way, they hollow out, on the other hand, the actual scope of the Convention.

Article II defines en-mod techniques as

> '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'.

A list of examples that had figured in earlier drafts was deleted but there was another 'understanding'[449] that the following examples were illustrative of phenomena that could be caused by en-mod techniques: earthquakes, tsunamis, upsets in ecological balance, changes in weather or climate pattern, of ocean currents or of the ozone layer or of the ionosphere. There was also a presumption that such phenomena would be, as required by Article I, for the application of the Convention, of 'widespread, long-lasting or severe' effect.[450]

In accordance with the original mandate of the General Assembly to the Committee on Disarmament[451] to keep further development of en-mod techniques under review, in conjunction with the provisions of the Convention itself,[452] it is now subjected to periodic Review Conferences. The First Review Conference was held in 1984 and dealt, above all, with the recurrent problems caused by the very limited scope of article I.[453] Article III provides, by an additional clause inserted late in the negotiations, that the Convention will be without prejudice to generally recognised rules of international law concerning en-mod techniques. There is a stipulation, in connection with this provision, that the Convention shall not hinder en-mod techniques for peaceful purposes. The Article also provides, in a second paragraph, for fullest possible exchange of information on en-mod techniques for peaceful purposes, although there was strong pressure at the Conference by the USSR to delete such alleged duty of cooperation in a field which was not germane to the Convention.[454]

By article V States undertake to cooperate in areas relevant to the Convention either directly or – as was added by a late revision of the draft Convention – through the United Nations. But there are only vague provisions on verification.

447 GAOR, 31st sess., 1976 Suppl. No. 27, A/31/27, para. 297–333.

448 Vienna Convention on the Law of Treaties, 1961, article 32.

449 *Cf.*, comments earlier in this section.

450 GAOR, 37th sess., Suppl. No. 27, A/31/27, para. 334–343.

451 GAOR 10th Spec. sess., Suppl. No. 4, A/S10/4, 1978.

452 Article VIII.

453 See above, in this section.

454 GAOR, 31st Sess., Suppl. No. 27, A/31/27, para. 344 *et seq.*

A procedure is set out in the article for convening a Consultative Committee of Experts to which information can be transmitted by States. In practice, this provision has been supplemented by other methods; for the Review Conference in 1984 information was also transmitted[455] to the Preparatory Committee for the Conference, established but not named, under article VIII of the Convention.[456] In the case of suspected breach of the Convention a State may lodge a complaint with the Security Council; contracting States undertake to 'cooperate' in any investigation by the Security Council.[457] This is thus another type of what could be called 'solidarity assistance'.[458]

Article IV provides for the transformation into national law[459] of the provisions of the Convention and provides that national rules shall incorporate necessary prohibitions and preventions.

A Review Conference was convened in 1984 under article VIII of the Convention.[460] The Conference made a Final Declaration whereby States reaffirmed their interest in preventing en-mod techniques for military or any other hostile use. The Conference noted that article I had been 'faithfully observed' by the State Parties.[461] There had not been any complaints under article VIII.[462]

Although there had been considerable discussion on the threshold of application of the Convention under article 1 there was no amendment of this article. Other articles were 'affirmed'.

The main concern of the Review Conference was the defects of article 1 which by its wording provides that environmental modifications on a smaller scale are not covered by the Convention.[463] Proposals were made, again by Mexico, to widen the scope of the Convention; but, after much discussion, the Review Conference refrained from taking any decision.

iii Environmental Obligations under General International Law

The environment can be used as means of warfare by, for example, setting alight oil wells, causing serious pollution. Serious environmental damage was inflicted by Iraq during Operation Desert Storm which liberated Kuwait from Iraqi occupation in 1991.[464] Iraq was held internationally responsible for this damage and was obliged to pay compensation.[465] The Security Council had reminded Iraq even before the hostilities came to an end[466] that all damage, including environmental damage,

455 For such information see En-Mod, CONF.1/4, 1984.
456 *Cf.*, Detter, I., *Law Making, op. cit.*, Chapter 1, on implied powers.
457 Article VIII(3)(4).
458 See Detter, I., *Concept, op. cit.*, 121 *et seq.*
459 On such techniques, see above, Chapter 6, section B ii.
460 GA Resolution 37/99 I, 1982.
461 En-Mod/Conf.1.1/11, 6.
462 *Ibid.*, 6–7.
463 En-Mod/CONF.1/4.1984, 4.
464 For the extent of the damage, see the *Farah Report*, UN S/535.
465 SC Res. 687 (1991).
466 SC Res. 686 (1991).

would have to be compensated. This is one of the first instances since The Trail Smelter Arbitration[467] when environmental damage has given rise to obligations to make compensation under general international law. There is, however, a considerable difference in that the trans-boundary pollution emitted by the Trail smelter in Canada was the result of an accident, and perhaps of negligence, whereas the environmental damage in the Gulf was intentional. The fact that Iraq had intentionally caused pollution by their oil wells engaged its responsibility under general international law.[468]

G INFORMATION AND CYBERSPACE WARFARE

The rapid advances in information technology have introduced a novel form of warfare, and, in a sense, a new type of weapon, These are not those which harm individuals in any direct physical sense but tools which may incapacitate defence capabilities and, in that way, destroy an enemy without even approaching a battlefield.

Categories of 'questionable' weapons described above concern those which are thought to be in varying degree 'unethical', that is to say designed to produce suffering for the sake of suffering rather than to be effective for the 'war effort'. Information weapons or information warfare, on the other hand, may not cause immediate physical harm to soldiers or civilians in any direct way but, by dismantling or by making defence mechanisms inactive, they may conceivably cause considerable damage to defenceless civilians by indirect effects.

The problem has not been approached in any systematic way although numerous institutions and governments have expressed concern about the problem. The United Nations Institute for Disarmament Research (UNIDIR) organised a conference on the matter as early as 1993 and the International Institute for Strategic Studies (IISS) discussed the problem at their 1999 Conference. For some time there was little, if any, academic comment by international lawyers. Now, on the other hand, there is increased interest in methods which could be most devastating to a belligerent, a fertile ground for terrorists and involving a host of interesting legal questions.[469]

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467 (1938) *RIAA* 1905. See further Detter, I., *International Legal Order*, Ch. V, s. vi.

468 See below, Chapter 12 and *cf.* Boelart-Souminnen, S., 'Iraqi war reparations and the laws of war', *ZaöRVR*, 1996, 225ff.

469 See Schmitt, M., 'Computer network attack and the use of force in international law', 37 Col. JTL, 1999; *idem*, 'Wired warfare: computer attacks and *jus in bello*', 84 *International Review of the Red Cross*, 2002; *idem*, 'Cyber operations and the *jus in bello*: key issues', Naval War College International Law Studies, 2011; *idem* and O'Donnell, B. (eds), *Computer Network Attacks and International Law*, (Newport: U.S. Naval War College International Law Studies, 2001); Byström, K. (ed.), *International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law* (Stockholm: Swedish National Defence College, 2004); Melzer, N., *Interpretative Guidance on the Notion of Direct Participation in Hostilities* (ICRC, 2009), 55 *et seq.* and *Cyber Warfare and International Law* (UNIDIR, 2011).

Cyberspace has been defined as 'the interdependent network of information technology infrastructures, and includes the internet, telecommunications networks, computer systems and embedded processors and controllers in critical industries'.[470]Planting a malicious virus in the computer network of an enemy can thus be highly effective to win advantage in military operations. This would be one method of cyberspace warfare.[471] The intent with which such interference is carried out entitles it to be classified as an 'attack'[472] in the sense of article 51 of the UN Charter which thus activates the right of self-defence.

Use of cyber warfare would also mean that this involves new 'weapons' and that the persons operating the destructive system for cyber attacks 'take part in hostilities',[473] which, in turn, means that they, too, become combatants and lay themselves open to be attacked in turn. If military structures of States devise cyber attacks there is ground for assuming that this could be part of warfare compatible with international law albeit by an unorthodox form of combatants. That this could be the case is indicated by the fact that the United States Governments has declared that cyber operators may be considered for a medal of valour, normally reserved for combatants in the field.[474] But if these attacks are carried out by private persons, or terrorists, these persons would be held to have participated in hostilities. As a result they would lose their status as civilians and would by their surreptitious attacks be classified as 'illegal combatants'.[475]

Today, many homes have a computer of greater capability than that which was used to launch the first satellites into space. The concern about computer network attacks (CAN) on military information infrastructure is therefore highly topical. 'Hackers' have already accessed many high-powered information networks and, although most intrusions have been carried out by technology 'amateurs' motivated by the intellectual challenge of hacking rather than by any malign intentions, it is not too far-fetched to conceive of the possibility of a State (even a very small one), a group of terrorists, or even a single individual, disarming the defences of a major State by a CAN.

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470 US Dept. of Defense, *The National Military Strategy for Cyberspace Operations*, 2006, 3.

471 *Cf.*, Roscini, M., 'World wide warfare – *jus ad bellum* and the use of cyberforce', in Bogdany, A. and Wolfrum, R. (eds) 14 *Max Planck Yearbook of the United Nations*, 2010, 96.

472 Zemanek, K., 'Armed attack', in Wolfrum, R. (ed.), *Max Planck Encyclopedia of Public International Law*, 2010, § 21.

473 Melzer, N., *Interpretative Guidance on the Notion of Direct Participation in Hostilities* (Geneva: ICRC, 2009), 55 *et seq.*

474 The US Defense Secretary Leon E. Panetta appeared to consider those who operate cyber networks and drones as combatants: he declared that a new medal, the Distinguished Warfare Medal, will be given to some of those who assist in a war effort by designing computer defences or creating poisonous digital codes to attack an adversary's network and this without necessarily any 'acts or valour or physical risk that combat entails', see statement by Defense Secretary Leon E. Panetta, *IHT*. 13 February 2013. *Cf.* above, in this Chapter B vi under Drones; operators remotely operating such unmanned weapons might also qualify for the above-mentioned Medal, as stated by Mr. Panetta in his valedictory speech, *IHT* 13 February 2013.

475 See above Chapter 4, C ii b and Chapter 9 B iv.

Before one even comments on the potential or actual use of cyber weapons by terrorists, it may be noted that radicalized Islamists have recently resorted to intense use of the Internet for propaganda purposes. Many such groups thus resort to propaganda and recruitment via the Internet. The Shabaab militia in Somalia tweets in English. The Fursan Al-Balagh Media and the Al-Quadisiya Media translate *jihad* propaganda into other languages than Arabic on the internet and publishes in Bengali, Hindi and Urdu. The Global Islamic Media Front is a virtual entity that publishes on the Internet in Arabic, English, French, German and Italian, but also in Albanian, Bosnian, Filipino, Pushtu, Urdu and Uighur. Once such groups have professional knowledge of use of the Internet, they become clearly also well placed to use cyber space for possible attacks.

Naturally, any attack on e-commerce or other financial structures may be most damaging; certain key economic targets such as, for example, oil, gas, water, electric power and telecommunications, banking and finance, have traditionally played a great role in warfare. However, what is most to be feared today is computer access to weapons systems. Defence systems, including early warning satellites,[476] may be immobilised by such unauthorised action and, perhaps even more seriously, offensive systems may also be activated by them.

States have taken steps to install advanced and sophisticated protective devices.[477] Some such efforts still concentrate on threats to economic systems,[478] whereas other attempts have been made to institutionalise threat assessment.[479] Military aspects of information warfare (IW) are currently under review in numerous countries, especially in those such as Sweden and Switzerland, for example, with high-level technology and emphasis on defensive but 'neutral' systems.

Information warfare is also linked to the capabilities that States and others may have in Outer Space.

H WAR SCENARIO IN OUTER SPACE

i Space Warfare

There has, until most recent times, been little interest in space weapons although such weapons pose considerable threat to national security. Since the end of the Cold War(s) States appeared to have resigned themselves to the fact that Outer Space is denuclearised. Yet, it is quite possible to 'take out' satellites, with minimum equipment, and thus to immobilise information systems, and communication satellites which, of course, are of vital military importance.

476 See below in the section on space weapons.

477 For example, see the Report of the Presidential Commission on Critical Infrastructure, US, *Critical Foundations: Protecting America's Infrastructure* (Washington, 1997).

478 Such as the US Critical Co-ordinating Group (CIAO) which was established by the Commerce Department.

479 For example, the US National Infrastructure Protection Center (NIPC) in the Department of Justice.

The European Space Agency (ESA) is designed to take interest only in the peaceful uses of Outer Space. But since Outer Space will always be of great military importance, it is also necessary to consider the military aspects of deployment of weapons in Outer Space and to consider implications of the militarisation of Outer Space. Few textbooks on Space law even mention weaponry in Outer Space.[480]

Space has, of course, been a vital part of strategies in armed conflicts in the sense that States have used satellites to enhance their military capabilities. For example, during the first Gulf War in 1990, the United States deployed a vast array of existing satellites. Later, in 2003, operations in Iraq demonstrated the necessity of adapting military space to the new strategic situations, for example with regard to early warning, telecommunications and observation activities. A so-called *'transverse convergence architecture'* was adopted by which space systems were designed to supplement existing military systems in order to increase the speed of operations and to enable more precise and discriminating firepower. Yet, from having been a 'force multiplier', space assets rapidly became an integral part of the weapons system they initially supported. Today, it has been said that *'every weapons system constitutes a space system'*.[481]

Space capabilities are thus necessary for navigation in military operations: most modern weapons systems rely on accurate and reliable positioning space capabilities in order to deliver their focused and effect-oriented power with minimum collateral damages. So-called *Effect-based operations*,[482] *Swarming*[483] or *Cruise missile attacks*[484] could not be performed without positioning satellites. Such systems are optimised for attacks on heavily defended and high-value targets.

ii Space Weapons

It is a question of definition whether weapons or tools used to manoeuvre in Outer Space to attack satellites, or to attack the Earth, should be called space weapons,

480 But see Detter, I., 'Militarisation in Outer Space', Rome Symposium on Space Law, 1997; *cf.*, Jasentulyana, N., *International Space Law and the United Nations*, 1999.

481 De Neve, A., 'The importance of space from a security and defence perspective, military applications of space technologies and expected technological developments', Centre d'Etude de Droit Militaire et de Droit de la Guerre, Conference on the Militarisation of Space, Brussels, 2007, 23.

482 According to the J9 Concepts Department of the United States Joint Forces Command, effects-based operations are 'a process for obtaining a desired strategic outcome or effect on the enemy through the synergistic and cumulative application of the full range of military and non-military capabilities at all levels of conflict'. 'Effects' are the physical, functional or psychological outcome, event or consequence that results from specific military or non-military actions. Thus, effects-based thinking consider the future and the entire continuum, peace, pre-conflict, conflict and post-conflict, and not just the conflict itself. J9 Concepts Department of the United States Joint Forces Command, *White Paper, Effects Based Operations*, 2001, 9 and 16.

483 Swarming implies operations when units of action attack an enemy from several different directions and then regroup, see Edwards, Sean J.A., *Swarming on the Battlefield* (Rand Monograph, 2000).

484 De Neve, A., 'The importance of space', *op. cit.*, *loc. cit.*

or whether the term should be reserved for weapons which are placed or moving in Outer Space. If one were to include information technology in such category of weapons one would clearly extend the notion by their function rather than by the emplacement of the weapons. On the other hand, the danger of attack on satellites, or on platforms, in Outer Space, is so grave that the discussion of the problems, in their widest sense, may take precedence over definitional issues. These are highly sensitive questions, especially in relation to developing capabilities of rogue States or of terrorist groups.

Still, there is probably a consensus that space weapons for use in or from Outer Space are those which form part of 'a system placed in orbit or deep space that is designed for destroying, damaging, rendering inoperable, or changing the flight trajectory of space objects, or for damaging objects in the atmosphere or on the ground'.

It is difficult or impossible to distinguish between civilian and military satellites as most are convertible or possible for dual-use. Observation satellites can report on troop constellations and civilian weather satellites can relay information for military operations. Such satellites may thus clearly furnish as much military information as a 'military' early warning satellite. Furthermore, those which relay telephone services can also be used for military communication chains. Private telecom services can be used for military command structures and civilian television transmissions can be relayed to a battlefield. The distinction sometimes made by the European Space Agency (ESA) between peaceful and military satellites[485] is difficult to uphold.

The question of anti-satellites (ASATs) was on the agenda of the Disarmament Conference (CD) in Geneva in the 1980s when the CD was held in high regard in the diplomatic world, having succeeded in drafting several important conventions on weapons.[486] But then the interest waned and the CD was itself stripped of much prestige as its ambassadors, once at the height of the diplomatic ladder, increasingly were replaced by envoys doubling up with functions in the Swiss government in Bern or with other international organisations in Geneva.

The work in CD in the 1980s was of considerable importance, especially with regard to anti-satellites as the Soviet Union, more so than the United States, had developed viable anti-satellite weapons. After the demise of the bipolar scenario, once the communist system had fallen and the USSR was no more, the threat from space weapons became, however, less acute and the CD ceased to discuss the matter. Possibly by foresight as for consequences for space of new information technology,[487] the question of space weapons was, in the spring of 1999, brought back on the agenda of the CD, at the request of China. It is clear that anti-satellite weapons may cause considerable or total damage to satellites merely by kinetic energy or in other inexpensive ways by a devised collision. However, nowadays it is not even necessary to organise such attacks: computer technology can be used to access the command centres of satellites. Such attacks by information technology may not only concern those satellites which are 'near' to Earth in the geostationary

485 ESA is under its Charter only charged with 'peaceful' uses of Outer Space.

486 CD, *Annual Reports*, 1981–1986.

487 See, IISS, *Report of the San Diego Conference*, 1999.

orbit, but also those which are far afield, in, for example, elliptical courses, often used in the Soviet and later in the Russian space operations.[488]

Space weapons clearly pose immense danger for targets and military operations on earth. Conversely, they may provide considerable military advantage for the power that controls and has access to such weapons. It is possible to use space-based radio-frequency energy weapons to disrupt, disable or destroy a wide variety of electronics and command and control systems. Other space weapons are multi-directional fragmentation weapons and hyper-velocity rod bundles.[489] The most simple, but highly efficient, space weapons are the anti-satellite weapons, or ASATs. As far as anti-satellites are concerned their functioning does not even involve costly investment as other satellites of other parties to a conflict can be immobilised by sheer kinetic energy. Thus, if an object, such as another satellite, is placed in the path of another, a collision is likely to destroy by simple kinetic energy. The path of a satellite is easy to predict as most use the geostationary orbit. The former Soviet Union, and now Russia, do, however, use an elliptical course for most of their observation satellites. The USSR was also the first country to develop anti-satellite weapons which were effective, albeit of a fairly heavy construction.[490]

Space debris can also provide ASAT functions by design: China has conducted experiments to create such debris to obstruct other satellites. China also carried out an ASAT kinetic 'kill' operation in 2007. It is claimed that this was not in violation of any rules of international law but did break a self-imposed moratorium between the United States and Russia, thus between two other important space powers.[491]China relies on 'Informationalised Warfare', implying priority of 'Information Dominance' together with Space Dominance in modern warfare. To this effect and to increase its space capabilities, China has advanced in the ASAT field and has also laser 'painted' US information satellites to put them out of function.[492]

As has been shown above, most military operations depend on space operations for efficient functioning, the most capable space weapon is an anti-satellite space weapon. By immobilising the satellites of other war-waging parties, a State can gain substantial advantage. Such attacks can be directed against various satellites for weather, information or reconnaissance and all these will provide important information which, if disrupted, can provide military advantage for another party to a conflict.

China has carried out R&D into space-to-earth strike weapons. However, a RAND report concluded that space-to-earth strike weapons are not cost-effective for the United States, since the United States already has so many other global conventional structures at their disposal. But space-to-earth strike weapons may

488 See, Detter, I., *Space Law* (forthcoming).

489 *Ibid.*, 32. See further, Hardesty, D.C., 'Space-based weapons: long-term strategic implications and alternatives', 58 *Naval War College Review*, 2005, 45–68.

490 See, Detter, I., *Report to the Swedish Delegation to the Disarmament Conference on Anti-Satellite Weapons* (Geneva, 1986).

491 Gleason, M.P., 'The US policy regarding the military use of space compared to the emerging space powers' policies', Centre d'Etude de Droit Militaire et de Droit de la Guerre, Conference on the Militarisation of Space, Brussels, 2007, 35.

492 *Ibid.*, 37.

provide a cost-effective means for a developing country that has access to space, to develop capability for striking targets on earth.[493]

It is important to underline that it is not only States that depend on space satellites for their military operations but also terrorist organisations: in recent attacks such groups have relied on telephone transmissions by satellites to coordinate their operations. It is also important to consider that most satellites are now placed in Outer Space not by States but by private and civilian operators for telecommunication and navigation purposes. This is another field where it becomes untenable to argue, as does virtually every textbook on international law, that only States and inter-governmental organisations are 'subjects' of international law, and are thus able to have rights and duties.[494] How do they then explain the space functions of INMARSAT, an inter-governmental organisation formed by a Treaty between States to assist in the satellite navigation of ships but which was subsequently privatised? It would seem artificial to pretend that its status in international law would dramatically have changed from having been a subject to being a non-subject.

With regard to State activity in Space it must thus be considered that the majority of satellites are operated by private firms. Clearly, it is only a matter of time before such installations can be diverted in their use to more sinister purposes by hostile groups taking over such devices.

Efforts like 'Star Wars' and 'Son of Star Wars', involving costly efforts to establish installations in Space to protect the United States from missile attacks, were rapidly copied by Russia to provide a similar shield against attacks on their most important cities and installations. Such systems rely on laser-generating satellites, orbiting mirrors reflecting lasers for missile defence purposes.

Yet, it is no longer missile attacks from earth which are to feared but rather attacks from weapons launched from Outer Space. On the whole, Outer Space is probably the most vulnerable scenario for future warfare.

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493 Morgan, Forrest E., 'Deterrence and first-strike stability in space: a preliminary assessment', Report for RAND Corporation and for US Air Force, 2010.

494 But see, Detter, I., *The International Legal Order*, *op. cit.*; Detter, I., *The Concept of International Law*, 2nd edn, *op. cit.*; and above, Chapter 5 C.

Chapter 8
Prohibited Methods of Warfare

A GENERAL RULES FOR ALL WARFARE

So far, certain general rules and rules pertaining to weapons in warfare have been discussed. Weapons have been thought to be the primary 'means' of warfare and rules relating to their prohibition or regulated use are at the core of the Law of War; for without weapons few wars would be fought.

We shall now seek to discern relevant rules for the methods of warfare as opposed to the means. The difference between means and methods in warfare is relative and not easy to maintain. Often weapons are used in a specific way which is in violation with the Law of War. Is it then a question of an illegitimate method or an illegitimate use of a weapon? This preliminary provocative question is only raised in this context so that the reader can bear in mind the interwoven character of the rules of the Law of War on means and methods. On the whole, one can often distinguish whole sets of problems that pertain more to 'method' than to 'means' and often it is fairly clear what is a practice rather than use resulting from the intrinsic characteristics of a weapon. Methods, as well as the use of weapons, are subjected to the general ethics of warfare,[1] and belligerents and combatants must all follow the basic rules.

However, one question of method is more fundamental than others: that is the question of targets, *i.e.* targets against which permissible weapons may be directed.

i The Doctrine of Illegitimate Targets

The question of targets goes to the root of the Law of War, just as much as the distinction between combatant and civilian.[2] In fact and in law, the two questions are two sides of the same problem: the problem of distinction. A combatant must distinguish himself from the civilian population[3] so that the war is kept

1 Above, Chapter 5, section C v, on ethics of warfare.

2 Above Chapter 4, section C ii, on combatants.

3 On relevant criteria, above, Chapter 4, section 4 B.

between combatants themselves. The combatant will, if he is captured, be treated as a prisoner or war[4] provided he has complied with the rudimentary rules of distinction. The civilian, in turn, will not be attacked by the enemy combatant. He is, as it were, immune from attack; and that is precisely the link between the question of distinction between combatant and civilians and the question of targets. For the rule of distinction applies here too. It is military targets that may be attacked in war whereas civilian objectives are, so to speak, immune[5] from attack.

These are the principles. In actual warfare things may be different. But in all recent wars belligerents have been aware of the limits and rules in this respect and have been eager to explain that damage or injury in the 'immune' sector was 'inevitable' or justified by military necessity.[6]

An open letter addressed to the defence ministers at NATO by Human Rights Watch in 2001 asked belligerents to take the time of day into account when attacks were carried out in areas where civilians might be going about their daily duties. Attacks on dual-use targets or targets near populated areas should thus take into account the time of day.

During the first Gulf War and in Yugoslavia, attacks on certain targets during periods of high civilian activity caused high civilian casualties and demonstrate the need to condemn attack areas where civilians have gathered. A mid-afternoon air attack by the Allies on a bridge at Nasiriyah in southern Iraq in February 1991 during the First Gulf War resulted in scores of civilian casualties among those on the crowded bridge. A NATO attack at 1 p.m. with precision-guided weapons on the Varvarin Bridge in central Serbia in May 1999 caused the deaths of nine civilians and the wounding of 40 others, who were attending the town market on the day of an Orthodox feast. NATO claimed that the bridge was a 'military target'. An attack in 1994, probably by the Yugoslav army, during the war in Bosnia at the town market in Sarajevo caused the death of 68 persons and hundreds were wounded.

Precautions should be undertaken in military operations to determine whether there is a time of day for attack that would minimise potential harm to civilians.[7] It is essential to stress that *all* are bound to the prohibition of attacking civilians, not only fighting nations but also international organisations which, by performing certain military operations become belligerents with ensuing obligations under the Law of War.

In the new scenario with terrorists being the main belligerents, albeit 'illegal combatants',[8] the Law of War is being seriously violated as these combatants, disguised as civilians, purposely attack prohibited targets. Thus the genocidal attack of the Twin Towers on 11 September 2001 was designed to kill as many civilians as possible. It was also carried out at the time of day when most of those who

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4 Below, Chapter 9, section B iii f.

5 The word immune is naturally used here to imply 'exempt from attack' and not in its other accepted legal sense of being 'exempt from jurisdiction', see my 'Foreign warships', op. cit., 55.

6 Below, Chapter 12, section B i a.

7 Open Letter from Kenneth Roth, Director of Human Rights Watch on 17 January 2002 to the Defence Ministers at NATO.

8 See above, Chapter 4, C ii b.

worked at the Twin Towers had arrived at their desks. When terrorists are brought to justice it is important that courts and tribunals are aware of their enhanced guilt in selecting prohibited targets and daytime timing for their unlawful pursuits.[9]

ii Identification of Immune Objectives

It is important to clarify which objectives are immune under the modern Law of War. The places and areas which are immune from attack should possibly be called immune 'objectives' and not immune 'targets', as the very notion 'target' implies something which is aimed at and it is this action, this 'aiming', which is prohibited.

a Zones

First, one may refer to the demilitarised and neutralised areas, and, if relevant, the denuclearised zones, discussed earlier in connection with spatial notions.[10] Additional Protocol I of 1977 specifically recognised that such zones are exempt from attack.[11] Other areas which are placed on the same footing as such zones, as indicated above,[12] neutral countries. Such countries are all those which are third party to a conflict until and unless they join hostilities.[13] There is thus no need for any specific declaration of neutrality.

b Open Towns

A second category are so-called 'undefended towns' or 'open towns'. This term has not been defined in treaties but there is much guidance in the doctrine on the requirements for an undefended town.[14]

The rules on open towns were laid down already[15] in the Brussels Declaration of 1874,[16] and readopted in the Hague Regulations.[17] A similar rule was also included in Hague Convention IX of 1907 on Naval Bombardment.[18] There are detailed contingency rules. Protection by, for example, submarine contact mines does not alter a port's state of being undefended; but military or naval installations, weapons

9 The Twin Towers were obvious civilian targets whereas the Pentagon might be perceived as a military target.

10 Above, Chapter 6, section A v.

11 Article 60 of Protocol I.

12 Above, Chapter 6, section A viii.

13 *Cf.*, above Chapter 1, section B ii, on irrelevance of declarations of war.

14 See, above all, Jennings, R.Y., 'Open towns', 22 *BYIL*, 1945, 258; *cf.*, Born, W., *Die offene Stadt, Schutzzonen und Guerillakämpfer* (Berlin: Duncker & Humblot, 1978); Zayas, A.M., 'Open towns', in 4 *Encyclopedia of Public International Law*, (Amsterdam, Lausanne, New York and Oxford: Elsevier, 1997) 69; Tromm, J., 'Open Steden', 59 *Militairrechtelijk tijdschrift*, 1966, 321; Schmitz, E., 'Die offene Stadt im geltenden Kriegsrecht', 10 *ZaöRVR*, 1940–1, 618.

15 See, on details of history, Rousseau, Ch., *Conflicts armés, op. cit.*, 128–9.

16 Declaration 27 August 1974, article 15.

17 Article 25.

18 Article 1. See, Hartig, H., *Die Beschiessung durch Seestreitkräfte im Kriegszeiten* (Berlin, 1911).

or ammunition, are military targets and may be attacked even if inside an open town: article 2 provides that, if required, the undefended port has a duty to provide supplies, proportionate to local resources, against payment, to the naval forces in its proximity,[19] and, should it refuse to do so, the naval forces may bombard the town. Obviously such rules lead to problems: who is going to assess whether the port has supplies?[20]

But the Draft Hague Rules on Aerial Warfare abandoned the notion of 'open towns' and distinguished instead, in more general terms, between military and civilian objectives.

The reason why the Hague Draft Rules on Aerial Warfare abandoned the notion of 'open towns' explains the difficulty of the concept in relation to the question of bombardment. The idea of undefended open towns was designed for conditions of land, or possibly naval, warfare but totally remote from the context of aerial warfare where attack necessarily will have a much lesser degree of distinction. Furthermore, there had been numerous attacks on open towns, in the Italian Ethiopian War, the Spanish Civil War,[21] the Sino-Japanese War and the Second World War.[22] In the Korean War in 1952, and even more in the Vietnam War from 1965 to 1972, the protection that open towns should have under the Law of War was largely disregarded.[23] And, violations of the rules on protection of open towns from naval bombardment had been violated, for example, by the bombing of Barcelona during the Spanish Civil War, and by the attack on Hai Phong by the French navy in 1946 and of Inchon and Chongjin in Korea by British and American ships.[24]

The prohibition was also violated by the Yugoslav Army, which used artillery to bomb the Croatian town of Dubrovnik in 1990. As this last action was mainly carried out by land warfare, it was clearly in contravention of the prohibition under the Brussels Declaration. The action was illegal as Dubrovnik was specially protected under UNESCO as part of the *Heritage of Mankind*, and furthermore protected under the 1954 Hague Convention.[25]

The prohibition to attack an open town still applies; violation of this rule constitutes a war crime.[26] For example the *British Manual of Military Law*[27] emphasises that the distinction between defended and undefended localities is not obliterated by the 'great destructive power of modern artillery and guided missiles'.

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19 Article 3.

20 *Cf.*, above Chapter 5, section C v and below, in this Chapter, section A ii c (3), on subjective criteria.

21 It was the horror of the attack on an undefended town on 27 April 1937 that Picasso depicted in his painting *Guernica*.

22 For example, the raids on London 7 September–3 December 1940; the attacks on Rotterdam, 14 May 1940, and Warsaw, from 1 September 1939. Paris and Rome were both treated as open towns in 1940 and 1943 respectively and the rules on hostile acts by inhabitants was largely respected; this was not the case in Manila in 1941, Wulf, T., *Handbok i folkrätt under krig*, 3rd edn, *op. cit.*, 95.

23 Rousseau, Ch., *Conflits armés*, *op. cit.*, 365–367.

24 *Op. cit.*, 238–239.

25 Below, in this Chapter, A iii b (9) on the Hague Convention on Cultural Property.

26 See below Chapter 12 C ii.

27 1958, article 290; *cf.*, article 284.

Protocol I of 1977 uses the new term 'non-defended locality' to describe an open town. To be exempt from attack such a place must be free of combatants, mobile weapons and its fixed military installations must not be used for any hostile purpose; nor must any other type of hostile act, or act to assist military operations, be committed by the authorities or by the population.[28] Under the Protocol a place may be 'declared a non-defended locality' provided no hostile acts will be committed against the enemy by fixed military installations, or by the authorities or population, and provided there are no acts supporting military operations.[29]

Although the notion of open town is still accepted as forming part of the binding rules of warfare today, as is indicated by the reaffirmation of the principle in Protocol I of 1977,[30] it is now used only as a supplementary concept to the one concerning military objective. There is a requirement of reasonable proportionality between damage and military gain.[31] Any 'strategy of devastation' is in violation of this rule.[32]

c Military and Civilian Objectives Distinguished

(1) The Notion of a 'Military Target'

It is vital to establish what a belligerent and its combatants must not use as a target for its military action. The concept of military target is used to indicate that it is legitimate to attack. Targets which are , not such military targets are civilian objectives, and, as such, exempt from attack.

(2) The Enumerative Approach

The Hague Draft Rules of 1923[33] prescribed that attacks from the air would only be permitted if directed against a military objective, the total or partial destruction of which presented a 'distinct military advantage' to the attacker. The level of the operative words may have been slightly less demanding in the French version which refers to '*un avantage militaire net*'.[34] The Rules go on to enumerate such military objectives, as 'military forces; military works; military establishments or depots; factories constituting important and well known centres engaged in the manufacturing of arms, ammunition or distinctly military supplies lines of communication or transport used for military purposes'.[35] The German version omits the equivalent to the word 'distinctively' in relation to military supplies.[36] The French text speaks of '*fournitures militaires caracterisés*' which possibly conveys the impression that, to be of a military nature, the supplies must have been

28 Article 59. For reference, above, Chapter 4, section C ii.

29 *Ibid., loc. cit.*

30 Article 59.

31 Meyrowitz, H., 'The law of war in the Vietnamese conflict' in Falk, 2 *The Vietnam War, op. cit.*, 55.

32 *Ibid., loc. cit.*

33 *AJIL*, 1923, Suppl., 245; Schindler and Toman, *Documents, op. cit.*, 2nd edn, 147.

34 Article 24(1).

35 Article 24(2).

36 The German version simply refers to '*militärisches Ausrüstungsgegenstände*'.

characterised as such by some authority. If this is so, it raises the question whether such subjective[37] classification overrides the objective nature of such supplies. In other words, could one, under the French text, classify anything as military supplies? Secondly, if this is so, how would information of such classification reach the enemy?

Furthermore, the German text covers more clearly than the English text also radio stations and other news media, not too obviously included in the English expression 'lines of communication'.[38]

The enumeration in article 24(2) has been held to be an 'exhaustive' list which, even though the Draft Rules never entered into force, provides a guide to the position of international law on the subject, especially, it is claimed, since there is little disagreement in the doctrine on the subject.[39] But, as has been shown above, merely the discrepancies between the various texts in different languages would seem to indicate some uncertainty of the subject.

Some have claimed that it would follow from the Hague Rules of 1923 that 'military persons' do not include those who, for example, contribute to the war efforts, or the so-called quasi-combatants; that industries, even those of the extracting type, like coal mines, or the refining type, are not included as military works as they are not 'purely military'; nor are those involved in transportation or storage of such material; and, finally, that government buildings are not included among military targets.[40] But others would emphasise that it is more important to examine whether installations are put to predominantly civilian or military use.[41]

The International Law Association (ILA) devoted some attention to the subject during its Conference in Stockholm in 1924. The Conference adopted the definition of military targets in the Hague Rules of 1923.[42] In 1938 the ILA elaborated the definition of 'belligerent establishments' to include 'military, naval or air establishments, or barracks, arsenals, munition stores of factories, aerodromes or aeroplane workshops, or ships of war, naval dockyards, forts or fortifications for defensive or offensive purposes or entrenchments'.[43] A further illustrating list was included in the Hague Convention for the Protection of Cultural Property of 1954 which indicates that property will only be protected under the Convention[44] provided it is situated away from military objectives like 'any large industrial centre or from any important military objective, constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or a railway station of relative importance or a main line of communication'.[45]

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37 *Cf.*, above, Chapter 5, section C v and this Chapter, previous section.

38 The German text uses the words '*Nachrichten und Verkehrsmittel*'.

39 Euler, A., *Die Atomwaffe im Luftkriegsrecht* (Cologne: C. Heumann, 1960), 47.

40 Meyer, A., *Völkerrechtliche Schutz friedlicher Personen und Sachen gegen Luftangriffe* (Königsberg: Ost-Europa Verlag, 1935), 99.

41 Spaight, J.M., *Air Power, op cit.*, 208.

42 33 *Report* ILA, Stockholm 1924.

43 40 *Report* ILA, Amsterdam 1938.

44 See further below, in this Chapter, section A iii b (9).

45 Hague Convention 1954, 249 *UNTS* 240, article 8(1)(a).

With regard to some of these examples, like, for example, a broadcasting station, it may be remarked that such an objective would not, unless there was clear intelligence reports, be identifiable from the air as such. The reference to 'ports' of at least some 'importance' seems to exclude the protection some ports would enjoy under the open town doctrine.[46]

Furthermore, it is clear that civilian installations near military targets may well be attacked during assaults on the military targets. Then the damage caused to civilian objects or to civilians will, under the Law of War, be held to be 'collateral' as it was not intended but an unavoidable side effect of a main attack. In fairly surprising judgments, the ICTY Tribunal convicted the superior officer General Gotovina, for having damaged civilian targets during the recapture of Krajina by Croats (assisted and advised by MPRI[47] and by the US government, which had approved the operation). And yet, this was what had actually been a brilliant recapture of a large area of land in a couple of days with very few fatalities and where minor collateral damage was obviously unavoidable.

The insistence that only military targets may be attacked is again found in the Mine Protocol of 1980 which expressly provides that mines (and other devices) may be used only against military areas which are themselves military objectives or which contain military objectives.[48] However, as a tragic result of the ample use of mines in armed conflicts, many unexploded mines often remain once the conflict is over. Then the limitation to 'military targets' is of little use as the terrain then inevitably will be used by civilians. Therefore there are still numerous injuries to civilians, especially to children, especially in Africa where many minefields were never cleared after the end of an armed conflict.[49]

The importance of protecting non-military targets, above all civilians,[50] from attack, also lies behind the reasons why the Landmine Convention[51] was adopted and also accounts for the speed with which the Convention was prepared. In 1999 the Security Council decided to prioritise the protection of civilians in armed conflict.[52] Another important development is that it has been clarified that the UN Peace-Keeping Forces can never be considered a legitimate military target. This results from the 1994 Convention on the Safety of the United Nations and Associated Personnel, Protection of UN Personnel.[53]

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46 Above, in this Chapter, section A ii b.

47 See above, Chapter 4, C ii (2) (ii). General Gotovina was acquitted on appeal.

48 Article 5 and above, Chapter 7 section A ii on mines.

49 See above in Chapter 7 B ii e (6) on remnants of minefields.

50 See below, in this Chapter, iii b 1.

51 See above, Chapter 7 B iii.

52 See SC Res. 1265 (1999); *cf., Report by the Secretary General*, S/1999/957.

53 UN GA/L/3269/ 1994. See, for comments, Arsanjani, M.H., 'Defending the blue helmets: protection of United Nations personnel', in Condorelli, L. (ed.), *The United Nations and International Humanitarian Law* (Paris: Pédone, 1995), 115–147.

(3) Relevant Criteria

Some writers insist that military objectives cannot be defined *in vacuo* but must relate to a purpose to which they can be employed.[54] Others have elaborated theories of 'adequate causation' and suggest that only objectives which stand in such relation to the war effort qualify as military objectives.[55]

But such suggestions offend against the basic principle of foreseeability and knowledge of the enemy: how is he expected to know the planned use of any particular installation? Surely objective criteria must be preferred rather than those which presuppose a detailed knowledge of enemy strategies.[56]

It is almost better to resort to large presumptions of use and thus classify all industrial centres as military objectives.[57] At least then there would be some security of law which is at the root of all legal regulation: that one knows beforehand the consequences of one's actions. As soon as subjective criteria are imported in the qualification of military objectives there is a corresponding undermining of clear knowledge of how the law is to be applied.

Protocol I provides rules on military and non-military objectives, but does not clearly define military targets. Although the Protocol refers to civilian and military targets in numerous articles,[58] it is not clear where to draw the line between military and civilian targets. Earlier attempts to regulate air warfare often relied on a list of 'legitimate' military objectives, for example as enumerated in the Hague Rules of 1923[59] against which bombardment had to be exclusively directed.

Protocol I refrains from providing such an enumerating list but it is questionable whether much is lost by a loose and abstract reference to 'military' targets, in view of largely accepted criteria such targets must fulfil.

Certain civilian objects have enhanced protection under the Protocol beyond that already granted by the 1954 Hague Convention,[60] which, in turn, expanded the rudimentary protection given by the Hague Regulations of 1907.[61]

Protocol I of 1977 defines military objectives as those objects which by their nature, location, purpose or use make effective contribution to military action as well as those 'whose total or partial destruction, capture or neutralisation, in the circumstances at the time, offers a definite military advantage'.[62] The second part of the provision thus brings back the unfortunate subjective criteria[63] which are so likely to cause problems in practice.

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54 Spaight, J.W., *Air Power, op. cit.*, 215.

55 Meyer, A., *Völkerrechtlicher Schutz, op. cit.*, 83.

56 *Cf.*, on subjective assessment, *supra*, Chapter 5, section C v and above in this Chapter, previous section.

57 Ming-Min-Peng, 'Le bombardement aérien et la population civile depuis la seconde guerre mondiale', *Revue général de l'air*, 1952, 302 *et seq.*

58 For example, articles 48, 51, 52 and 56.

59 Above, in the previous section.

60 249 *UNTS* 240.

61 Article 27. Hague Regulations to Convention II 1899, 26 *NRGT*, 2 série, 949; 1 *AJIL*, 1907, Suppl., 129, and Hague Regulations to Convention IV of 1907, 3 *NRGT*, 3 série, 949; 1 *AJIL*, 1907, Suppl., 129.

62 Article 52.

63 Above, *e.g.*, Chapter 5, section C v, and above in this Chapter.

The Protocol defines 'military' and 'non-military' objectives, as distinct from civilian objectives, in abstract terms, without the traditional reference to typical examples.[64]

iii Consequential Protection

From the distinction made above between military and civilian objectives certain rules follow exempting certain objectives from attack. Many of these rules are codified in Protocol I of 1977. It must be noted that the scope of the Protocol covers inter-State wars as well as liberation wars which are equated to 'international' wars.[65] Protocol II of 1977 covers many facets of internal wars which do not constitute liberation wars.[66]

a Prohibition of Area Bombing

Rules on bombardment are often discussed by writers under a separate heading on aerial warfare; but the prohibition rules in this respect apply to bombardment from air, sea or land. In view of modern reliance on, for example, land-based missiles, or on those launched from submarines, it appears more appropriate to deal with bombardment in connection with rules applicable to all warfare.

It is universally accepted that bombardment exclusively directed against the civilian population is prohibited. Such rules form the basis of the Hague Draft Rules of 1923 and have been regarded both in doctrine and in practice as a binding rule.

The attempts[67] to prohibit all bombardment from the air had long since been abandoned as unrealistic in *Coenca frères v Germany*.[68] But there remained thus a duty to warn: the Greek-German Mixed Commission held that warning to civilians, a rule which had long been compulsory in land warfare, also applied[69] to bombardment.[70] There was thus duty to warn civilians of an imminent attack,[71] a duty which also applied to air attacks,[72] with some support in case law.[73]

Lack of such warning may entitle civilians to a right to compensation for damage to property. In one case, *Kiriadolou v Germany*,[74] before the Greek-German

64 Article 42.

65 Above, Chapter 1, section D i a and d.

66 Above, Chapter 1, section D ii and Chapter 6, section B ii g.

67 For example, by the 1899 Declaration Prohibiting the Launching of Projectiles and Explosives from Balloons, and the Hague Convention XIV with the Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.

68 7 *RIIA* 683.

69 Hague Regulations, article 26 and above.

70 However, some commentators claim that there was never any duty to warn civilians of an imminent attack, Fleck, D., 'Die rechtliche Garantien des Verbots von unmittelbaren Kampfhandlungen gegen Zivilpersonen', *RDPMDM*, 1966, 97–98.

71 Hague Regulations, article 26.

72 Fleck, D., 'Die rechtliche Garantien', *op. cit., loc. cit.*

73 *E.g.*, Greek-German Mixed Commission, in *Coenca v Germany* (1927), 7 *RIAA* 183; *Kiriadolou v Germany*, 1930, 10 *ibid.*, 100.

74 10 *RIIA* 100.

Mixed Commission, the Court emphasised the need for giving warning of aerial bombardment to civilians and added that chemical warfare from aeroplanes is particularly forbidden.

One indication of the binding nature of this obligation is also the efforts States have made to 'justify', in terms of military necessity,[75] any attacks which have affected the civilian population.[76]

The rule of distinction by bombardment – distinguishing between military targets and civilians – was, during the Second World War, set aside to allow even extensive bombing by civilians by so-called 'area bombing' which targets a whole area, such as cities, regardless of the fact that civilians, or even primarily civilians, may be killed.

'Area bombing' or 'blanket bombing' was extensively used by the United Kingdom and later by the United States in the Second World War.[77] The theory of 'strategic bombing' was elaborated and adopted as a method of warfare by the United States and United Kingdom High Command in Casablanca on 21 January 1943. The plan to use this method was mainly implemented by zone bombardment or target area bombing by which numerous aeroplanes attacked several military targets between which there were pockets of civilian population. As a result of this strategy some 593,000 German civilians were killed as against 60,500 in the United Kingdom and some 60,000 in France.[78]

Yet, area bombing is in sharp contradiction to the Declaration on 27 September 1937 by Corden Hull that stated that any general bombing of areas where there are large civilian populations is contrary to the principles of international law and of humanity.[79] And on 2 December 1939 the United States stated that the American government wholeheartedly condemned 'unprovoked' bombing of civilian population from the air.[80] But the strategy or area bombing was later expanded and applied systematically in Vietnam.[81]

Protocol I of 1977 is the first agreement in treaty form to prohibit area bombing. The Protocol prohibits indiscriminate attacks and area bombing is one of the prime forms of such attacks.

According to the Protocol there must be no indiscriminate attacks of any form. Such attacks, are for example, bombardment which is not directed against a specific military objective or one which employs methods which cannot be directed against such a target or other means which cannot be limited as to their effect.[82] The prohibition is not limited to air warfare but such bombardment from planes is the obvious method for such attacks. One specific form of such 'indiscriminate'

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75 Below, Chapter 12, section B i a.

76 Below, in this Chapter, section A i c.

77 Castrén, E., 'La protection juridique de la population civile dans la guerre moderne', *RGDIP*, 1955, 13.

78 Rousseau, Ch., *Conflits armés*, *op. cit.*, 131.

79 6 *Hackworth* 267; *cf.* statements by United States to Japan, 22 September 1937 and 14 June 1940, *ibid.*, 268.

80 *Ibid.*, 267.

81 Rousseau, Ch., 'Chronique des faits internationaux', *RGDIP*, 1973, 826.

82 Article 51(1).

bombardment, often called 'area bombing', has now been specifically prohibited by Protocol I by a further provision forbidding bombardment 'by any methods or means', or treating as a single military objective, several distinct military targets located for example in a city where there is 'similar' concentration of civilian population. Furthermore, any attack which may be expected to cause incidental loss among civilians, or civilian objects, is prohibited unless outweighed by concrete and direct military advantage.[83]

b Specific Exemptions from Attack

The main group of exempted targets concern civilians, together with their legitimate cultural and religious places, as well as those who are on par with civilians as being soldiers *hors de combat*. On the other hand, the centre of a government is not protected, as shown in clear recent State practice. Government administration buildings are thus permissible targets in warfare.[84] Later, rather than suggesting that it was not a 'real' government building, such buildings were specifically selected as prime targets, as shown in the campaign against Libya in the spring of 2011. Political realities indicate that the heart of the government constitutes not an exempt but a prime target for attack. Government buildings are thus not excluded under any clear rule of law from enemy attack.

Recent practice in armed conflict also shows that the place where a Head of State is seeking refuge after political turmoil in his country is not protected. Both Saddam Hussein in Iraq and Colonel Gaddafi in Libya were hunted down in their hiding places. Gaddafi was killed without a trial and Saddam was condemned to death after a summary trial. Whatever immunity Heads of State previously enjoyed[85] must be reviewed in the context of international law; in both cases just mentioned, the leader of the country had also abused his position by maltreating, executing or bombing his own citizens.

(1) Civilians and Persons *hors de combat*

If the distinction between military and civilian objectives is difficult to draw in practice, it is still clear that the civilian population as such is the primary group on

83 Article 51(5)(g). See further on military necessity, below, Chapter 12, section B i a.

84 But see, for earlier practice, Garner, J.W., 'La réglementation de la guerre aérienne', *RGDIP*, 1923, 386. In some conflicts, it was considered necessary to explain why government buildings were attacked. For example, in the Vietnam War, it was argued that a target does not constitute a 'government' building if the authority using that building is not recognised as a 'government'.

85 There is wavering practice on this point: on the one hand, the Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly German Emperor, for a 'supreme offence against international morality and the sanctity of treaties'. See Versailles Treaty, Art. 227(1). On the other hand, a decision as late as 2001 insisted that it not possible to indict a Head of State, and thus Colonel Gaddafi was held to enjoy immunity in French Courts: Court de Cassation, N° Z 00-87.215 FS-P, F N° 1414 13 March 2001, DF, M. COTTE président. And yet, President Milosović was indicted in the International Criminal Tribunal for former Yugoslavia, in 2008, see below, Chapter 12 C ii.

which attacks must not be launched. This obvious statement has not, in general terms, been entrenched in treaty law until recently.

From the prohibition of attacks on civilian objectives follows that civilians, as groups or as individuals, may be attacked. Alternatively, one could deduce the prohibition of attacks on civilian targets precisely from the protection that individual civilians enjoy as being non-combatants[86] and as such exempt from the war.

But history shows that civilians, in spite of this protective regime, are increasingly at risk in war. In the First World War some 5 per cent of the victims were civilians; in the Second World War this figure had risen to 48 per cent, to escalate in the Korean War to 84 per cent and in the Vietnam War to 90 per cent.[87] Not all increase in this proportion can be explained by difficulties of distinction between combatants and civilians.[88]

The protection of civilians is, from the humanitarian point of view, the most important task of any legislative effort on warfare as such persons include the weakest members of the community, most in need of protection, such as women, children and the aged. Another reason for their specific protection is that civilians must normally be assumed to have wished to abstain from any involvement in the conflict. Even if numeric reasons are not always relevant, it is furthermore important to consider that the civilian population normally represents a much larger number of people than the combatants.

Civilians, who had received some rudimentary protection under the Hague Conventions of 1899 and 1907,[89] benefited from a general clause on prohibition of attacks on undefended localities under the Hague Regulations,[90] and also, in a much more comprehensive way, under the Fourth Geneva Convention of 1949,[91] which did not seek to abrogate the earlier Hague Conventions but expressly attempted to supplement them. The Fourth Convention, for example, extends rules relating to the treatment of alien enemies 'in the light of recent practices of civilised nations'.[92]

The Fourth Geneva Convention also introduced, for the first time, criteria of distinction between civilians and combatants.[93] But if 'civilian' means someone who is not a combatant,[94] this also means that problems connected with the identification of 'combatants' are carried over to the field of protection of 'civilians'. A further question is that the distinction is eroded by actual or threatened use of weapons of mass destruction.[95]

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86 Above, Chapter 4, section C.

87 Wulf, T., *Handbok i folkrätt under krig*, *op. cit.*, 102.

88 Above, Chapter 4, section C i.

89 For references, see above, Chapter 4, section C.

90 Article 25; *cf.*, article 27. For protection in time of occupation, see articles 42–56 of the Hague Regulations of 1900 and 1907.

91 See further below in this Chapter.

92 Yingling, R. and Ginnane, R.W., 'The Geneva Conventions of 1949', *AJIL*, 1952, 411.

93 A Diplomatic Conference of 1929 had recommended a further Convention for the Protection of Civilians. The ICRC prepared Draft Rule at the Tokyo Conference in 1934 but these Rules were never considered by the Diplomatic Conference because of the intervening Second World War. On the principle of distinction, see further above, Chapter 4, section C i.

94 See above, Chapter 4, section C ii.

95 Rousseau, Ch., *Conflits armés*, *op. cit.*, 81.

Protocol I of 1977 expands protection of civilians considerably, especially by a paramount presumption that anyone who is not proved to be a combatant has civilian status.[96] The Protocol extends the protection of the Fourth Geneva Convention by prohibiting any attacks on the civilian populations either to gain military advantage or to take reprisals.[97] Civilians comprise two distinct groups, which are those who never took part in the hostilities and who form part of the normal civilian population and those who were combatants but are *hors de combat* and no longer take part in the hostilities, perhaps because they are wounded or because they have, for other reasons, re-joined the permanently civilian population.[98] The protection of the civilian population may even be the main aim of Protocol I of 1977[99] and is achieved by the prohibition of certain methods of warfare as well as by some mandatory provisions on the treatment of victims of war. The rules on belligerency obviously concern the combatants in the first place but will have as their objective and inevitable result an improved protection of civilians. Other rules envisage more directly the treatment of civilians or combatants *hors de combat* such as the wounded and prisoners of war. The fusion of rules previously found in the instruments on the law of The Hague with those in documents on the law of Geneva has, as some commentators point out,[100] upset the traditional division between the two sets of rules, a division which perhaps was never well-founded.[101]

Protocol I codifies, for the first time, the established rule that civilians must not form the object of attack.[102] Furthermore, acts which are intended to spread terror among the civilian population are prohibited.[103] Such acts may, for example, be area bombardment, like the Blitz of London.[104]

Civilians are also specifically protected in Protocol II of 1977. Although Protocol II is very short in its final truncated form,[105] it contains some important provisions which represents an innovation in the rules of warfare.

One such new provision is the prohibition of attacks on civilians. Although Common article 3 had secured a certain level of treatment of non-combatants it had not clearly precluded military operations directed against civilians or against civilian targets. Protocol II of 1977 now includes such clear prohibition of attacks of non-military targets.[106]

In the Iran–Iraq War, between 1980 and 1988, the Iraqi Air Force carried out indiscriminate bombing attacks on Iranian built-up areas, causing considerable

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96 Article 50. Such status is only refused if civilians takes direct part in the hostilities, see article 51.

97 Article 51(2) of Protocol I; *cf.*, article 13(2) of Protocol II.

98 *Cf.*, Bretton, P., 'Le problème des "méthodes et moyens de guerre ou de combat" dans les Protocols additionnels aux Conventions de Genève du 12 août 1949', *RGDIP*, 1978, 43.

99 *E.g.*, CDDH/SR.5, 81, vol. 7, 136.

100 Siotis, *Le droit de la guerre*, *op. cit.*, 226.

101 *Cf.*, above, Chapter 5, section C ii.

102 The 1922 Draft Rules on Airfare were never ratified.

103 Article 51(2).

104 Above, in this Chapter, section A ii.

105 Above, Chapter 6, section B ii g.

106 Article 13.

destruction of purely civilian property with ensuing loss of life and personal injuries to civilians.[107] But severe criticism by the United Nations Secretary General on 9 June 1984 resulted in a special undertaking by both Iran and Iraq to cease military attacks on purely civilian population centres in either country from 00:01 GMT, 12 June 1984.[108] Swift condemnation by leaders and organs of world society may indicate that, even if the special rule is violated, it is nevertheless a fundamental rule of the Law of War.

With regard to the strategy and tactics of genocidal *jihad* terrorists, it must be noted that they have primarily selected immune targets for their attacks: they have chosen to attack innocent civilians rather than combatants. Although they occasionally attack soldiers or military installations the bulk of their attacks have been directed against unsuspecting civilians, including women and children, going about their daily life without having any warning that they will be killed without mercy by scheming terrorists, disguised as civilians.[109]

(2) Parachutists

Parachutists are equated to persons *hors de combat* under Protocol I of 1977. Aeroplanes of the enemy are, of course, an obvious target for a belligerent, both for defensive and offensive purposes. However, it has been argued that parachutists jumping from aeroplanes would not be legitimate targets as they are, as it were, not combatants in action until they reach the ground. Whether or not this is a proved fact or not may be disputed.

However, Protocol I of 1977 has introduced certain specific rules on this topic prescribing, *inter alia*, that parachutists jumping from an aircraft in distress must not be attacked and, if they land in enemy territory, they must be given an opportunity to surrender.[110] This regulation may codify earlier law.[111] Parachutists in such situations can be compared with the shipwrecked[112] for they are, as it were, 'shipwrecked in the air'.[113] The question was raised whether parachutists should enjoy protection only if they descend into enemy controlled territory where they could easily be rendered *hors de combat*, or whether their protection is unqualified.[114] Naturally, humanitarian considerations do not present themselves with the same intensity if a parachutist lands in friendly territory. The Arab group at the Conference argued that in such situations airmen should not be protected.[115] After the ICRC Vice President Pictet had indicated his reservation to any adoption of a text authorising killing of any parachutists descending from aircrafts in distress.

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107 ICRC, *2nd Memorandum to Governments Participating in the Geneva Conventions of 1949 in the Conflict Between the Islamic Republic of Iran and the Republic of Iraq*, 10 February 1984.

108 *United Nations Weekly News Summary*, 23 June 1984.

109 See above, Chapter 1 B iv b.

110 Article 42(1)(2).

111 *Cf.*, Spaight, J.M., *Air Power*, *op. cit.*, 152 *et seq.*

112 CDDH/III/SR/47,51,79.

113 ICRC, M. Pictet, CDDH/SR.39,88.

114 CDDH/III/SR/47 at 51, 79.

115 CDDH/414.

The Conference adopted an article affording protection without qualification.[116] The provisions of the protocol are important because of their practical applications in modern-day armed conflict. The Israeli air raid against Arab territory in 1967 and 1973 and the American actions in Vietnam induced the Conference drafting the 1977 Protocols to adopt a proviso exempting from protection any 'airborne troops'.[117]

(3) Parlamentaires

Parlamentaires and other messengers authorised to negotiate with the enemy must not be attacked.[118] The root of this inviolability is the same as the one for diplomats and envoys. It forms part of the oldest part of international law and is reinforced by tradition and reciprocity.

(4) Food Supplies and Crops

Objects necessary for the survival of the civilian population, *e.g.* foodstuffs, livestock and drinking water installations, are protected from attack.[119] It has been shown above that such supplies must not be attacked by chemical,[120] biological[121] or environmental warfare.[122]

Protocol I of 1977 enlarges this protection by specifying that such objects are illegitimate targets, both as strategy to starve the civilian population[123] or as means to force the civilians to move from an area.[124] But a belligerent may, on the other hand, destroy its own food supply in certain circumstances.[125]

(5) Civilian Ships

Civilian ships may be an unusual expression but seems to cover the ships that may not be attacked in warfare including, for example, both merchantmen and other non-warships. There are certain accepted guidelines on the criteria necessary for a ship to qualify as a warship: it must be commanded by a naval officer, have a crew subject to his authority, and it must normally be entered in the list of warships in the flag State.[126]

It has long been accepted that, for example, merchant ships are not legitimate targets. Their cargo may assist the enemy and it is often important to intercept

116 CDDH/SR.39, 110.

117 Article 43(3).

118 Hague Regulations, article 32; a parlamentaire would normally display a white flag, *cf.*, above, Chapter 4, section C ii; immunity extends to interpreters who accompany him.

119 See also below, in this Chapter, section A iv b on starvation.

120 Above, Chapter 7, section D i.

121 *Ibid.*, section D ii.

122 *Ibid.*, section E.

123 See, below, in this Chapter, section A iv B, on starvation and on siege.

124 Article 54.

125 See, below, in this Chapter, section A iv d (2), on the 'scorched earth policy'.

126 See my 'Foreign warships', *op. cit.*, 66. On the right of visit and search to verify civilian character see *The Mariana Flory* (1826), 11 *Wheaton* 1; and on such measures against a British vessel in a French 'security zone' during the Algerian War, see *The West Breeze* incident; discussed by Zwanenberg, A., in 'Interference with ships on the high seas', 10 *ICLQ* 785.

merchantmen carrying valuable supplies to the enemy. But this must be done by capturing such vessels as prize[127] and not by attacking or sinking the ships.

Ships that are not subjected to the law of prize always constitute illegal targets, for example hospital ships,[128] ships used for the transport of medical supplies or of wounded,[129] cartel ships used to carry prisoners of war[130] and postal ships.[131]

There is thus a certain relationship between the law of prize and the position of certain ships with regard to targets. However, the ambit of the law of prize is wider than that of illegal targets insofar as enemy merchantmen may be taken as prize but they may not be attacked.[132] But, as has just been pointed out, from the other point of view the scope of the law of prize is narrower in the sense that ships that are immune from military attack may also be immune to capture as prize.

It was sometimes argued that the privilege of merchantmen, of being exempt from attack, would be forfeited if merchant ships accompanied warships in a convoy.[133]

Special rules regulate protection from attack by submarines. However, since submarine warfare is specific to warfare at sea, relevant questions have been discussed in connection with naval war.[134] Submarines are highly vulnerable by even lightly armed merchant vessels. There has been some uncertainty with regard to the question whether submarines which are threatened by armed merchantmen have any right to attack.[135] But it must be emphasised that the unequal strength is such that no 'threat' by merchantmen can entitle submarines to attack them.[136]

There are some early basic rules that civilians at sea must not be attacked. However, such rules are often undermined by other rules on naval warfare. The Treaty for the Limitation and Reduction of Naval Armaments of 1930,[137] together with the Protocol of 1936,[138] allowed warships to sink merchant vessels provided passengers and crew were removed to a place of safety. If a merchant vessel refused to stop or to be subjected to visit and search, the vessel could be sunk without such precautionary measures.

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127 Below, Chapter 10, section C iii a (2).

128 Hague 1907 XI, article 3; Geneva II, articles 22, 24, 26, 27, 29, 30, 43; *cf.*, articles 34–35.

129 Geneva IV, article 21; Protocol I of 1977, article 23.

130 Below, Chapter 9, section B iii g.

131 Below, Chapter 10, section C i.

132 See, below, on the sinking of merchantmen from which passengers and crew are evacuated; but prize proceedings must still follow, *cf.*, below, Chapter 10, section C iii a (2), and *cf.*, Higgins, P., 'Submarine warfare', 1 *BYIL*, 1920, 149, 152 *et seq. Cf.*, the Washington Draft Treaty of 1922, article 22 and below, in this Chapter, section B iii.

133 *E.g. The Dönitz and Raeder Cases* before the International Military Tribunal at Nuremberg, 1 Nuremberg 1947, 331; 41 *AJIL*, 1947, 172, 303. *Cf.*, O'Connell, D.P., 'International law and contemporary naval operations', 44 *BYIL*, 1970, 19, 51, on right of submarines to attack merchant ships if there is an imminent air attack.

134 Below, in this Chapter, section B.

135 O'Connell, *Sea Power*, *op. cit.*, 46.

136 Below, in this Chapter, section B ii.

137 CMND. 3548.

138 *UKTS* 29 1936; *AJIL*, 1937, Suppl. 137.

The new protection of Protocol I of 1977 concerning presumption of civilian status also extends to naval warfare and increases the protection of civilians on board merchant vessels.[139]

(6) Hospitals, Hospital Ships and Medical Units

Hospitals must not be attacked,[140] nor must medical units, whether military or civilian, be subjected to any military offensive operations.[141] Hospitals ships[142] are protected and must not be attacked; and sick bays on board warships must not form part of attacks but be 'spared as much as possible'.[143] Hospital trains[144] are furthermore specially protected and protection also applies to mobile military units.[145]

This protection is clearly accepted as binding parts of international law in doctrine and in practice.[146] Since such protection exists there arises, on the part of the authorities in charge of medical hospitals and units, a two-fold duty.

On the one hand there is a duty on the part of a belligerent to keep medical units away from military targets[147] implying, for example, that medical units must not be used to conceal or shield military objectives; such methods would amount to prohibited ruses of war.[148]

Secondly, the authorities, and/or the medical units themselves, must ensure that there is a clear marking of the units by a sign notified to the enemy[149] or by a Red Cross mark.[150] Ever since the establishment of the Red Cross Organisation[151] the emblem of the Red Cross had been universally recognised and respected, also in non-Christian countries like Japan,[152] Siam[153] or the Muslim countries.[154] During the 1907 Hague Conferences there was discussion whether other signs should also be allowed, like the Red Sun for Persia and the Red Crescent for Turkey. But since neither of these two countries ratified the Hague Conventions the question lapsed. Renewed discussions were instigated during the negotiations for the 1929 Convention on the Wounded,[155] when it was agreed that alternative signs and

139 *Cf.*, United Kingdom, CDDH/III/SR.3, vol. 14, 21.

140 Hague Regulations article 27. Geneva Convention IV article 19; Article 18 of Geneva IV and article 12 of Protocol I of 1977 extend protection to all civilian hospitals.

141 Protocol I 1977 article 12.

142 Geneva I article 20, and below, in Chapter 9, section B iii.

143 Geneva II, article 28; *cf.*, articles 34–35.

144 Geneva I article 21.

145 For a wide definition of 'medical unit' see, Protocol I of 1977, article 8.

146 *E.g.*, Rousseau, Ch., *Conflits armés*, *op. cit.*, 109.

147 Hague Regulations, article 27; Geneva I, article 19; Geneva IV, article 18; Protocol I of 1977, article 12.

148 See further, below, in this Chapter section A iv d (3).

149 Hague Regulations, article 27.

150 Geneva I, articles 38 and 42; Geneva IV, articles 18 and 21; Protocol I of 1977, article 18, and Annex, articles 3–4.

151 Above, Chapter 5, section A.

152 Bugnion, F., *The Emblem of the Red Cross* (Geneva, 1977), 22.

153 *Ibid.*, 22.

154 *Ibid.*, *loc. cit.*

155 *UKTS* 36 1931; Cmnd. 3793.

emblems would be allowed such as the Red Crescent and the Red Lion , mainly to satisfy demands by Turkey and Persia, as well as a further special sign of the Red Sun for Japan. Some were unhappy not to have the unity of one sign and regarded the novel signs as regrettable deviations.[156] Efforts to obtain the right to use other signs have been rejected, for example the proposals by Israel for the Red Star of David[157] as well as demands for signs without religious significance, such as the Red Heart for Ethiopia[158] or a reverse red swastika for Sri Lanka.[159]

It is probably desirable to avoid confusion by too many unrecognised signs. Apart from being universally recognised, and immediately connected with certain protected status, the emblem of the Red Cross has also, because of its colour and simplicity, the obvious advantage of being more readily recognised from the air, than most other signs.

(7) Attacks on Dangerous Installations

Certain methods of warfare which will endanger certain installations containing dangerous forces, such as dams, dykes and nuclear power stations, are furthermore prohibited.[160]

Protocol II of 1977 also contains a strict prohibition of attacks on installations containing dangerous forces, such as dams, dykes or power stations.[161]

Attacks against such installations pose particular threats to the safety of civilians by releasing dangerous forces. The protection of these installations from attack has recently been the focus of attention of the Disarmament Conference because of the considerable danger posed by attacks on, for example, nuclear installations when considerable radiation could be released affecting whole regions.

(8) Cultural Property

(i) Provisions for international wars[162] The Hague Convention of 1954[163] affords special protection to 'cultural property' which is stated to be property of 'great importance to the cultural heritage', *e.g.* monuments, architectural sites, art museums, manuscripts and books of artistic, historical or archeological interest, libraries and archives, provided such property is clearly marked by a blue and white sign. Special protection can be afforded to certain property provided it is located away from major military targets.[164] Furthermore, in order to enjoy such enhanced

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156 De Gouttes, 'La Convention de Genève pour l'Amélioration du Sort des Blessés et Malades dans les Armés en Campagne, du 27 juillet 1929', in CICR, *Commentaire*, 1930, 44 and 35.

157 Buignon, *The Emblem, op. cit.*, 41, 56.

158 *Ibid.*, 55.

159 *Ibid.*, 70.

160 Article 56.

161 Article 15.

162 As has been shown above, Chapter 1, section D ii a, liberation wars were often equated with international wars for the purpose of the Law of War. Rules on the protection of property follow this pattern and grant, therefore, that protection is different in such wars from other 'internal' wars.

163 249 *UNTS* 240.

164 Article 8.

protection, the relevant type of property must be registered with UNESCO in peace-time.[165] But there are wide escape clauses for military necessity undermining protection granted by the Convention.[166]

The Hague Convention 1954 was primarily intended to protect cultural buildings and monuments, and numerous places of worship would doubtlessly come within this category. Protocol I widens this protection to all places of worship and other civilian objects and buildings whether or not they are of the quality demanded by the Hague Convention. However, there were some objections against such protection of, for example, Churches: some Churches should not be protected as they could be 'useful' in military operations as 'church steeples make excellent observation posts'.[167] At the Conference it was thus questioned whether all churches were protected or merely those which form part of the 'cultural heritage'.[168] The way the article was finally drafted it could, albeit against the spirit of both the 1954 Hague Convention and the 1977 Protocol, be read to imply the more limited protection.[169]

In the context of civilian objects the Protocol adopts the system of presumptions as with regard to civilian persons: if there is any doubt as to whether an object is civilian or not, it must be presumed to be civilian and thus protected under the Protocol. Furthermore, foodstuffs and objects indispensable for the survival of the civilian population are immune from attack.[170]

(ii) Provisions for Internal Warfare Protocol II of 1977 adds certain protection of civilian objects, such as cultural objects and places of worship.[171] An article further strengthening the protection and inviolability of civilian property was deleted. Some Islamic states supported the deletion as 'obviously a *de jure* State would never try to exterminate its nationals or damage the environment'.[172]

In any event, national legislation is often sufficient to protect such interests. Islamic legislation, claimed the Saudi Arabian delegate, was 'generally opposed to war as such ... In Islamic society war is always defensive, merciful and humanitarian, and its sole aim is to repel aggressors, without exposing either civilians, cultural objects or the environment to danger'.[173] As superfluous and repetitious the proposed provisions had no place in Protocol II. Not only the Islamic States supported such notions. The United Kingdom also voted against the adoption of the expanding article[174] as it would be wrong to preserve protection for objects when so many

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165 Regulations to the Convention, article 12.
166 Below, Chapter 1, section B i a.
167 *Cf.*, Bothe et al.; *New Rules on Victims of War, op. cit.*, 331.
168 CDDH/III/17, Rev.1, XV OR 213.
169 *Cf.*, Bothe et al., *New Rules on Victims of War, op. cit.*, 332.
170 ICRC, Mme D. Bindschedler-Robert, CDDH III/SR.14, vol. 14, 109.
171 Article 16.
172 Saudi Arabia, CDDH/SR.51. vol. 7, 123.
173 *Ibid., loc. cit.*
174 Draft article 20. For the UK see *ibid.*, 163.

articles on individuals had been deleted. Finland, too, found that any extended protection of property would 'unbalance' the Protocol.[175]

It is difficult to see why the protection of such property had to be sacrificed to satisfy any artificial symmetrical balance of interests. Surely, it would not help individuals if protection of their property was reduced. One representative pointed out that even if human life is obviously more precious than buildings, certain such property may be 'repositories of culture and spiritual life' and, as such, worthy of protection against the vandalism of war.[176]

(9) Places for Religious Worship

There is special protection for buildings for religious worship and any attacks on such places are held to be illegitimate.[177] But protection is only afforded if such buildings are clearly indicated to be places of religious worship and provided they are not used for military purposes.[178] Some such buildings may also be specifically protected under the Hague Convention for Cultural Property of 1954.[179]

(10) Civil Defence

Civil defence activities can be defined as certain humanitarian assistance to the civilian population in armed conflict, such as the establishment and operation of warning systems, and arrangements for firefighting, evacuation and shelters.[180] Permanent civil defence personnel, including military persons on special, exclusive and permanent assignment,[181] come under the ambit of new protection under Protocol I of 1977. But others connected with civil defence activities are also protected, *e.g.* those who perform by responding to calls by the authorities for civil defence action.[182]

Civil defence personnel, buildings and assets, clearly indicated as such by a distinctive sign, are immune from attack under Protocol I of 1977.[183] A blue triangle on an orange background has been adopted as a 'distinctive sign' and for further identification purposes, all civil defence personnel are to be equipped with a special identity card which must be carried if such personnel are in the combat zone.[184]

175 *Ibid.*, 157.

176 *Ibid.*, 157.

177 Hague Regulations, article 27; Protocol I of 1977, article 53.

178 *Cf.*, below, in this Chapter, section A iv d on ruses.

179 Above, in this Chapter, section A iii b (9).

180 *Cf.*, Protocol I of 1977, article 61.

181 Assigned military personnel may only perform civil defence duties in their own country but not in occupied territory, see article 67.

182 Articles 62–67.

183 Article 62.

184 *Ibid.*, article 66 and Annex I, articles 14–15.

iv Specifically Prohibited Methods

a 'No Quarter'

It has long been held that any order of 'no quarter' is inhumane and should not be allowed as a permissible method of warfare. This implies an order that, for example, when a city is stormed no survivors must be left.

Protocol I of 1977 provides a specific prohibition of orders concerning 'no quarter'.[185] But there is some uncertainty whether the prohibition extends to combatants or merely to civilians as the provision is included in a section concerning non-combatants.[186] However, considering the often illogical arrangement[187] of provisions and sections in the Protocol, one may assume that the drafters intended to protect both groups.

b Starvation

Siege is one example of 'attacks' on civilians, by exposing them to starvation and hardship, by which a belligerent could seek to conquer his enemy.[188] The rules on 'open towns'[189] did not always suffice to protect the civilian population when the town did not qualify as being undefended. In the case of a defended town, all the attacker had to do once he had encircled the area and cut off further supplies of ammunition and food, was to wait.

The method by which civilian population is subjected to starvation as a strategic way of defeating the enemy had been somewhat restrained by the Hague Regulations of 1907,[190] at least insofar as foodstuffs and necessities for survival were considered as 'the enemy's property' which could not be destroyed unless demanded by the 'necessities of war'.[191] There were also some other rudimentary rules to the effect that medical stores were allowed through a besieged area.[192] These vague rules of protection for the benefit of the civilian population have been greatly improved by Protocol I of 1977. This recent attempt is intended to prohibit that starvation is used as a method of warfare[193] and such regulation thus prohibits siege in the old meaning and function of the term.[194]

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185 Article 40.

186 *Cf.*, Bretton, 'Le problème des 'méthodes et moyens de guerre ou de combat', *op. cit.*, 41.

187 *Cf.*, below, Chapter 12, section B ii.

188 *Cf.*, Nurick, 'The distinction between combatant and non-combatant in the law of war', *op. cit.*, 686 and above, Chapter 4 C.

189 Above, in this Chapter, section A ii b.

190 Article 23 (g).

191 On military necessity, see further below Chapter 12, section B a.

192 Geneva IV article 23.

193 Protocol I of 1977, article 54(1).

194 Article 54(1).

The International Committee of the Red Cross had, in its initial Draft[195] visualised only an indirect prohibition of starvation as a method of warfare.[196] However, an amendment proposed by the United Kingdom and Belgium provoked a more detailed treatment which resulted in the more definite prohibition in the text of Protocol I.[197] The prohibition is not intended to alter the rules on naval blockade[198] but even if they do not have this effect, the new rules will be of great benefit to the civilian population.

Protocol I of 1977 further grants special protection to relief actions and to persons involved in such activities.[199] The Protocol expands the fairly limited protection previously enjoyed by certain relief personnel under the Fourth Geneva Convention of 1949.[200]

Starvation is specifically prohibited also as a means of internal warfare.[201] The article on starvation only 'survived' due to what some have termed an 'energetic'[202] and others an 'eloquent'[203] intervention of the representative of the Holy See at the Conference. The article had been due for deletion, together with numerous others cut from the initial text, when it was decided, after the forceful intervention which created considerable debate, to retain the article. In the final discussion even the Soviet Union had rallied to the support of the Holy See to retain the article.[204]

c Reprisals

There has for some time been confusion in the doctrine concerning the nature and the right of reprisals. Most writers have somehow sought to reconcile belligerent reprisals with the traditional notion of general reprisals in international law. The traditional concept implies the right of a State, in response to a violation of international law by another State, to resort to force against that State, or to take other counter-measures; the degree of force and the nature of other acts may be such that the acts would themselves have amounted to violations of international

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195 Above.

196 CDDH/III/SR.15, vol. 14, 119 and 139. *Cf.*, Bretton, 'Le problème des "méthodes et moyens de guerre ou de combat"', *op. cit.*, 45.

197 Article 54. See below, in this section on Protocol II.

198 Article 49(3) and CDDH/215, Rev.1, 73, vol. 15, 322. *Cf.*, Bretton, 'Le problème des "méthodes et moyens de guerre ou de combat"', *op. cit.*, 45.

199 Article 68–70.

200 Under articles 23, 55 and 59 *et seq.* See further Kimminich, O., *Schutz der Menschen in bewaffneten Konflikten: Zur Fortentwicklung des humanitärischen Völkerrechts* (Munich: Chr. Kaiser Verlag, 1979), 186 *et seq.*; *cf.*, Bothe, M., 'Rechtsprobleme humanitärischer Hilfsaktionen zugunsten der Zivilbevölkerung bei bewaffneten Konflikten', in Fleck, P., *Beiträge zur Weiterentwicklung des humanitärischen Völkerrechts für bewaffnete Konflikte* (Hamburg: Deutsches Rotes Kreuz, 1973), 45 *et seq.*

201 Protocol II of 1977, article 14. *Cf.*, comments to article 54 of Protocol I, above.

202 Bretton, 'Le problème des "méthodes et moyens de guerre ou de combat"', *op. cit.*, 45.

203 Bothe et al., *New Rules on Victims of War*, *op. cit.*, 681.

204 CDDH/SR.52, vol. 7, 136. The delegate of the Soviet Union said he 'wholeheartedly supported the Holy Sees's position on [the article on starvation] for it was one of the most humane provisions in the entire field of humanitarian law'.

law unless they were 'legitimised' as justified response to the initial violation by the other State.[205]

Such reprisals are legitimate provided they are proportionate to the violation, and, above all, providing there actually was a violation in the first place by the other State.[206] There are clear limits to the right of reprisals[207] and the law is fairly settled since the leading *Naulilaa Case* in 1922.[208]

But belligerent reprisals are of a completely different type: they are not used to retaliate against a State for what that State has done in violation of international law. In a large majority of cases it is individuals who have committed an act of hostility, perhaps in violation of the Law of War by using civilian status,[209] or by abusing the protective status of an open town,[210] and the reprisals are taken against other innocent individuals, usually civilians.

Such action, lying as it does on the plane between individuals, or at least between individuals, as civilians, on the one side and the belligerent forces on the other, is, in nature and function, quite different from traditional State reprisals. Belligerent reprisals can thus not be defined in the same way as State reprisals although some insist that they are acts against an occupied 'State'.[211] But belligerent reprisals could perhaps be better defined as

> 'acts of victimisation or vengeance by a belligerent directed against groups of civilians, prisoners of war or other persons *hors de combat*, in response to an attack by persons of unprivileged status or by persons not immediately connected with the regular forces of the enemy'.

For example, when a lorry carrying German military was attacked in Rome in Via Rasella in March 1944, orders were given by Hitler that 10 Italian soldiers were to be shot for every German soldier killed in the attack. Consequently, 335 prisoners were taken from prisons in Rome and shot in the Catacombs.[212] An Italian decision of the Supreme Military Tribunal in 1951[213] condemned this action as being contrary to the Law of War.

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205 *Cf.*, above Chapter 2, section B, on legitimising elements for the use of force.

206 On a chain of 'reprisals' when it became difficult to discern where the line had started, see, on economic reprisals, Detter, I., *Finance and Investment in Developing Countries*, 2nd edn (London: Gower, 1986), 76–78.

207 See, *e.g.*, Dominice, C., 'Observations sur les droits de l'Etat victime d'un fait internationalement illicite', in IHEI (ed.), 2 *Droit international* (Paris, 1981–2).

208 2 *RIIA* 1073. On proportionality, *cf.*, *The I'm Alone* (1929) 3 *RIIA* 1609 and the *Case Concerning the Air Services Agreement of 27 March 1946*, Arbitral Award, 9 December 1978, 54 *ILM* 304.

209 Above, Chapter 4, section B and C.

210 Above, in this Chapter, section A ii b.

211 Karlshoven, F., *Belligerent Reprisals* (Leiden: Nijhoff, 1971), 37, who defines belligerent reprisals as 'coercive measures taken by one State against another and motivated by an international wrong committed by the later to the prejudice of the former State', at 22; *cf.*, 33.

212 Wulf, *Handbok i folkrätt under krig*, *op. cit.*, 65.

213 *Tribunale supremo militare*, 23 October 1952, *Rivista*, 1953, 193, and note by Ago, 200.

Another example, which will also illustrate the definition we have adopted above of belligerent reprisals, was when some German soldiers were shot by Greek guerrillas outside the village of Klissura in Greece in 1944. Under the commander, General Felmy, 215 men, women and children in the village were shot.[214] It is this type of reprisals that are typical of inhumane warfare and which are undesirable. It is reprisals against persons protected by the Geneva Conventions which are prohibited, not reprisals in general.[215]

State reprisals, on the other hand, like the reprisals by Germany to attack London by bombardment in response to similar attacks on German cities, lie on another plane and merit different considerations.[216] They, too, may be unlawful under the Law of War but then, not because they involve reprisals, but because they imply indiscriminate attacks, inevitably affecting civilian objectives.

The regulation of reprisals in war by international conventions also seem to correspond to the definition adopted above and concern, primarily, the protection of civilians and of prisoners of war from acts of reprisals.

The Hague Conventions did not prohibit the military use of reprisals apart from granting some basic protection to prisoners of war.[217] Other instruments regulating warfare had also been silent on this question. However, the Geneva Convention of 1929 restricted the right of reprisals.[218] Still, during the Second World War reprisals against protected persons was used as means of warfare.[219] But, as was shown in the Nuremberg Trials, such practices were forbidden by the Law of War and the belligerents were bound by duties not to resort to reprisals by maltreatment or by the taking of hostages.[220]

The right of reprisals against civilians was restricted by rules laid down in the Judgments of the Military Tribunal at Nuremberg. The Tribunal emphasised that reprisals must at least be limited geographically to one area, mainly as actions against persons in one area could have little deterrent effect on people in other areas. If there was not such geographical connection a 'functional' link might be acceptable as limiting the right of reprisals: there had thus to be some connexity between the reprisals and the civilians against whom action was taken.[221] The Tribunal furthermore ruled out reprisals for which certain ethnic, religious or political groups had been selected.[222]

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214 *Ibid.*, 198 and note by Ago at 206.

215 *Cf.*, Meyrowits, H., 'The law of war in the Vietnamese conflict', *op. cit.*, 567 n.120. But, for a different view, defining reprisals, including State reprisals, see Kalshoven, F., *Belligerent Reprisals*, *op. cit.*, 22.

216 For example, see above, in this Chapter, section A iii a on area bombing.

217 Hague Regulations, article 4 *et seq.*; *cf.*, below, Chapter 10, section B iii f.

218 Article 2(3).

219 ICRC. 1 *Report on Activities During the Second World War*, 1949, 365, 522; Hinz, J., *Das Kriegsgefangenenrecht* (Berlin: Verlag F. Wahlen, 1955), 58; Kalshoven, F., *Belligerent Reprisals*, *op. cit.*, 193.

220 *Cf.*, *The Great War Criminal Cases*, *AD*, 1946, 26; *The List Case*, *AD*, 1948, 632.

221 For example, *Re Kappler*, *AD*, 1948, 480; such 'functional connection' could be that of office or works.

222 See the *von Mackesen Case*, 8 *War Crimes Report*, 1945, 2.

Reprisals as a means of warfare were forbidden by the Four Geneva Conventions,[223] but not in any particular detail.

Protocol I of 1977 widens the protection enjoyed previously.[224] In this part the new rules have been criticised by commentators as, indeed, the Geneva rules had been as well. The original protection in, for example, the Fourth Geneva Convention, had been questioned as some claimed it would lead to fragmentation and resistance,[225] as such rules protecting persons against reprisals cannot easily be reconciled with the idea of war. Some claimed that the rules would favour resistance and 'as no belligerent will keep the rules if his very existence is threatened' the new rules (of the Geneva Conventions) would only contribute to 'more anger, more accusation, more reprisals, more deviation from valid law'.[226]

The protection granted by the Fourth Geneva Convention with respect to civilians has been supplemented by further protection under the 1954 Hague Convention with regard to property which must not form the object of reprisals under the Convention.[227] Protocol I improves the protection against reprisals and the regulation of the matter forbids any reprisals against the civilian population[228] and against civilian objects.[229]

During the Conference some delegations argued that reprisals have function to fill in war as 'a reprisal is a sanction to deter further violations of the law. It is not an act of vengeance. The availability of this sanction may persuade an adversary not to commit violations of the law in the first place'.[230] Others claimed that the protection given by Protocol I of 1977 with regard to reprisals was so extended that the rules risk becoming a dead letter.[231]

Yet, it cannot be denied that, in the light of experiences of the Second World War and of numerous recent armed conflicts, a general prohibition of reprisals as that afforded by Protocol I, can only further the level of treatment in times of armed conflict. Such regulation would also prevent the 'chain reaction', when reprisals against civilians, prisoners of war or detainees by one belligerent lead to subsequent further reprisals by another. Attacks by the French Resistance on German soldiers in 1944 led Germany to execute 80 of its French 'political' prisoners in Lyon; whereupon the French authorities in the Annecy district decided to shoot 80 German prisoners. The ICRC appealed to the French in Annecy to delay the execution for six days pending negotiations with Berlin to obtain an agreement by

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223 Convention I, article 46; Convention II, article 47; Convention II, article 13 and Convention IV, article 33.

224 *Cf.*, Nahlik, S., 'Le problème des répresailles à la lumière des travaux de la Conférence diplomatique sur le droit humanitaire', *RGDIP*, 1978, 130 *et seq*.

225 See Krafft, A., 'The present position of the Red Cross Geneva Conventions', 37 *TransGrotSoc*, 1951, 146.

226 Röling, R.V.A., 'The Law of War and the national jurisdiction since 1945', 60 *RCADI*, 1960, ii, 428, 445.

227 149 *UNTS* 240.

228 Articles 51(6) and 75.

229 Article 53.

230 Australia, CDDH/SR.41, vol. 6, 176.

231 Dinstein, Y., 'Another step in codyfying the laws of war', *op cit.*, 288.

which the Germans would bind themselves to execute French civilians no longer and to allow French partisans to enjoy prisoner of war status. The time elapsed without an agreement, however, and the German prisoners were executed.[232]

But what about reprisals in internal war? Are those not equally contrary to the basic tenets of the Law of War? There were attempts during the negotiation of Protocol II of 1977 to include an article on reprisals.[233] But Nigeria made a forceful protest to the inclusion of any such article in the final Convention and said that such an article dealt with reprisals and, as such, it had no place in an instrument on internal conflict. Reprisals, said Nigeria, belong to inter-State relations[234] and stated further that

> 'it is not inconceivable that in the course of an internal conflict, rebels ... deliberately commit acts to which the normal reaction would be in the nature of reprisals, but because of a prohibition of such measures, governments would feel bound to fold their arms while dissident groups go on a rampage killing and maiming innocent civilians and burning dwellings and food crops'.[235]

But it is not against such acts that the provisions were designed to function but to protect civilians. Again, it may have been the confused notion of belligerent reprisals, as being undefined and mistaken for having similar characteristics and legal effects as State reprisals,[236] which was responsible for the failure to incorporate reprisals in Protocol II on internal war.

d Perfidy

(1) General Rules

Force and fraud may be cardinal virtues in war.[237] But although all warfare may be based on deception,[238] a strict distinction must be drawn between deception or ruses (*stratagems* or *Kriegslist*) and perfidy. Treachery, perfidy and impermissible ruses are practices within a war. A whole war cannot be 'treacherous' although the Prosecution sought to allege this in the Tokyo Trials.[239]

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232 *Report on Activities During the Second World War*, 542.

233 Article 10 *bis* of the Draft.

234 CDDG/SR.51, vol. 7, 122. *Cf.*, above, Chapter 2, section B iv on State reprisals.

235 *Ibid., loc. cit.*

236 Above, Chapter 2, section B iv, on State reprisals.

237 Hobbes, T., *Leviathan, or The Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil* (London, 1651, reprinted Oxford: OUP, 1929), 1 Ch. 13.

238 Sun Tse, *The Art of War* (ed. and transl. by S.B. Griffiths) (Oxford: OUP, 1963), 66; on the relative value of words in Sun Tse, see Hongman Li, 'A comparative study on English translations of culture loaded words in *The Art of War*', in *Theory and Practice in Language Studies*, Vol. 1, No. 5 (Helsinki: Academy Publisher, 2011), 478–481. *Cf.*, Becker, H.D., *Die Dreizehn Gebote der Kriegskunst* (Munich: Günther Mäschke, 1972), 50.

239 See, for criticism of this standpoint, Judge Pal, in Röling, B.V.A. and Ruter, C.F. (eds), *The Tokyo Trials* (Amsterdam, 1971), 626.

Military necessity[240] is said to warrant the use of 'deception' for military ends but does not allow the use of perfidy. Already the Lieber Code acknowledged this basic tenet of the Law of War.[241] The Hague Regulations allow what is commonly called 'ruses'[242] and it is this term which is commonly used to denote deception as opposed to perfidy or treachery and which is prohibited under the Law of War.[243] The prohibition is reaffirmed in Protocol I of 1977[244] and there is ample evidence[245] that these rule form part of the Law of War whether or not a party has adhered to a treaty as these rules reflect what is binding on the basis of general international law.[246]

(2) Specific Practices

Permissible ruses include the use of camouflage, decoys, mock operations as well as ambush.[247] False signals are allowed,[248] including the jamming of communications.

Improper use of a white flag constitutes treachery[249] as well as feigning surrender in other ways or pretending to have wounded or civilian status.[250] Once capitulations have been agreed, they must also be observed, and it is treachery for soldiers who have surrendered to take up arms and attack the enemy.[251] It also constitutes perfidy to use the uniforms of the enemy[252] or of neutral States.[253] Similar abuse of the Red Cross sign, or of equivalent emblems, is also expressly forbidden.[254]

The law of land warfare has, for a long time, prohibited the use of the enemy's flag[255] but, contrary to these rules, it has been claimed that warships are entitled to fly false flag, and even the flag of the enemy, or be disguised as merchant ships

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240 Below, Chapter 12, section B i a.

241 Article 16. *Cf.*, above, Chapter 5, section A.

242 Article 24.

243 Hague Regulations, article 23(b).

244 Article 37.

245 *E.g.* Fleck, D., 'Ruses of war and prohibition of perfidy', *Revue du droit de la guerre*, 1974, 269; Bourdoncle, R., *De l'influence des ruses sur l'évolution du droit de la guerre* (Paris: Sirey, 1958).

246 On the underlying obligation, see my *International Legal Order*, *op. cit.*, 522 *et seq.*, my *Concept*, *op. cit.*, 118 *et seq.*, and my *Essays*, *op. cit.*, 117.

247 Greenspan, *The Modern Law of Land Warfare*, *op. cit.*, 319.

248 *Ibid.*, *loc. cit.*

249 Hague Regulations, article 23(f); article 37 Protocol I of 1977.

250 Protocol I of 1977, article 37.

251 Hague Regulations, article 35.

252 Hague Regulations, article 23(f); Protocol I of 1977, article 39; *cf.*, Jobst, V., 'Is the wearing of the enemy's uniform a violation of the laws of war?', 35 *AJIL*, 1941, 435; on the relevance of the wearing of uniform, see also my 'Foreign warships', *op. cit.*, 61 *et seq.* But the wearing of the enemy's uniform has not always led to condemnation or loss of POW status: see the *Skorzeny Case*, 9 Nuremberg 90.

253 Protocol I of 1977, articles 37 and 39.

254 Geneva I, article 44; Geneva II, article 44; Protocol I of 1977 article 38. *Cf.*, Hague Regulations, article 23(f).

255 Hague Regulations, article 23(f); Protocol I of 1977, article 37.

of their enemy or of a neutral State.[256] At least such 'ruses' would be allowed, it is claimed, before the ship goes into action. It has certainly been common practice to hoist the ship's own flag before going into hostilities; but some ships have not disclosed their true identity, like *The Graf Spee* which sailed under false flag even during action.[257] However, the rather curious practice of using false flag has not gone unchallenged. The *Institut de droit international* questioned in 1913 whether this practice was compatible with the Law of War.[258] It could be argued that the swift nature of modern naval warfare has made obsolete such different rule from land warfare. In State practice there is also ample evidence that neutral powers, whose flags were often abused during the Second World War, certainly did not consider this practice to be lawful and made serious protests.

There have also been attempts to outlaw, on a partial basis at least, the practice of false flag at sea. Thus, under article 2 of the Havana Convention on Rights and Duties of States in the Event of Civil Strife of 1928[259] any insurgent vessel, whether warship or merchantman, which flies the flag of a foreign country to shield its action may be captured and 'tried' by the State the flag of which it has adopted. This provision raises several interesting points. First, the term 'tried' in relation to a ship, must indicate that it can be taken, together with its cargo, as prize.[260] Secondly, the jurisdiction granted to the 'abused' flag State is reminiscent of some hijacking treaties, giving jurisdiction to a State away from the territorial crime and separate from the actual nationality of the perpetrators.[261]

It may be argued that the prohibition in the Havana Convention reflects the law in general as it stands today. One reason in support of considering this to be the case is that air warfare has adopted the same rule as applies on land and therefore prohibits the use of false external identification marks on aircraft.[262] A consequence of using false, or no external, marks on aeroplanes is that the plane will be considered as having been used for espionage and its pilot will not be entitled to prisoner of war status but will be tried as a common spy.[263] On the other hand it is lawful to use reconnaissance scouts in war[264] and espionage, or the 'gathering of information', by such scouts, is not perfidious or in violation of the Law of War.[265]

It has been questioned whether warfare by submarines, by nature perfidious vessels, amount to treachery. There were attempts to outlaw such warfare or, at

256 Colombos, C.J., *International Law of the Sea* (London, 1962), 496–8.

257 Rousseau, Ch., *Conflits armés*, *op. cit.*, 237.

258 *Annuaire* 1913; *cf.*, *The Oxford Manual*, 5 *Annuaire*, 1881–2, 156, 1913.

259 35 *LNTS*, 1932, 187.

260 Below, Chapter 12, section C iii a (2).

261 See Detter, I., *International Legal Order*, *op. cit.*, 271.

262 Hague Regulations, article 19.

263 See my 'Foreign warships', *op. cit.*, 65–66 on the *Gary Powers Case* and other incidents; *cf.*, above, Chapter 4, section C ii (4) on spies, and below, Chapter 9, section B iii f on prisoners of war.

264 *The Flesche Case* (1949), Dutch Court of Cassation, 16 *ILR*, 266; and my 'Foreign warships', *op. cit.*, 67; and above, Chapter 4 section D.

265 But, again, the relevant criterion whether the scout is to be granted POW status or be executed as a common spy, is the wearing of uniform, see my 'Foreign warships', *op. cit.*, 66 *et seq.*, and above, Chapter 4, C ii b (iii).

least, to restrict its use.[266] But modern warfare undoubtedly allows submarines which, however, like all warships are under strict duty not to attack merchant vessels.[267]

The 'scorched earth strategy' is not a treacherous practice and is specifically allowed by Protocol I of 1977.[268] This provision allows the destruction of foodstuffs and crops in derogation of the general rule[269] if such action is indispensable for the defence against invasion. This is thus a provision subjected to military necessity.[270]

It is a particularly serious violation of the Law of War to shield military targets from attack by placing or moving them to densely populated areas or to move civilians near military targets to protect such targets from attack.[271] Nor must medical units[272] or places for religious worship[273] be used to shield military targets from attack. Such prohibition also extends to cultural property[274] and, by analogy, to civil defence property.[275]

It may be questioned whether hostile propaganda is permissible as a ruse of war or whether it amounts to treachery. The better view is probably that it is not unlawful under the Law of War. Such propaganda in times of war is normally dispersed by an enemy government and may contain disinformation and misleading facts. To the extent that propaganda is broadcast by individuals it may be noted that States are rarely under any obligation to suppress propaganda directed against another State even if such propaganda incites rebellion against the internal order.[276] The position in Western countries is usually a clear conflict, in such cases, between the propaganda and the freedom of free speech.[277] There is no duty of territorial States to prevent subversive propaganda,[278] although some have asserted that there is a duty to suppress revolutionary activities against

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266 Below, in this Chapter, section B ii.

267 *Ibid.*

268 Article 54.

269 Above, in the previous section, on starvation.

270 See United States Military Tribunal, *Hostages Trial* (1948), 15 *ILR* 632 and below, Chapter 12, section B i a.

271 Geneva IV, article 28; Protocol I of 1977, article 51(7); *cf., ibid.*, article 58.

272 Protocol I of 1977, article 12; *cf.*, Geneva I, article 19; *cf.*, also Hague Regulations article 27.

273 Protocol I of 1977, article 53.

274 Hague Convention 1954, articles 4 and 8.

275 Protocol I of 1977, article 65.

276 But see the Convention Concerning the Use of Broadcasting in the Cause of Peace, 1936, 5 *Hudson* 409; and the South American Convention on Radio Communications, 1935, 7 *Hudson* 47.

277 See for example, the notification of the United States Secretary of State to the Mexican Ambassador on 7 June 1911 to the effect that the United States could not interfere against hostile propaganda against Mexico because of the constitutional right of freedom of speech in the United States, 2 *Hackworth* 142; on the defamation of the Mexican government by the Hearst newspaper group, see Dickinson, E.D., 'Defamation of foreign government', *AJIL*, 1928, 840.

278 See Preuss, L., 'International responsibility for hostile propaganda against foreign states', *AJIL*, 1934, 649.

another State.[279] Production and distribution of counterfeited enemy money, which in peace-time has been said to constitute veritable *delicta juris gentium*,[280] probably also constitute permissible ruses from which belligerents may abstain only by the knowledge of retaliation on the basis of reciprocity.[281]

The rules of Protocol I of 1977 extend the earlier provisions in the Hague Regulations which merely mentioned treachery[282] and forbid killing by perfidy and a more precise meaning is given to this term[283] in view of recent practices of guerrillas.[284]

(3) The Legal Effects of Perfidy

Exemption from the rules on targets[285] or protection under humanitarian rules[286] can be suspended by acts of perfidy. Even if there is no intention to deceive the enemy, any link between protected objectives or persons and military activities may cause the disruption of the protective regime.

Thus, protection of, for example, medical units[287] is forfeited if acts harmful to the enemy are committed, in violation of the conditions for protection, by or through medical units. However, only quite considerable involvement with military efforts are to lead to this result and, for example, the mere carrying of weapons for self-defence or for the defence of the sick and wounded is not such an act[288] nor is the establishment of guards or escorts,[289] nor does the presence of military persons for medical reasons lead to that protection being forfeited.[290] The presence of civilian sick and wounded in a military unit does not lay such civilians open to attack[291] and is not to be considered to be a link of such intensity that protection is forfeited.

Similar rules apply to other objectives which are exempt from being targets and/or which are specially protected. For example, civil defence personnel and buildings will lose their immunity if they are used for military purposes. But acts that benefit those who are *hors de combat* do not lead to such results, nor does the fact that personnel is carrying light weapons for personal self-defence, or to

279 *Cf.*, above, Chapter 2, section A iii on intervention, and *cf.*, Kuhn, A.K., 'The complaint of Yugoslavia against Hungary with reference to the assassination of King Alexander', *AJIL*, 1935 87.

280 Harvard Draft Convention 1929, 23 *AJIL* 1929, Suppl. 478.

281 For regulation in peace-time, see for example, the Convention for the Suppression of Counterfeiting Currency (1929), 4 Hudson 2692; *cf.*, *United States v Arjona* (1887) 120 US 479; *Emperor of Austria v Kossuth* (1861) 30 *LJ*, ch. 690.

282 Article 23(1)(b).

283 Protocol I of 1977, article 44(3).

284 Above, Chapter 1, section D iv.

285 Above, in this Chapter, section A ii.

286 Below, Chapter 9.

287 Above, in this Chapter, section A iii (6) and *infra*, Chapter 9, section B iii d.

288 Geneva I, article 22; Protocol I of 1977, article 13(2).

289 *Ibid.*

290 Geneva IV, article 19.

291 Geneva I, article 22.

'maintain order'[292] or action under or in cooperation with military authorities or along military lines.[293] By the application of similar rules, a parlamentaire loses his protection[294] if he abuses his position to commit an act of treachery.[295] However, with regard to this last example, it must be added that here the quantum of proof required possibly increased: the immunity of a parlamentaire or other envoy is a 'strong' rule and it must be proved beyond any doubt that he took undue advantage of the situation.

B SPECIFIC RULES FOR NAVAL WARFARE

i The Special Case of Warfare at Sea

Certain prohibited methods of warfare relating to all types of warfare have been discussed and described above. The regulation of naval warfare differs insofar as there are a number of traditional practices which are only pertinent to warfare at sea. However, some of these practices, like the law of prize, is better discussed in relation with other interference with property,[296] and so is the unusual practices of angary.[297] Furthermore, a few questions relating to submarine warfare have been dealt with in connection with perfidy.[298] There remains, however, in this section, a need to comment on submarine warfare and on blockade as methods of naval warfare.

First, some general comments may be made. The Law of War has, by tradition, included certain practices that are special to war on the seas and has recognised and regulated these practices, some of which are in decline of use. However, the general rules described earlier in this work also apply to naval warfare. For example, rules on the nature of the high sea imply, as has been shown,[299] that hostilities must not take place on the high seas,[300] which must only be used for peaceful purposes. Such general rules, as well as the establishment of positive and negative zones,[301] will have an impact on the location of naval warfare.

Next, it must considered that naval warfare is different in nature to land warfare as land warfare has as its objective to take over and occupy the enemy's territory. At sea, war is often about 'maritime superiority' and naval warfare implies uses of the sea for its own purpose rather than to occupy and annex any specific areas. On the other hand, superiority at sea is not an aim in itself but a means to achieve 'national survival' or victory on land.[302]

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292 But in the combat zone only hand guns are allowed. Protocol I of 1977, article 65.
293 *Ibid.*
294 Above, in this Chapter, section A iii b (3).
295 Hague Regulations, article 34.
296 Below, Chapter 10, section C iii a (2).
297 Below, Chapter 10, section C iii a (4).
298 Above, in the previous section.
299 Above, Chapter 6, section A iv.
300 O'Connell, D.P., 'Contemporary naval operations', 44 *BYIL*, 1970, 27.
301 Above, Chapter 6, section vii and viii.
302 UN, *Study on the Naval Arms Race, op. cit.*, 30.

Land warfare thus aims at victory over the enemy who, after his territory has been taken, cannot escape; war at sea implies also a war against the enemy's trade.[303] But the trend towards 'total war' in the Second World War has erased this sharp distinction: all types of war involve attacks on commerce.[304] In the Second World War special ministries for 'economic warfare' were created to plan strategies to strangle the enemy's trade. At sea this type of warfare is important. British ships, for example, adopted the practice of exercising their power of visit and search of neutral ships on the high seas and issued special navigation certificates, if the examination of cargo and the ship's papers warranted such 'approval'. This method, the so-called Navicert System, became an important method of economic warfare.[305]

The system of intercepting merchant vessels carrying goods that might be destined for enemy use[306] is still used, for example, in the Iran–Iraq War, where this method of warfare has been thought essential to undermine the enemy's economy in general as well as to stem the flow of war supplies.

The nature of naval warfare has changed considerably over the last 50 years.[307] Now, the blue water navies and coastal navies are all highly specialised and technically alien to earlier navies: after the 'nuclear revolution' commencing with the USS *Nautilus* being commissioned as a nuclear powered ship in 1952,[308] and the 'electronic revolution', leading to drastic changes in the weapons systems, there is little in modern navies that resembles the traditional equipment. For example, traditional guns would only be used today for minor or undefended targets. For other targets 'fire-and-forget' missiles, whose trajectory cannot be corrected, might be used.[309] Other technical developments, like the closed cycle combustion system, will allow non-marine submarines to be submerged for weeks rather than days.[310]

The relevant treaties regulating naval warfare fall into two broad groups. The first group include a number of treaties which restrict the use of force at sea and provide rules on self-defence or collective security at sea; this group has been largely discussed in relation to the use of force.[311] The second group of relevant treaties are those which regulate typical naval strategies like blockade or submarine warfare. Among these treaties we find the Declaration of Paris of

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303 Wehberg, H., *Seekriegsrecht* (Stuttgart, 1915), 34; Schmitt, J., *Die Zulässigkeit von Sperrgebieten, op. cit., im Seekrieg*, Hamburg, 48.

304 Stone, *Legal Controls, op. cit.*, 457.

305 See, Steinecke, D., *Das Navicertsystem* (Hamburg: Forschungsstelle Universität Hamburg, 1966), 2 vols.

306 *Cf.*, below, Chapter 10, section C iii a (2) on contraband.

307 On earlier developments, see Reuter, P., 'Le droit de la guerre maritime et les juridictions internationales temporaires issues des Traités de paix de la grande guerre', *RDI*, 1934, 375.

308 UN, *Study on the Naval Arms Race, op. cit.*, 33–34, 41–42.

309 *Ibid.*, 47–48.

310 *Ibid.*, 49.

311 Above, Chapter 2, section A ii.

1856,[312] seven of the 1907 Hague Conventions,[313] the Treaty of London 1909,[314] the Treaty of London of 1930[315] and the Protocol of London of 1936,[316] both on *inter alia* submarine warfare, and, finally, the Geneva Convention II[317] on the shipwrecked.

The rules in these Conventions are well accepted by all the maritime nations and they have often justified deviations from the rules by arguments on military necessity[318] accepting that the rules, *per se*, were binding but inapplicable in the specific event because of overriding factors.[319]

ii Submarine Warfare

When submarines were first used the British attitude was that submarines, 'perfidious' by nature, were designed precisely to attack merchantmen and of less importance to fight warships: submarines should therefore be prohibited. Furthermore, submarines could not treat merchantmen as conventional warships, by subjecting such merchant vessels to visit and search and take cargo as prize. But such views were strongly opposed by the German view that 'military necessity'[320] demanded attacks by submarines on merchant vessels. The French intermediate position advocated 'regulated' use of submarines, dismissing both the British and the German extreme positions. The German view was not compatible with the Law of War and the British view, said the French, confused perfidy and ruses, ignored the effect of submarine attacks on warships as well as the extensive French case law on prize taken by submarines.[321]

The Declaration of London of 1909 was not ratified by, for example, the United Kingdom and never entered into force. Yet, since it codified existing rules its substantive regulation was still effective in terms of binding obligations[322] arising and the United Kingdom, herself, applied the Convention in the First World War.[323] The Declaration of London, however, was an attempt to codify 'acknowledged principles of international law'.[324] Courts also applied it as it, in their opinion, embodied general international law[325] even though a Maritime Rights Order-in-Council[326] had expressly revoked the Declaration.

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312 1 *AJIL*, 1907 Suppl. 89.

313 For a list see above, Chapter 5, section A.

314 104 *BSFP*, 1911, 242; 3 *AJIL*, 1909, 179 and above.

315 25 *AJIL*, 1909, 179 and above.

316 31 *AJIL*, 1937, 137.

317 75 *UNTS* 85; *cf.*, above, Chapter 4, section C ii a and below, Chapter 9, section B ii.

318 Below, Chapter 12, section B i a.

319 *Ibid.*

320 Below, Chapter 12, section B i a.

321 Rousseau, Ch., *Conflits armés*, *op. cit.*, 245–247.

322 On underlying obligations, see my *International Legal Order*, *op cit.*, 520 *et seq.*; my *Concept*, *op. cit.*, 118 *et seq.* and my Essays, *op. cit.*, 108.

323 Rousseau, Ch., *Conflits armés*, *op. cit.*, 214.

324 Colombos, J.C., *Prize Law* (London, 1926), 342.

325 *The Håkan* (1918) *AC* 148, 152.

326 Order-in-Council, 7 July 1916.

Germany's unlimited submarine warfare, proclaimed in 1917, involved attacks also on neutral ships in certain zones[327] and, in spite of dubious legality, such strategies were repeated during the Second World War.

The Washington Treaty on the Use of Submarines, the so-called 'Root Resolution',[328] prohibited surprise attacks on merchant vessels and provided 'standards' for submarine warfare as 'established part of international law'. But the Treaty never entered into force.[329] The Draft Treaty had sought to prohibit submarine warfare against merchantmen. At the Conference there had even been suggestions, *inter alia*, by the United Kingdom, that submarines should be forbidden altogether.[330] Although the Treaty of Washington never entered into force it was, by article 22 of the London Treaty of 22 April 1930, incorporated as 'declaratory' of international law. When the 1930 Treaty expired in 1936, this article 22 was, in turn, incorporated in the London Protocol of 6 November 1936.[331] Up to this point the 1922 rules on submarine warfare had been regarded, by the large maritime nations, as declaratory of international law. The explicit 1936 Protocol was prompted merely by the fact that the past paragraph of article 22 'invited' all other Powers to express their assent to the rules, on, for example, surprise attack;[332] but it was thought to add little to already existing rules on submarine warfare.

The Treaty of London imposed a duty on submarines not to attack merchantmen, unless such ships had refused visit and search. But there are doubts as to whether merchant ships, as a term, covers those which are armed.[333]

It has been suggested lately that submarines are vulnerable to attacks by even only lightly armed merchant vessels.[334] But even if this is so, submarines undoubtedly pose a greater threat to merchantmen than to what they are exposed themselves and must strictly adhere to rules on exempt targets.[335]

iii Blockade

One of the earliest treaties on the Law of War in modern times, the Declaration of Paris of 1856,[336] deals with the regulation of blockade. But the treaty contains no definition of the term. Blockade implies the cutting off of the enemy's coastline by forceful measures so that supplies to and from the enemy are restricted. Blockade must thus not be confused with the mere policing of a coastline for limited

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327 Above, Chapter 6, section A viii.

328 16 *AJIL*, 1922 Suppl. 57.

329 Above, in this Chapter, section A iii (5) and notes on civilian ships.

330 16 *AJIL*, 1922 Suppl., 252.

331 31 *AJIL*, 1937, 137.

332 UN, *Study on the Naval Arms Race*, *op. cit.*, 11.

333 Rousseau, Ch., *Conflits armés*, *op. cit.*, 253.

334 O'Connell, *Influence of Law on Sea Power*, *op. cit.*, 46.

335 Above, in this Chapter, section A ii.

336 1 *AJIL*, 1907, Suppl. 89.

purposes, for example to prevent rebels from reaching a specific port.[337] Nor must it be confused with the closure of ports.[338]

A blockade, in order to be recognised as such by third parties, for example, by neutral States, must be effective.[339] This rule was probably accepted by international society long before the Declaration.[340] A blockade cannot be effectively maintained only by mining[341] and probably not only by submarines.[342] On the other hand, with modern weapons even long distance blockades can probably be made effective.

There are other conditions for the legality of a naval blockade in war, such as it must be limited to the coast of the enemy.[343] The blockade must also be declared and notified in order to be recognised. Knowledge is not necessary on the part of the ship's master, unless it is clear that he did not, and could not, have had actual or presumptive knowledge of the blockade.[344]

Certain rules thus limit the geographical application to the enemy's coastline.[345] This area is further restricted to exclude straits or parts of straits which must not be subjected to blockades.[346] Similar prohibitions are inserted in treaties regulating international canals, for example in the Constantinople Convention of 1888 on the Suez Canal.[347]

There has been an increasing decline in the use of blockades as a method of naval warfare. In the First World War there were some ten blockades imposed. In the Second World War they became even rarer, and one can perhaps only point at the Soviet blockade of Finland during the Winter War in 1939 or at the Japanese blockades of Hong Kong in 1941 and of Java in 1942.[348] In recent years blockade has fallen into even greater disuse. The measures applied by the United States to stifle any supply of arms to Cuba probably constituted a 'peaceful blockade' although the United States insisted on calling it a 'Quarantine' to avoid the connotations of

337 Rousseau, Ch., *Conflits armés, op. cit.*, 259–260.

338 *Ibid.*, 259–260 and *e.g.* the *Portendinck Affair*, 1 *RIAA* 512.

339 Declaration of Paris, 15 *NRGT*, 1 série, 791; 1 *AJIL*, 1907, Suppl. 89. Declaration of London on the Laws of Naval War, 1909, 3 *AJIL*, 1909, Suppl. 179.

340 *The Betsey* (1798) 1 C. Rob. 93.

341 *Ibid.*, ; *cf.*, Hague Convention VIII 1907, article VIII.

342 2 Oppenheim 780.

343 Declaration of London 1909, article 1; *cf.*, articles 18–19 on forbidden blockades of neutral ports.

344 *The Franziska* (1855) Spinks, 287, 298. *Cf.*, Declaration of London 1909, articles 8–11. Knowledge is presumed if a neutral vessel left port subsequent to the notification of the blockade to the port authorities at that port, *ibid.*, article 12. On French and other continental views on requirements of knowledge, see Rousseau, Ch., *Conflits armés, op. cit.*, 270–271.

345 Above, Chapter 6, section A.

346 2 Oppenheim 773.

347 3 *AJIL* 1909, Suppl., 123. But interception of contraband has been carried out: Brown, T.D., 'World prize law applied in a limited war situation', 58 *Minnesota Law Review*, 1965–6, 842; Cross, 'Passage through the Suez Canal of Israeli bound cargo and Israeli ships', 51 *AJIL*, 1957, 530; Lapidoth, R., 'The reopened Suez Canal in international law', 4 *Syracuse Law Journal of International Law and Commerce*, 1976, 37.

348 See, further McNulty, J.F., *Blockade, Evolution and Expectation, in US Naval War College, International Law Situations* (Newport: Naval War College, 1980), 172.

a blockade.[349] But in the Cuban crisis there was no armed conflict and therefore the rules on naval blockade in war would still not be relevant. Nor was there any war in which the United Nations and Rhodesia, or between the United Kingdom and Rhodesia,[350] were involved when the Security Council authorised the United Kingdom to impose a blockade on Rhodesia to prevent oil tankers from reaching the port of Umtali.[351]

One of the few blockades imposed in wartime in the last few decades was the US blockade of Hai Phong in Vietnam in 1972.[352] A blockade might also have been briefly applied in the India–Pakistan War in 1971.[353]

There is a school of thought that no blockade can be declared unless there exists a state of war; at least a blockade imposed in other situations may not be 'recognised' by third parties as 'effective'. Since the United States insisted, in 1967, that there was no war with Vietnam, the United States was inhibited from declaring any blockade of any part of that country. Any blockade in that situation would, it was said, be of 'doubtful legality'.[354] But by 1972 the attitude had changed and the United States imposed a blockade to stem the flow of arms into Hai Phong in Vietnam.[355] The Hai-Phong blockade consisted of time-delayed mines that would become active after three days[356] to enable warning to be given to neutral ships to depart. But even these measures may not have amounted to a traditional naval blockade as the system mainly relied on mines and one of the basic rules of blockades is that they cannot be imposed by mines alone.[357]

Protocol I of 1977 explicitly exempts blockade from regulation.[358] However, it is difficult to reconcile this exemption with the Protocol's own prohibition of

349 *Cf.*, above, Chapter 1 B ii–iii; and Wright, Q., 'The Cuban Quarantine', 57 *AJIL*, 1963, 546. McDougal, M.S., 'The Soviet Cuban Quarantine and selfdefence', 57 *AJIL*, 1963, 598; Kolodkin, A.L., 'Morskaya blokada i sovremennoe mezhdunarodnoe pravo', *Sovetskoe gosudarstvo i pravo*, Moscow, 1963, No. 4, 92; D'Estefano, M.A., 'La Curantena y el derecho internacional', *Politica Internacional*, No. 4, Havana, 1963; Christol, C.Q. and Davie, C.R., 'Maritime quarantine: the naval interdiction of offensive weapons and associated material to Cuba', 57 *AJIL*, 1963, 525; Meeker, L., 'Defensive quarantine and the law', *ibid.*, 515; Fenwick, C.G., 'The quarantine against Cuban legal or illegal', *ibid.*, 588; Mallinson, W.T., 'Limited naval blockade or quarantine interdiction, national and collective defence claims valid under international law', *ibid.*, 592.

350 See above, Chapter 1, section D i d on internationalised war.

351 SC 221 1966. *Cf.*, McNair, A.D., *The Legal Effects of War*, (Cambridge: CUP 6th edn 1966), 20 *et seq.*, on formal measures short of war, *e.g.* apart from blockade, embargo; this concept initially implied the taking of ships, usually in territorial waters, coupled with later restitution without compensation; later, this concept came to mean prohibition of exports without any necessary maritime connection, see *ibid.*, *loc cit.*

352 O'Connell, D.P., *Influence of Law on Sea Power*, *op. cit.*, 129–130.

353 *Ibid.*, *loc. cit.*

354 Carlisle, 'The interrelationship', *op. cit.*, 8.

355 O'Connell, *The Influence of Law on SeaPower*, *op. cit.*, 95.

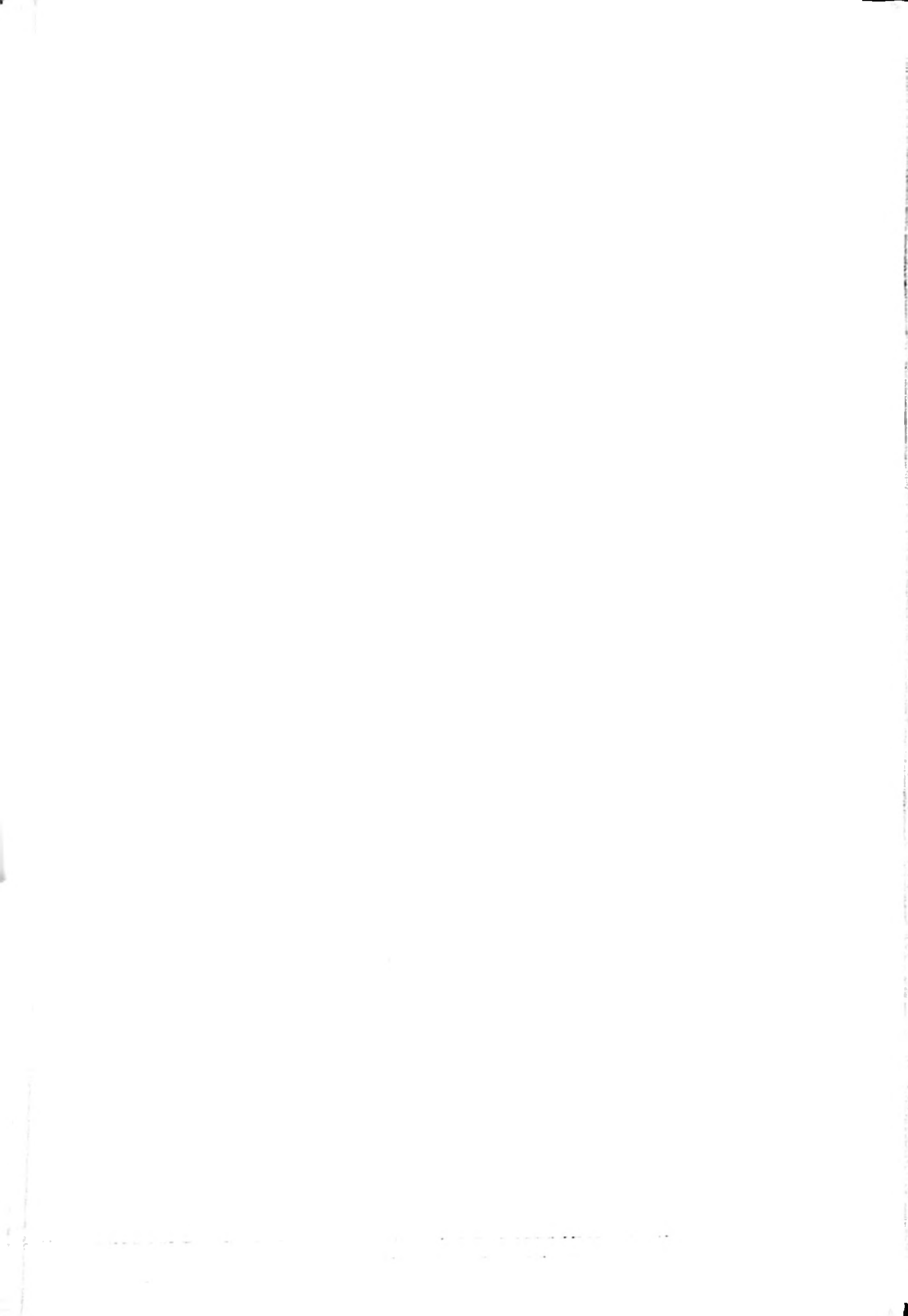
356 Or possibly in three hours as indicated in O'Connell, 2 *The International Law of the Sea* (Oxford: OUP, 1984), 1139.

357 Above, Chapter 7, section A iii.

358 See the preamble of the Protocol.

starvation as a method of warfare,[359] a prohibition which has led to the outlawing of sieges in land war.[360]

359 Article 54 (1).
360 Above, in this Chapter, section A iv.



Chapter 9
Humanitarian Rules

A THE REALISTIC MEANING

Some aspects of the nature and function of humanitarian rules have already been explored in this work.[1] In this context the substance of the basic rules will be described. However, at all times it must be borne in mind that the humanitarian rules supplement those analysed above and which deal with restriction of weapons[2] and regulation of method of warfare.[3] Furthermore, humanitarian rules must be seen and interpreted against the background of the general ethics in war,[4] especially the rules which relate to unnecessary suffering which goes to the root of the Law of War.

Many subsume under humanitarian law also rules which exempt civilians or other non-combatants from being targets of warfare. However, such rules are identical in character to those which exempt non-military targets in general; such rules thus concern targets which have been dealt with above in the context of *methods of warfare*. The difference as to how we classify these rules is one of quantity rather than quality. In other words, rules which stipulate that a village inhabited by 5,000 civilians, without military installations, must not be stormed or bombed are akin to rules saying that one unarmed civilian must not be attacked.

For reasons or clarity, the term humanitarian law has been reserved in this work for rules protecting the human person, *except* rules that concern attack or exempt persons from constituting targets, which are dealt with elsewhere.[5] Rules on weapons and methods in war inevitably present a negative element, insofar as they restrain the way force is used.[6] Some humanitarian rules, especially

1 Above, Chapter 5, section C iii c.

2 Above, Chapter 7.

3 Above, Chapter 8.

4 Above, Chapter 5, section C v.

5 Protection of property and equipment may be ancillary to the protection of individuals.

6 *Cf.*, above, Chapter 8, section A i and ii.

concerning prisoners of war, involve both negative restraint provisions as well as rules for positive measures. However, most humanitarian rules are basically positive, demanding specific action on the part of belligerents and combatants. This restricted notion of humanitarian rules will be more realistic and, by being less hazy, perhaps more easily subsumed under a viable Law of War.

For a useful analysis of rules of the Law of War it is not logical, nor useful, to include in humanitarian rules heterogeneous rules on other matters, such as rules on targets for attack: these rules are more akin to other rules on methods of warfare and belong to another category. Some scholars shelve these rules on targets, when they involve, for example, civilians from the Law of War and insert them in a conglomeration of rules regarding also other matters. To insert provisions concerning targets in a set of rules that deal, for example, with the care of the wounded, or with treatment of prisoners of war, will not enhance the value of the provisions concerning individuals in practical terms: such rules risk to float out in an undefined mass of vague human rights.

On the contrary, it is only by a stringent division of rules on *methods* of warfare, including strict prohibitions of attacks on, for example, civilians, that humanitarian values will be safeguarded. Without much analysis, numerous recent works on humanitarian law artificially group together various rules concerning 'individuals in armed conflict', regardless of the contents of the rules, to form part of an anomalous 'humanitarian law', often referred to as 'IHL' – as if it constituted a known system – but which is marked only by its vagueness.

Thus, by restricting the very meaning of humanitarian law by a narrower definition and by dealing with other rules on individuals, for example concerning targets and methods, in their organic context, the interests of individuals may, by a clearer synthesis of rules, be enhanced.

B SPECIFIC RULES

i Treatment of Civilians

As all rules in warfare humanitarian rules turn on the question of distinction[7] and, in the field of humanitarian law, the impact of the application of this principle is perhaps most acute.

On the other hand, it is really only in peace-time that there is a clear distinction between civilians and military forces.[8] But the network of conventions and treaties which seek to improve the situation of non-combatants in war are naturally limited to base the increased protection that they grant upon the status of persons, as determined by the principle of distinction. This, however, will occasionally lead to some undeserving groups being treated better in practice than they should under the Law of War and some deserving persons being denied protection, because of the hazy distinction between new forms of combatants and civilians.[9]

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7 Above, Chapter 4, section C.

8 *Cf.*, CDDH/SR.41., vol. 6, 180.

9 Above, Chapter 4, section C i.

Civilians comprise two distinct groups, which are those who never took part in the hostilities and who form part of the normal civilian population and those who were combatants but are *hors de combat* and no longer take part in the hostilities, perhaps because they are wounded or because they have, for other reasons, re-joined the permanently civilian population.[10]

The protection of civilians is, from the humanitarian point of view, the most important task of any legislative effort on warfare as such persons include the weakest members of the community, most in need of protection, such as women, children and the aged. Another reason for their specific protection is that civilians must normally be assumed to have wished abstain from any involvement in the conflict. Even if numeric reasons are not always relevant, it is furthermore important to consider that the civilian population normally represents a much larger number of people than the combatants.

Civilians received some protection under traditional rules of combat. They were spared as combat often took place in delimited areas.[11] If a town was stormed or villages were taken, civilians necessarily suffered greatly; but the normal structure of traditional warfare was such that civilians were not usually involved. Under the Hague Conventions of 1899 and 1907[12] civilians received formal protection and, in a much more comprehensive way, under the Fourth Geneva Convention of 1949,[13] protection of civilians and combatants alike was extended by the 1948 Genocide Convention,[14] as well as by other Human Rights instruments,[15] such as the Universal Declaration on Human Rights,[16] the 1966 United Nations Covenants on Human Rights,[17] the 1950 European Convention on Human Rights,[18] and the Latin American Convention on Human Rights of 1969,[19] to the extent that they are not suspended during armed conflicts.[20] Other treaties, such as the 1966 Conventions on the Elimination of All Forms of Racial Discrimination,[21] the 1950 Convention Relating to the Status of Refugees[22] and its 1967 Protocol,[23] may also be relevant in war. But the most specific rules for the Law of War are found in the Geneva Conventions and their Protocols of 1977.

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10 *Cf.*, Bretton, P., 'Le problème des "méthodes et moyens de guerre ou de combat" dans les Protocols additionnels aux Conventions de Geneve du 12 août 1949', *RGDIP*, 1978, 43.

11 Battles were often fought in specific fields, often even with breaks during night time until fighting resumed the following morning.

12 Above, Chapter 5, section C.

13 Above, Chapter 8, section A iii b (1).

14 78 *UNTS* 277.

15 See above, Chapter 6, section C iii c (1) on suspension in war.

16 GA Res. A/811 (1948).

17 Annex to General Assembly Resolution 2200(XXX); 6 *ILM* 360 and 368.

18 213 *UNTS* 221.

19 9 *ILM* 673.

20 Above, Chapter 5, section C iii c (2).

21 60 *UNTS* 195.

22 189 *UNTS* 150.

23 606 *UNTS* 267.

Contrary to earlier Conventions, the 1949 Geneva Conventions deal also with civilians and not only with combatants. The earlier 1929 Geneva Conference which negotiated the Convention on Prisoners of War of the same year recommended a convention on civilians and the ICRC elaborated a Draft for the Tokyo Conference in 1934. But the Second World War intervened and the planned Diplomatic Conference for this earlier convention never took place. The Fourth Geneva Convention thus introduced, in 1949, the most comprehensive regulation of civilians in wartime and it also introduced, for the first time, criteria of distinction between civilians and combatants.[24]

It may be difficult to ensure that civilians are adequately protected in the case of total war[25] but a belligerent cannot escape liability for serious violations of these rights. Most protection that civilians enjoy is based on the system laid down in the Geneva Convention IV of 1949 on Civilians. This Convention ensures rights which are so firm that they cannot be denounced by individual civilians or a group of them.[26] The rights laid down in the Geneva Convention IV are now extensively supplemented by the provisions of Protocol I and II of 1977.[27]

Protocol I of 1977 expands protection of the civilian population considerably, especially by a paramount presumption that anyone who is not proved to be a belligerent has civilian status.[28] The Protocol extends the protection of the Fourth Geneva Convention to include specific protection on civilians.[29] Protocol I codifies, for the first time, the established rule that civilians must not form the object of attack.[30] Furthermore, acts which are intended to spread terror among the civilian population are prohibited.[31] The protection of the civilian population may even be the main aim of Protocol I of 1977,[32] and is achieved by the prohibition of certain methods of warfare as well as by some mandatory provisions on the treatment of victims of war.[33] Specific rules envisage directly the treatment of civilians or combatants *hors de combat* such as the wounded and prisoners of war. The fusion of rules previously found in the instruments on the law of the Hague with those in documents on the law of Geneva has, as some commentators point out,[34] upset

24 *Supra*, Chapter 4, section C i.

25 *Cie. d'assurance le Soleil v. Français, RGDIP*, 1947, 259.

26 Geneva IV, article 8.

27 Protocol I, article 51(1); Protocol II, article 13.

28 Article 50. Such status is only refused if the 'civilian' takes direct part in the hostilities, see article 51. *Cf.*, above Chapter 4 on illegal combatants.

29 Article 51(2) of Protocol I; *cf.*, article 13(2) of Protocol II; above, Chapter 5, section C iii c.

30 However, Geneva IV prohibits, as analysed above, Chapter 8, section A iii b (1) attacks on the civilian population either to gain military advantage or to take reprisal. The 1922 Draft Rules on Airfare, which prohibited attacks from the air on civilians, were never ratified.

31 Article 51(2).

32 *Cf.*, CDDH/SR.5, 81, vol. 7, 136.

33 The rules on belligerency obviously concern the combatants in the first place but will have as their objective and inevitable result an improved protection of civilians.

34 Siotis, *Le droit de la guerre, op. cit., loc. cit.*

set traditional division between the two sets of rules, a division which perhaps was never well-founded.[35]

A valuable contribution of the Protocols is that they include a catalogue of forbidden practices to which civilians and persons *hors de combat* must not be subjected. These forbidden practices include under Protocol I:

> '(a) violence to the life, health, or physical or mental well-being of persons, in particular:
> (i) murder;
> (ii) torture of all kinds, whether physical or mental;
> (iii) corporal punishment; and
> (iv) mutilation;
> (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
> (c) the taking of hostages;
> (d) collective punishments; and
> (e) threats to commit any of the foregoing acts'.[36]

Protocol II contains a similar catalogue of prohibited practices.

> '(a) violence to 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.'[37]

Civilians must thus not be subjected to murder or mass executions.[38] Nor must they be subjected to torture or any other action which causes physical suffering or their intimidation. Such acts are particularly prohibited if they are designed to obtain information.[39] There must be no collective penalties[40] and no hostages must be taken.[41] Civilians must not be transferred to protect a place from being

35 *Cf.*, above, Chapter 5, section C ii.

36 Protocol I, article 75.

37 Protocol II, article 15.

38 See below, in this Chapter, section B ii f, on the massacre of Croatian patients in the Vukovar hospital: they were in all likelihood soldiers. But if there were some civilians among them, the above-mentioned provisions on protection of civilians would be relevant.

39 Hague Regulations, article 44; Geneva IV, articles 31, 33.

40 Geneva IV, article 33.

41 Geneva IV, article 34.

a military target.[42] They must not be deprived of their food by requisitions by an occupying Power.[43]

If civilians are interned they must be given adequate clothes, light and heating.[44] The must not be subjected to forced mass transfers.[45]

Relief to civilian population must be allowed through,[46] and those who accompany such consignment of relief goods must also enjoy protection.

ii The Treatment of Wounded, Sick and Shipwrecked

Some victims of war, for example prisoners of war, had received rudimentary protection under the 1864 Geneva Convention on the Treatment of Wounded.[47] Ratifications of the Convention did not come forth but, with some success, the newly founded International Committee of the Red Cross sought to prompt governments to accede to the Convention. In 1866 Prussia opened hostilities against Austria and the Convention received its first test. Austria had, when the hostilities opened, not yet ratified the Convention but Prussia notified the Committee of the Red Cross that it would apply the Convention regardless of Austria's non-ratification.[48]

This Convention was extended to cover also the wounded and shipwrecked at sea, including protection for hospital ships, by the Third Hague Convention of 1899.[49] The 1906 Geneva Convention on the Wounded and Sick[50] expanded the Third Hague Convention of 1899. Prisoners of war were the subject of declaratory rules laid down by the *Institut de droit international* in the so-called Oxford Manual of 1888,[51] of which some rules were adopted in the 1899[52] and the 1907 Hague Conventions.[53] Prisoners of war also received some protection under the Hague

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42 Geneva IV, article 28. Above, Chapter 8, section A iii b (1).

43 Hague Regulations, article 52(1); Geneva IV, articles 36, 55; Protocol I of 1977, article 54(1); Protocol II of 1977, article 14; *cf.*, below, Chapter 10, section C iii a (3) on requisitions; and above, Chapter 8, section A iv b, on starvation as a prohibited method of warfare.

44 Geneva IV, articles 90 and 85.

45 De Zayas, A., 'Population transfers', *op. cit.*, 207.

46 Protocol I of 1977, articles 68–71, supplementing Geneva IV, article 23, 55 and 59; Kimminich, O., *Schutz der Menschen in bewaffneten Konflikten*, *op. cit.*, 186 *et seq.*; *cf.*, Bothe, M., 'Rechtsprobleme humanitärischer Hilfsaktionen', *op. cit.*, 45 *et seq.*

47 19 *NRGT*, 1 série, 607. The Additional Articles of 1868 were never ratified but the 1864 Convention remained an important instrument until it was replaced, between certain parties by the 1929 Convention (see below in this Chapter, section B iii f).

48 Boissier, P., *Histoire du Comité de la Croix-Rouge*, *op. cit.*, 236.

49 International Convention III for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864, 26 *NRGT* 979.

50 1 *AJIL*, 1907, Suppl. 201.

51 5 *Annuaire*, 1881–2, 156.

52 26 *NRGT*, 2 série, 976.

53 3 *NRGT*, 3 série, 630.

Regulations,[54] which gave some additional basic protection to civilians by laying down certain criteria to distinguish them from combatants.[55]

The situation of such prisoners of war was greatly improved by the conclusion, in 1929, of a new Convention on Prisoners of War.[56] The Convention was the result of certain draft rules drawn up by the International Committee of the Red Cross (ICRC) and contained certain innovations with regard to restriction of the right to reprisals,[57] and with regard to functions of protective powers.[58]

Another Convention of 1929 improved the conditions of the wounded and the sick in armed conflict.[59] This Convention, together with the 1929 Convention on Prisoners of War[60] replaced, as between contracting parties, the 1864 Geneva Convention and supplemented the rudimentary protection afforded by the 1907 Hague Regulations. They were themselves replaced, again as between contracting parties, by the First and Third 1949 Geneva Conventions.

The major advance, in modern times, with regard to the condition of wounded, sick and shipwrecked, of prisoners of war, and by civilians, was made by the 1949 Conventions, the four so-called Red Cross Conventions.[61] The First Red Cross Convention expanded the protection of the wounded and sick in the field and the Second Convention increased protection of the wounded, sick and shipwrecked at sea.

It is a great advance of Protocol I 1977 that it supplies a definition of the terms wounded, sick and shipwrecked.[62] The Geneva Conventions had a shortcoming insofar as they failed to specify relevant qualifications of such categories of persons.

The wounded, sick and shipwrecked enjoy, like all involved in armed conflicts, the fundamental human rights enounced by the Protocol,[63] as well as specific protection due to their condition.[64] If they are taken prisoners of war they enjoy the cumulative provisions of such provisions.[65] The Protocol provides further that the protected persons must not be subjected to mutilations, transplants or to any medical experiments.[66] The Protocol affords protection beyond that under the

54 Articles 4–21 of the Regulations Respecting the Laws and Customs of War on Land, Annex to Convention IV, 3 *NRGT*, 3 série, 630.

55 Chapter I of the Regulations. See further on the relevant criteria, above, Chapter 4, section C i.

56 108 *LNTS* 343.

57 Article 2(3).

58 Articles 86–87.

59 108 *LNTS* 303.

60 108 *LNTS* 343.

61 Convention I For the Protection of War Victims Concerning the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 *UNTS* 31; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *ibid.*, 85; Convention III Relative to the Treatment of Prisoners of War, *ibid.*, 135; Convention IV Relative to the Protection of Civilian Persons in Time of War, *ibid.*, 287.

62 Article 8.

63 Article 75. *Cf.*, below, in this Chapter, section B iii g.

64 Article 8.

65 See below, in this Chapter, section B iii f.

66 Article 11.

1949 Conventions by including all wounded, sick and shipwrecked in its ambit and not merely those in the power of the adversary party.

Under the first two Geneva Conventions the category wounded, sick and shipwrecked comprises members of a belligerents forces that fulfil the requirement of combatant status.[67] This category is extended by Protocol I of 1977.[68] Protection of wounded, sick and shipwrecked extends to all who qualify as combatants[69] on the condition that they abstain from any hostile activity.[70] The protected persons shall be respected, treated humanely and there must be no attempts on their lives or violence on their persons. In particularly, they must not be subjected to murder,[71] torture or any biological experiments.[72]

Positive obligations of the captor include the duty to search and collect enemy wounded, sick and shipwrecked and to give them adequate care.[73] The military command has the right to 'appeal to the charity' of the civilian population in the relevant territory to voluntarily collect and care for the sick and wounded,[74] and of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick and shipwrecked persons.[75] In the case of shipwrecked the military authorities may also ask for assistance to collect the dead.[76] On the other hand, civilians who respond to the calls for charitable assistance must not subsequently be held responsible for having aided the enemy or for other acts relating to their care; nor must they be molested for having lent assistance.[77] Commanders of other vessels who assist in a similar way must not be captured on account of their transporting protected persons but remain liable to capture for other acts, implying violations of neutrality.[78]

The identity of all sick, wounded and shipwrecked, as well as of the dead, must be ascertained and relevant information transmitted to the Information Bureau of the ICRC in Geneva.[79] They must also be protected against pillage and ill-treatment.[80]

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67 Above, Chapter 4, section B.

68 Above, Chapter 4, section C.

69 Above, Chapter 4, section B, on requirements.

70 *Cf.*, above, Chapter 8, section A iv d on perfidy.

71 The execution of 297 Croatian patients at the Vukovar Hospital by the Serb Army on 19 November 1991 would fall in this category, if the wounded were combatants; it would be a crime against the rules ensuring protection of prisoners of war if they were first taken prisoners, below, in this Chapter, section B ii f; and it would be a gross violation of the protection of civilians if they were not soldiers, above, in this Chapter, section B i; see further *UN Report of the Exhumation at Ovčara*, 1998.

72 Geneva I and II, article 12.

73 Geneva I, article 15; Geneva II, article 18.

74 Geneva I, article 18.

75 Geneva II, article 21.

76 Geneva II, article 21(1).

77 Geneva I, article 18;

78 Geneva II, article 21(3); *cf.*, below, in this Chapter, section B iii f on capture.

79 Geneva I, article 16; Geneva II, article 19. An Information Bureau was to be established under article 122 of Geneva III to process information on dead, sick, wounded, shipwrecked as well as of prisoners of war. The services of the ICRC have been used in practice for this purpose.

80 Geneva I, article 15; Geneva II, article 18.

Special agreements may be concluded by belligerents for the removal or exchange of sick, wounded and shipwrecked from a besieged or encircled area or to allow the passage of relief aid.[81] Protected persons who remain in the hands of the enemy shall qualify as prisoners of war and be guaranteed further protection as such.[82] Warships of belligerents have the right to demand the transfer of their sick, wounded and shipwrecked from other vessels, except neutral warships, who have lent assistance[83] provided the protected persons are in a fit state to be moved, and provided the warship can provide adequate care.[84] If the protected persons are on board a neutral warship the flag State must ensure that the protected persons take no further part in the hostilities and shall be 'guarded' to that effect.[85]

iii Specially Protected Groups

Certain rules increase previous protection afforded to certain groups of persons, above that granted to all civilians.

a Women and Children

Women received some protection under Geneva Convention IV which prescribed that women must not be subjected to attacks on their honour, rape, enforced prostitution, or any form of indecent assault.[86] Under the same Convention, particular duties were imposed on the parties to ensure the safety of children under 15, who are orphaned or separated from their families as a result of war, so that they are not left to their own resources.[87]

Protocol I of 1977 extends protection of women by specifying certain mandatory rules in their favour and granting enhanced protection to the most vulnerable group, that of pregnant women or mothers with dependant infants.[88] Children receive special protection by detailed provision dealing both with their safety[89] and with their evacuation in case of need.[90]

It because women and children are specially protected under the Law of War, that the degree of violations of their right to be sheltered are taken into account when international and national criminal tribunals sentence war criminals.[91]

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81 *Ibid.*, and below, in this Chapter, section A iii f on relief aid.

82 Geneva I, article 14; Geneva II, article 16; *cf.*, below, in this Chapter, section A iii f on prisoner of war status.

83 Above, Chapter 6, section A iii.

84 Geneva II, article 14.

85 Geneva II, articles 15–17.

86 Geneva IV, article 27(2).

87 *Ibid.*, article 24.

88 Protocol I of 1977, article 76. See further Khushalani, Y., *Dignity and Honour of Women and Basic Fundamental Human Rights* (The Hague: Martinus Nijhoff, 1982), 63ff.

89 Article 77.

90 Article 78.

91 See below Chapter 12 C ii a on war crimes.

b Journalists

War correspondents received some protection under the 1949 Conventions insofar as they were to be given prisoner of war status if captured.[92] It may be surprising that one category singled out for further protection by Protocol I of 1977 would be that of journalists. However, considering that journalists are extremely useful as part of the machinery which ensures the implementation of rules of war when most means of enforcement is lacking, such protection is most important. It is often through reports of journalists that inhuman practices in wars are made known to the rest of the world and their function of transmitting news to those outside a particular conflict may often be conducive to the condemnation by world opinion of certain methods of warfare or a certain state of affairs.

c Civil Defence Personnel

Under Geneva Convention IV there is a tentative regulation of protection of civil defence organisation during occupation.[93] Such entities are ensured the right to continue their work 'subject to temporary and exceptional measures imposed for urgent reasons of security'.[94] The rationale of any protection of civil defence units is that they protect civilians from attack.[95]

Protocol I of 1977 recognises that civil defence personnel should be protected as they do not form part of the ordinary armed forces. Ancillary protection should also be granted to certain equipment.[96] Such protection is entirely novel in international law.[97]

During the Conference some delegations expressed the opinion that civil defence personnel ought to have been given a status similar to that of medical personnel and thus protected from being taken as prisoners of war.[98] Yet, even if the final articles were a compromise of conflicting views as, indeed, many other articles of the Protocol, the innovating protection of civil defence personnel and equipment is another step in the development of the laws of warfare.

d Medical Personnel

As has been described above,[99] medical units are protected from attacks. They are also ensured special treatment by the Geneva Conventions.[100] Medical personnel

92 Convention III, article 4 (A)(4).

93 Article 63.

94 On military necessity, see below, Chapter 12, section B i a.

95 Gelsvik, N., 'Militaert forsvar eller civilt vaern', *Syn og Segn* (Oslo, 1930).

96 Articles 61–67.

97 See Jakovljevic, B., *New International Status of Civil Defence as an Instrument for Strengthening the Protection of Human Rights* (The Hague: Martinus Nijhoff, 1982), 32 *et seq.*

98 *E.g.*, Switzerland, CDDH/SR.43, vol. 6, 276.

99 Above, Chapter 8, section A iii b (6).

100 Geneva I, article 24; Geneva IV, article 20; on identification, see above, Chapter 8, section A iii b (6) and Geneva I, article 40; Protocol I of 1977, article 18(3) and its Annex.

include also hospital administrators,[101] members of the armed forces assigned to medical units,[102] members of Red Cross organisations, other volunteers[103] as well as, by an extension of Protocol I of 1977, all civilian medical personnel.[104] If medical personnel are captured they must normally not be made prisoners of war but may be kept in POW camps to give medical assistance provided the number of prisoners require such help.[105] There are specific rules by which medical personnel will carry out their duties with priority to their own sick and wounded and they are guaranteed certain facilities to ensure this work.[106] Medical personnel at sea who fall into the enemy's hands shall be 'respected and protected' and they may continue to carry on their medical duties for as long as is necessary. They shall be sent 'back' when the Commander-in-Chief under whose authority they find themselves considers it practicable.[107]

Fixed medical installations and medical transport units are protected under the rules on methods of warfare, exempting them from being targets.[108] The Protocol of 1977 extends protection previously granted to medical personnel under the Geneva Conventions to civilians who care for the sick and wounded.[109] Problems related to medical transport by air were not solved by the 1929 Convention[110] nor by the 1949 Red Cross Conventions. The Protocols,[111] on the other hand, '*Ont un immense mérite: ils tiennent largement compte des exigences de la médecine et des réalités opérationnelles et technique de l'aéronautique dans le temps ou nous vivons*'.[112]

Protocol I adopts a varied system for overflight by medical transport, attempting to establish a balance between humanitarian demands and the legitimate fear of parties to armed conflicts that any overflights might have a military purpose. The Geneva Convention had required prior agreement for all medical flights.[113] Such authorisation in advance is not always compatible with speedy medical assistance. Protocol I still requires consent, however, for flights over enemy or neutral territory.[114] Under the new Protocol there is also extended possibilities for third parties to provide medical assistance.[115] The Protocol extends protection to

101 Geneva I, article 24.

102 Geneva I, article 25 and above, Chapter 8, section A iii b (6).

103 Geneva I, article 26.

104 Protocol I, articles 8 and 15; *cf.*, above, Chapter 8, section A iii b (6).

105 Geneva I, article 28.

106 Geneva I, articles 28, 30, 31.

107 Geneva II, article 37.

108 Above, Chapter 8, section A iii b (6).

109 Article 8 and 15.

110 108 *LNTS* 343.

111 For Protocol II, see below, in this Chapter, section B iii g.

112 Evrard., E., 'Le nouveau statut protecteur des transports sanitaires par voie aérienne en temps de conflit armé', *RGDIP*, 1978, 234. (The Protocols are of great merit as they take into account medical requirements, operational and technical realities of air transport in the world in which we live).

113 Convention I article 36 and Convention II article 39.

114 Articles 27 and 31.

115 Articles 9(2) and 22(2); *cf.*, comments by Bothe et al., *New Rules on Victims of War, op. cit.*, 145.

certain small medical crafts at sea even though no notification has been given[116] as previously required by the Geneva Convention on the Sick and Wounded and Shipwrecked.[117] The Protocol also remedies the deficiencies in this Geneva Convention by prescribing that protection applies at sea or in any other waters,[118] thereby including rivers and lakes under the ambit of the Protocol. The Protocol furthermore provides more detailed and specific rules for the identification of medical transport.[119]

e Religious Personnel

Military religious personnel, such as military priests, enjoyed protection under the Geneva Conventions.[120] Protocol I extends this protection also to civilian religious personnel.[121] Military[122] and civilian[123] priests must not be made prisoners of war but must be treated in similar way as medical personnel and therefore be 'respected' and retained only to carry out their ordinary duties.

f Prisoners of War

At present there are numerous discussions, and divergent views, as to the status of prisoner of war. This is a new and dramatic development, linked to the question of status of combatants. Some claim that terrorists, once caught, are not only detainees but entitled to be treated as prisoners of war.[124] Others have argued that extending such treatment with ensuing privileges of prisoners of war to terrorists hollows out the protection that 'real' soldiers and 'real civilians' deserve.[125]

It is important to be aware of this debate as an extended category of prisoners of war could endanger the core of the Law of War and deviate from the clear rules that hitherto have applied. The history of the Law of War shows that only a deserving category of combatants deserve the status of prisoners of war. This does not mean, however, that terrorists have no basic protection from torture and other inhuman practices but the level of privileges is not the same as for prisoners of war.[126]

116 Article 22.

117 Convention II article 27.

118 Article 23.

119 Articles 8, 18, 24 and Annex I, Schindler and Toman, *Documents*, 2nd edn, *op. cit.*, 609.

120 Articles 24 and 28 of Convention I.

121 Article 15(5).

122 Geneva I, article 24, 28.

123 Protocol I of 1977 article 15.

124 For example, Doswald-Beck, L., *Human Rights, op. cit.*; *cf.*, below, Chapter 12 C on treatment of terrorists.

125 See Detter, I., 'Illegal combatants and the Law of War', *Law Journal of George Washington University*, 2007; and Detter I., 'Extraordinary rendition', *University of North Carolina Law Journal*, 2008; and below, Chapter 12 C under treatment of terrorists.

126 See below, in this Chapter, under B iv c.

Some victims of war, for example prisoners of war, received rudimentary protection under the 1864 Geneva Convention on the Treatment of Wounded.[127] There had been earlier privileges only for certain classes of prisoners of war.[128] Ratifications of the Convention did not come forth but, with some success, the newly founded International Committee of the Red Cross sought to prompt governments to accede to the Convention. In 1866 Prussia opened hostilities against Austria and the Convention received its first test. Austria had, when the hostilities opened, not yet ratified the Convention but Prussia notified the Committee of the Red Cross that it would apply the Convention regardless of Austria's non-ratification.[129] This Convention was extended to cover also the wounded and shipwrecked at sea, including protection for hospital ships, by the Third Hague Convention.[130]

The 1906 Geneva Convention on the Wounded and Sick[131] expanded the Third Hague Convention of 1899. Prisoners of war were the subject of declaratory rules laid down by the *Institut de droit international* in the so-called *Oxford Manual* of 1888,[132] of which some rules were adopted in the 1899[133] and the 1907 Hague Conventions[134] Prisoners of war also received some protection under the Hague Regulations.[135] The Regulations also gave some basic protection to civilians by laying down certain criteria to distinguish them from combatants.[136]

The situation of such prisoners of war was greatly improved by the conclusion, in 1929, of a new Convention on Prisoners of War.[137] Another Convention of 1929 improved the conditions of the wounded and the sick in armed conflict.[138] This Convention replaced, as between contracting parties, the 1864 Geneva Convention and supplement the rudimentary protection afforded by the 1907 Hague Regulations. They were themselves replaced, again as between contracting parties, by the First and Third 1949 Geneva Conventions.

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127 19 *NRGT,* 1 série, 607. The Additional Articles of 1868 were never ratified but the 1864 Convention remained an important instrument until it was replaced, between certain parties, by the 1929 Convention (see above, Chapter 6, section B i) and finally completely replaced by the 1949 Conventions (see below, in this section).

128 Above, on the historical background, Chapter 5, section A.

129 Boissier, P., *Historie du comité de la Croix-Rouge, op. cit.*, 236.

130 International Convention III for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864, 26 *NRGT* 979.

131 1 *AJIL*, 1907 Suppl. 201.

132 5 *Annuaire*, 1881–2, 156.

133 26 *NRGT*, 2 série, 976.

134 3 *NGRT*, 3 série, 630.

135 Articles 4–21 of the Regulations Respecting the Laws and Customs of War on Land, Annex to Convention IV.

136 Chapter I of the Regulations. See further on the relevant criteria, Chapter 4, section C.

137 108 *LNTS* 343. The Convention was the result of certain draft rules drawn up by the International Committee of the Red Cross (ICRC) and contained certain innovations with regard to restriction of the right to reprisals (article 2(3)) and with regard to functions of Protective Powers (articles 86–87).

138 *Ibid.*, 303.

The essence of treatment of prisoners of war is that it must not constitute a sanction but a set of precautionary measures.[139] It is as a consequence of such considerations that it appears reasonable that prisoners of war are humanely treated.

The Hague Regulations of 1899 included provisions intended to prevent any harsh interrogation of prisoners of war.[140] The 1907 Hague Regulations provided a very much more detailed regulation of the required treatment of prisoners of war.[141] Geneva Convention III had improved on the treatment of prisoners of war under the 1929 by specifying the categories of persons who would be entitled to protection. Convention III divides persons into broad categories, those who had fallen into the enemy's hands, including a new category of civilian crew members of military aircraft, and those in occupied or non-belligerent territories which should, much in the light of the Second World War, be treated as prisoners of war. Entitlement to prisoner of war status under the Geneva Conventions is restricted to those who can show that they fulfil the four conditions of 'combatants'.[142] The Geneva Convention extended privileged prisoner of war treatment to resistance movements operating in occupied territory.[143] Another category, possibly not identical with the aforementioned group, qualifying for prisoner of war status, includes members of armed forces who profess allegiance to a government or an 'authority' not recognised by the detaining power. Such members would, in any event, fight 'on behalf' of a party to a conflict. There is some uncertainty as to what link is required between independent forces, such as resistance movements, and parties to the Convention.[144]

By changing the required conditions for combatants Protocol I of 1977 widens the protection of prisoners of war: since the conditions are reduced[145] a person may now qualify as a prisoner of war although he would not have enjoyed protection under the Third Geneva Convention. This extension will prove to be more useful than the presumption clause in the Geneva Convention that protection as a prisoner of war will be enjoyed until any questionable status is settled by a competent Tribunal.[146]

In practice even persons who do not fulfil the conditions of combatancy have been given prisoner of war status. To encourage the surrender of guerrillas and spies commanders have sometimes asked the political organs of their home State for special permission to treat unprivileged combatants as prisoners of war. Such a practice developed, for example, in the Malaysian conflict to distinguish between

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139 *Cf.*, Rousseau, Ch., *Conflits armés*, *op. cit.*, 90.

140 Below, in this Chapter, section B iii f.

141 Articles 4–20.

142 See above, Chapter 4, section C ii.

143 Article 4A(2).

144 *Cf.*, above, Chapter 4, section B. Some writers claim that the 'authority' to which members of armed forces may profess allegiance may even be the United Nations, see Farer, T.J., 'The humanitarian laws of war in civil strife towards a definition of armed conflict', 7 *RBDI*, 1971, 29; *cf.*, Draper, G.I.A.D., 'The Geneva Conventions of 1949', 114 *RCADI*, 1965, i 114.

145 See above, Chapter 4, section C ii a (1).

146 Geneva III, article 5(2).

'captured enemy personnel' (CEP) and 'surrendered enemy personnel' (SEP), whereby the latter group would also be treated as prisoners of war.[147] At times the all-important question for prisoner of war status has been whether there is a 'war'. If a State can argue that there is no such conflict it may also attempt to evade all obligations incumbent on it for specific treatment of prisoners of war. It is clear that non-recognition of an entity as a State does not necessarily lead to non-combatant status of persons.[148] China refused to admit that there was a state of war in Korea and denied the US pilots, on that basis, the status of prisoners of war. They were instead treated as 'spies' captured overflying China's territory.[149]

By claiming that the hostilities in Slovenia, Croatia and Bosnia were of an 'internal' character and therefore constituted, if a war at all, a 'civil war',[150] the government in Belgrade sought to justify even mass arrests of 'detainees'. The federal government of former Yugoslavia was greatly assisted in these hostile tactics by the European Union and other international organisations and international spokesmen who repeatedly, and for a considerable time, referred to hostilities as a 'civil war'. However, it was clear, at least after the declarations of independence, that the hostilities constituted an international war, and for some time before independence it was probably an 'internationalised' war.[151] Objections to claims that an international war exists, make the qualification of a conflict as 'war' according to objective rather than subjective criteria[152] even more pertinent.

Some claim that intelligence forces have no right to be treated as prisoners of war[153] but this is probably only true for spies who are not in uniform.[154] There is no evidence that reconnaissance soldiers would be deprived of protection as prisoners of war.[155]

Furthermore, the most severe acts, like torture, are forbidden even if applied to those who do not qualify for combatant status: those may be liable to execution but they must not be tortured.[156]

Defectors are said not to qualify for prisoner of war status as they have not 'fallen into the hands' of the enemy.[157] Consequently, there is legally no duty to hand defectors over. But the difference between defectors and deserters is not always easy to draw. It could perhaps be said that defectors wish to change allegiance and

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147 Miller, R.I., *The Law of War*, *op. cit.*, 258 *et seq.*

148 *The Fjeld* (1950) Prize Court of Alexandria, 17 *ILR*, 1950, 345; *Diab v AG*, (1952) Supreme Court of Israel, 19 *ILR*, 1952, 550.

149 *Cf.*, GA Res. 906 (IX) 1954 condemning the treatment as contrary to the Korean Armistice Agreement at Panmunjom on 25 September 1953.

150 Above, Chapter 12, section D i b, c and d for relevant criteria.

151 Above, Chapter 1, section D i d.

152 Above, Chapter 1, section B iii.

153 Rosas, *The Legal Status*, *op. cit.*, 233; *cf.*, 231.

154 Above, Chapter 4, section C ii a (1).

155 See my 'Foreign warships', *op. cit.*, 67.

156 Norwegian Supreme Court, *AD*, 1946, 391.

157 Draper, *The Red Cross Conventions*, *op. cit.*, 53.

deserters only wish to avoid military service,[158] but it is not always easy to establish the subjective motives of a person.[159]

Protocol I of 1977 effectively extends the qualitative treatment of prisoners of war by subjecting them, along with other persons, to certain fundamental guarantees.[160] Although other persons are also protected under this provision, it is to prisoners of war that these guarantees will be particularly important as it is they, who, by definition, find themselves in the hands of the enemy. The guarantees imply that *inter alia* a prisoner of war must not be subjected to any act included in the catalogues of prohibited practices.[161]

But the ambit of the protection of prisoners of war is still uncertain. There are specific provisions in Geneva Convention III to the effect that persons who have been prosecuted for acts prior to capture will retain the benefits of the Convention.[162] In other words, if a person is a war criminal,[163] he does still qualify for prisoner of war status. The former communist States in Eastern Europe made significant reservations to this article. The former Soviet Union said in its reservation that it would not

> 'consider itself bound by the obligation, which follows from article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg Trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment'.[164]

The other then-socialist States made similar reservations although they did not all refer to 'convicted' but to 'prosecuted and convicted' persons, thus indicating that there would have had to be a 'trial'.[165] But the United Kingdom, Australia and New Zealand made protests against the reservations as a breach of the Convention.[166] The Democratic Republic of Vietnam considered the US raids on DRV as war crimes and stated therefore that captured pilots would be liable for judgment as war criminals and would not enjoy prisoner of war status.[167] Other incidents, like in Kashmir in 1965, when Pakistan forces crossed the border, show that prisoner of

158 Esgain, A.J. and Solf, W.A., 'The 1949 Geneva Conventions relative to the treatment of prisoners of war', 41 *North Carolina LR*, 1963, 555.

159 *Cf.*, on mercenaries, above, Chapter 4, section C ii a (3).

160 Article 75.

161 Above, in this Chapter.

162 *Ibid.*, article 85.

163 Below, Chapter 12, section C ii a.

164 For text see 3 *Commentaire* 449.

165 Democratic Republic of Vietnam, *ibid.*, *loc cit.*

166 Schindler and Toman, *Documents*, *op. cit.*, 2nd edn, 485.

167 5 *ICRC*, 1965, 528. The Democratic Republic of Vietnam added that captured pilots were 'well treated'.

war status may be denied persons who do not wear uniform and therefore become suspected of being infiltrators or 'freedom fighters'.[168]

Although Italy had made no reservation to article 85, Italian courts have held that article 85 of the Prisoner of War Convention of 1949 must be interpreted to 'exclude' benefits of the Convention to prisoners of war who have committed war crimes.[169] Even safeguards on court procedure in article 87 only concern civilians during captivity and are 'inoperative' with regard to war crimes committed previously.

Some assert that the rules concerning the required treatment of prisoners of war during captivity or repatriation are unchallenged by States although the rules concerning, for example, reprisals[170] are less clear.[171] There have been numerous allegations or violations of the rights of prisoners of war, especially as regards torture.[172]

The specific rights of prisoners of war imply that they must be humanely treated.[173] The rights to which prisoners of war are entitled are fairly well consolidated, but certain ancillary rights may be suspended or modified by local custom and tradition.[174]

Summary executions are strictly forbidden.[175] Prisoners of war must not be subjected to biological experiments[176] nor must they be subjected to torture.[177] Prisoners of war must not be the object of reprisals.[178] The former Soviet Union declared expressly in 1942 that reprisals would not be taken against German prisoners of war despite the flagrant violations of the Law of War that these had

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168 6 *IRRC*, 1966, 19; UN *Yearbook*, 1965, 161; below, in this Chapter, section B iii g.

169 Tribunale Supremo Militare, 25 October 1952, *Rivista*, 1953, 193 and note by Ago. In the event the crime consisted in reprisals against the civilian population for attacks on German soldiers by Italian non-combatants. *Cf.*, below, in this Chapter, section B iii g.

170 Above, Chapter 2, section B iv.

171 Rosas, A., *The Legal Status*, *op. cit.*, 101.

172 Pakistan allegations of torture of prisoners of war by India, S/10560, 10579 and 10589, 1973; International Observer Team in Nigeria 1968, *Report, Sverige och konflikten i Nigeria*, 1970, 212, 243; allegations of Israeli violations, S/9614; allegations of Syrian violations. S/9621; allegations of violations in the Iran–Iraq War, *Report by a Mission Dispatched by the Secretary General*, S/16962, 1985; on allegations considered by a court, see the *Weizäcker Case*, *AD*, 1949, 351; the *Malzer Case*, *AD*, 1946, 289; on bad treatment both by camp authorities and by civilians, see the *Heyer Case*, *AD*, 1946, 287; in Algeria torture was even defended. Massu, J., *La vraie bataille d'Algers* (Evreux: Plon, 1971), 165 *et seq.*; *cf.*, GA *Resolutions* 3059 (XXVIII), 1973; 3218 (XXIX) 1974; 3452 and 3453 (XXX) 1975.

173 Hague Regulations, article 4; Geneva Convention 1929, article 48; Geneva III, articles 13–14.

174 Miller, *The Law of War*, *op. cit.*, 107 *et seq.*

175 See, on the execution of 297 Croatian patients at the Vukovar Hospital by the Serb Army on 19 November 1991, above, in this Chapter, note 71 and accompanying text. See also earlier incidents, for example *The Wielen Case*, *AD*, 1946, 292 and *cf.*, Rousseau, Ch., *Conflits armés*, *op. cit.*, 100, on other case law.

176 *The Brandt Case*, *AD*, 1947, 296.

177 See above, in this Chapter, section B ii, and Geneva II, article 3(1)(a); Protocol I of 1977, article 75(2).

178 Geneva Convention 1929, article 2(3); Geneva III 1949, article 13(3) and above, Chapter 2, section B iv.

shown.[179] This statement affirms that the prohibition against reprisals against prisoners of war is rooted in general international law: the USSR was not bound by the Geneva Convention of 1929.[180]

Prisoners of war must not be subjected to interrogations. All 'illegal' methods to obtain information are prohibited.[181] Prisoners of war are entitled not to disclose anything but their name, rank and serial number.[182] But this privilege of a prisoner of war may act to the detriment of the interests and rights of other individuals. This limitation of the Law of War was illustrated in the *Astiz Affair* during the Falklands War. Here, an Argentine officer, who was very likely to have committed atrocities against several individuals, was released after the end of hostilities, having merely been asked to identify himself.[183]

There were numerous reservations to the clause in the 1899 Regulations securing prisoners of war from interrogation.[184] The 1929 Convention[185] improved the protection with regard to questioning but since many states did not ratify this Convention, nor the 1907 Conventions,[186] there was no satisfactory regulation until the Geneva Conventions of 1949.[187] Protocol I of 1977 now extends such protection to all who qualify as combatants under the more generous conditions of the Protocol.[188]

Prisoners of war must be given sufficient food[189] and clothing,[190] and health care.[191] There must be adequate standards of hygiene in prisoner of war camps.[192] Prisoners of war may be evacuated[193] or transferred to other areas, but only in such circumstances that are apt for their condition.[194] They must not be interned in areas where conditions are injurious to their health.[195] This provision is different from the

179 USSR Academy (ed.), *International Law* (Moscow, 1960), 418.

180 Below, Chapter 12, section B i on breach and section B ii on reciprocity.

181 *Killinger Case*, *AD*, 1946, 290.

182 Geneva III, article 17.

183 Rousseau, Ch., 'Chronique des faits internationaux', *RGDIP*, 1982, No. 4, 763.

184 See reservations to article 44 by Austria, Germany, Japan and Russia.

185 108 *LNTS* 343, article 5; *cf.*, article 31.

186 For example, certain Latin American States, like Argentina, Chile, Colombia, Ecuador, Paraguay, Uruguay and Venezuela as well as some European powers such as Italy, Greece and Spain. These countries were, for a considerable time, all through the First World War, only bound by the 1899 Conventions in this respect.

187 See articles 17 and 50 of Convention III. For illustration of the problems involved in shifting the allegiance of prisoners of war by requesting them to carry out certain work, see *US v Krupp*, 9 *Trial of War Criminals*, 1395: French prisoners of war could not be allowed to work in German armaments factories; even if there had been an agreement to this effect between Germany and the Vichy Government, such an agreement would be *contra bonos mores* and void under international law.

188 Protocol I of 1977, article 44.

189 Geneva III, article 26.

190 *Ibid.*, article 27.

191 *Ibid.*, articles 25–27.

192 *Ibid.*, articles 29–32.

193 *Ibid.*, article 20.

194 *Ibid.*, articles 46–48.

195 *Ibid.*, article 25(1).

earlier regulation in the 1929 Convention under which prisoners of war originating from temperate climates should be transferred from unhealthy localities where they had been captured.[196] Such obligations were often difficult to carry out and were not altogether justified in segregating treatment according to country of origin.

Prisoners of war must not be confined to quarters not lighted by daylight.[197] They must not be transferred to prisons or other places of close confinement.[198] If they try to escape they may be disciplined but not punished.[199] There have, however, been frequent violations of this rule.[200] There must be a fair trial if judicial action is taken for crimes.[201] The disciplinary power of the camp commander cannot be delegated to another prisoner of war.[202]

Prisoners of war had already been relieved under the 1899 Hague Conventions from any duty to take part in military service against their own country.[203] This exemption was reiterated in the 1907 Hague Convention[204] and then coupled with a rule that a prisoner of war should not be required to disclose any information about his own army or about the means of defence of his own country.[205]

A prisoner of war who is an officer must not be compelled to work; non-commissioned officers may only be required to supervise work.[206] No prisoner of war is obliged to carry out any work that could be detrimental to his home State.[207] The Geneva Convention of 1929 prohibits work which has direct connection with the home State[208] but there have been frequent abuses.[209] Geneva Convention III of 1949 does not incorporate this provision but specifies certain activities in which prisoners of war shall be allowed to work.[210] Such works include administration, installations and maintenance of the prisoner of war camp, and furthermore activities in agriculture, raw material and manufacturing industries, except metallurgical, machinery or chemical industries; public works and building works without military character; transport and handling of non-military stores;

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196 Geneva Convention 1929, article 9.

197 *Ibid.*, article 25(3).

198 Geneva Convention 1929, article 48; Geneva III, article 21.

199 Hague Regulations, article 8(2); Geneva III, articles 92, 91, 89; *cf.*, article 90; for a list of permissible types of disciplinary penalties, see Geneva III, article 89; on the difficult distinction between disciplinary and penal action, see the *Campbell Case* before the European Commission of Human Rights (1985) 7 *EURR* 165; *cf.*, the *Engel Case, Reports of the European Court of Human Rights*, 1976.

200 See German Order of 1942 imposing the death penalty for escape attempts, see D. 1942 L.87; and Rousseau, Ch., *Conflits armés, op. cit.*, 97.

201 Geneva Convention 1929, articles 50 *et seq.*; Geneva III 1949, article 84.

202 Geneva III, article 96(3).

203 Article 44 of the Hague Regulations of 1899.

204 Article 23 (h) of the 1907 Hague Regulations.

205 Article 44 of the Regulations.

206 Geneva III, article 49; ICRC, *Commentaire*, 259; Greenspan, *The Modern Law, op. cit.*, 118; Esgain and Solf, 'Geneva Conventions', *op. cit.*, 571.

207 Hague Regulations, article 6(1).

208 Geneva Convention 1929, article 31.

209 *The Leeb Case, AD*, 1948, 394; *The Lewinsky Case, AD*, 1949, 515; *The Student Case, AD*, 1946, 296; *The Milch Case*, 17/4/1947, Nuremberg.

210 Geneva III 1949, article 50.

commercial business; domestic service and public utility services having no military character or purpose.[211] Prisoners of war must not to be asked to do dangerous work, such as removing mines, or unhealthy or degrading work.[212] Prisoners of war are to have a monthly allowance.[213]

There must be certain facilities for prisoners of war to contact the outside world. They shall, for example, be allowed to send out a 'capture card' to the Prisoner of War Agency[214] and they must be allowed to send two letters and four cards every month.[215] There are also certain provisions to ensure that relief shipments are distributed.[216]

Prisoners of war must be repatriated at the end of hostilities[217] and sometimes such delivery of prisoners marks the end of war itself.[218] Seriously wounded persons have the right to be repatriated during hostilities,[219] although there may, of course, be serious practical problems for the belligerent party that holds the prisoner. There may also be difficult decisions whether transport would endanger a wounded prisoner of war and how transport would be carried out without jeopardising both the prisoner and those who take him through enemy lines. Repatriation by force during hostilities, however, is forbidden, although it is questionable what constitutes 'force' against a seriously wounded person.

The ICRC assists in repatriation as a general rule unless there are serious reasons for fearing that prisoners of war will be subject to 'unjust measures', especially on grounds of race, class or political views, in which case repatriation may be 'contrary to general principles of international law for the protection of the human being'.[220] There is a general rule not to apply force[221] and the United Nations General Assembly stressed in Resolution 610 (VII) 1952 that force must not be used against prisoners of war to prevent or effect their return to their homeland. Provisions on choice relating to where a prisoner may wish to go were rejected by the Conference.[222] But

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211 *Ibid., loc. cit.*

212 Geneva III, article 52.

213 Geneva III, articles 58–68, on financial arrangements and accounts.

214 *Ibid.*, article 69.

215 *Ibid.*, article 71.

216 *Ibid.*, articles 73–75.

217 'As soon as possible after the end of hostilities' Hague Regulations, article 20; 'as soon as possible', Geneva Convention 1929, article 75(1); 'without delay'; Geneva III 1949, article 118(1); for detailed rules see *ibid.*, articles 118–121 on release from belligerents; articles 109–110 on release from neutral parties.

218 Below, Chapter 10, section A ii.

219 Geneva III, article 109(3).

220 ICRC, *Commentaire*, 546.

221 Baxter, R., 'Asylum to prisoners of war', 30 *BYIL*, 1953, 489; Charmatz, J., and Wit, H.M., 'Repatriation of prisoners of war and the 1948 Geneva Conventions', 62 *Yale LJ*, 1953, 391; Gutteridge, J., 'The repatriation of prisoners-of-war', 2 *ICLQ*, 1953, 207; Esgain and Solf, 'Geneva Conventions', *op. cit.*, 592; Garcia-Mora, M.R., *International Law and Asylum as a Human Right* (Washington, DC: Public Affairs Press, 1956), 112; Flory, M., 'Vers une nouvelle conception du prisonier de guerre', 59 *RGDIP*, 1954, 67; Kimmenich, O., *Asylrecht* (Berlin: Neuwied, 1968), 39; Mayda, J., 'The Korean repatriation problem and international law', 47 *AJIL*, 1953, 414.

222 Rosas, *The Legal Status of Prisoners of War, op. cit.*, 480.

a conflict arises if a prisoner of war does not wish to return to his State. Armistice in Korea was delayed until 1953, partly due to disagreement on repatriation.

The rights of prisoners of war cannot be denounced and are thus 'inalienable'.[223] This provision has occasionally been interpreted to the detriment of prisoners of war, implying that they cannot refuse to be repatriated. After the Second World War, before the new Geneva Conventions came into effect, there were several problems relating to the repatriation of prisoners of war. The notable case became the one concerning repatriation to the Soviet Union of soldiers from the Baltic States who had served in the German Army. There was no support in international law for their repatriation to the Soviet Union: even their citizenship was in many cases questionable until international society at large had recognised the incorporation of the Baltic republics into the Soviet Union.[224] Finland was probably not required under the Peace Treaty to extradite the Baltic soldiers and Sweden had, in spite of a legally and morally questionable decision to hand over prisoners,[225] even less reason to grant extradition.

Similar incidents arose during the Korean conflict.[226] There is probably a right to refuse repatriation.[227] Considerable difficulties would arise if there were not such a right especially considering the difficult line between defectors, deserters and those who might have changed their attitudes during captivity. The problem turns mainly on a concern that the prisoner of war himself is allowed to make his decision freely. The privileges of prisoners of war are coupled with important duties.

The privileges of prisoners of war are coupled with important duties. The right to protection as prisoner of war can be forfeited if illegitimate acts are committed. One such act is to carry arms; this, formerly, would have led to execution,[228] but would now be punished in other ways.[229] There is some practice to the effect that officers who themselves had perpetrated ordered execution of United States Commando troops in the Second World War were themselves executed as war criminals.[230]

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223 Geneva III, article 7.

224 Granfelt, H., 'Finland och baltflyktingarna', *Statsvetenskaplig Tidskrift*, 1948, 60.

225 *Ibid.*, 61.

226 Draper, *The Red Cross Conventions*, *op. cit.*, 69; Mayda, 'The Korean repatriation problem', *op. cit.*, 414; Charmatz and Wit, 'Repatriation', *op. cit.*, 391; Baxter, R.R., 'Asylum to prisoners of war', *op. cit.*, 489; *cf.*, 10 Whiteman 1968, 203, 257 and 503.

227 Rockwell, 'The right of non-repatriation of prisoners of war captured by the United States', *Yale LJ*, 1973, 358; *cf.*, Versailles Treaty, article 220(2); Brest Litovsk Treaty 1918, article 17(1).

228 See German note, through the Swiss legation in charge of German interests in the United States, September 1918, 6 *Hackworth* 271–272.

229 Above, Chapter 8, section A iv d.

230 *The Dostler Case*, *AD*, 1946, 280; *cf.*, *The Falkenhorst Case*, *AD*, 1946, 282; *The Bauer Case*, *AD*, 1946, 305.

g Detainees

In internal conflicts, rebels are still citizens and subjected to the laws of the country. They are, therefore, under most municipal laws, liable for treason for their acts if such acts are directed against the State. Rules on modern internal warfare deviate from the previous civil war pattern: the traditional requirement of recognition of belligerency of civil parties has fallen into disuse.[231] In the contemporary world there are, however, several full-scale internal wars, where the insurgents or freedom fighters have passed the threshold[232] of being rebellious subjects to being consolidated belligerents which the State must fight as it fights other States; it is as if, at a given stage, the State has lost its power of quelling a rebellion and trying the perpetrators for treason.

Once the insurgents have reached this stage they are very much like the traditional recognised belligerents and they, too, take prisoners of war and the members of their own forces are captured by the other side.

Naturally, the State has a problem at what stage it is willing to treat its own subjects as anything equal to prisoners of war. The freedom fighters are, when captured, usually called 'detainees' to indicate that they have a status different from ordinary prisoners of war. But the treatment the captured persons are to be ensured under Protocol II of 1977 is not so drastic that it could not be easily compatible with any standards of State respecting the rule of law, a *Rechtsstaat*.

The problem arises in internal armed conflict as to whether detainees have any right to special consideration. If the conflict had been international or a liberation war such persons would have enjoyed prisoner of war status under Protocol I of 1977. Internal conflicts should not be treated differently, if such persons are in uniform and if they are members of organised forces that are engaged in a military action. Then they should not be treated as mere 'detainees' under Protocol II and should not be exempt from favourable treatment under any other conventions concerning the Law of War.[233] Also, the General Assembly has called on parties to give prisoner of war status to all such freedom fighters.[234]

Detained persons have the right under Protocol II of 1977 to food, drinking water and medical relief.[235] They are specifically assured of right to take part in religious practices.[236] If they are wounded, sick or shipwrecked they have the same rights as civilians in these conditions.[237]

Three provisions that would have been important to the treatment of detainees were deleted. One provision concerned the prohibition of reprisals.[238] It was held

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231 Above, Chapter 5, section C v.

232 Above, Chapter 1, section B iii b and D ii a, b, c and d.

233 But see above, Chapter 5, section C iii c on human rights under certain treaties.

234 *E.g.* Resolutions 2395 (XXIII) 1968; 2547 (XXIV) 1969; 2207 (XXV) 1970; 2795 (XXVI) 1971; 2918 (XXVII) 1972; 3113 (XXVIII) 1973.

235 Article 5(1)(b) and (c).

236 Article 5(1)(d).

237 Article 5(1)(a) and article 7.

238 Draft article 10 (*bis*). *Cf.*, *supra*, Chapter 2, section B iv on the legal nature reprisals and Chapter 8, section A iv c, on reprisals in the context of Protocol I.

that such rules did not have any place in an instrument on internal conflicts as reprisals, it was claimed, belong to the inter-State field.[239] Reprisals against rebels were defended, as

> 'it is not inconceivable that in the course of internal conflict, rebels ... deliberately commit acts to which the normal reaction would be in the nature of reprisals, but because of a prohibiting article such as this, governments feel bound to fold their arms while dissident groups go on a rampage, killing and maiming innocent civilians and act against their own country.'[240]

But some voted in favour of the article precisely because it forbade reprisals and, as such, would increase humanitarian protection.[241]

It is difficult to conceive why offending rebels could not have been subjected to due process of law rather than remaining a legitimate target for reprisals. Such reprisals are often directed against persons who did not themselves perpetrate acts of violence and who perhaps are civilians. Reprisals, which no doubt have a deterrent effect, would appear to expose innocent persons to arbitrary actions.

Another provision which would have afforded further protection especially to detainees concerned the deferment of the death penalty until the end of hostilities.[242] There had been a 'gentlemen's agreement' among some Third World States 'not to press' for the inclusion of this article.[243] All that was left were some judicial guarantees[244] to secure due process of law. Even these may not be implemented in practice since they are, in some countries, somewhat unrealistic when applied to detainees in civil armed conflict. However, it is important to retain at least some level of judicial protection, not only as a target, but as actual binding legal obligations, even if States could not agree to defer death penalties until the end of the hostilities.[245]

But detainees are still subject to certain 'fundamental guarantees' under Protocol II, similar to those that apply in the case of Protocol I.[246] Protocol II thus provides that anyone who does not take part in hostilities, or has ceased to do so, must not be subjected to the practices forbidden in the catalogue.[247] The standards imposed by these rules would not be too lofty for any State. But, what is often not sufficiently emphasised, the freedom fighters too are bound by these rules and they must also refrain from such acts against persons in their power.[248] On the other hand, the era of freedom fighters and liberation movements typically lies in the past: first the colonial rule was dismantled; then the communist-imposed federations were

239 Nigerian CDDH/SR,51. vol. 7, 122.

240 Article 44 of the Hague Regulations of 1899.

241 *Ibid.*, 120.

242 Draft Article 10(5).

243 *E.g.*, Iraq, CDDH/SR.50, vol. 7, 108.

244 Article 6(2).

245 *Cf.*, the present plans in the United Nations to adopt a Convention Forbidding the Death Penalty.

246 Above, in this Chapter, section B i. *Cf.*, below, Chapter 12, C on treatment of terrorists.

247 Above, in this Chapter, section B i.

248 *Cf.*, below, Chapter 12, section B ii on reciprocity.

lifted. So today there are few movements aspiring for further major changes to achieve new State structures although there is still concern about the situation in Palestine, the Basque region and, in spite of ceasefire agreements, in Ireland. Yet, the turbulent vista now largely concerns terrorists and their status is not the same as that of traditional detainees.

iv Treatment of Terrorists

a Not Civilians and Not Soldiers but 'Illegal Combatants'

In recent years there has been vivid discussion as to the kind of treatment that should be afforded to terrorists. Captured terrorists also tend to be called 'detainees' which may sometimes lead to confusion with insurgents and others who may seek to establish a separate State by secession but who are not necessarily terrorists.

With regard to the treatment of terrorists, in particular *jihad* terrorists, there are some who claim that these should be entitled to prisoner of war status as no one must be left 'unprotected'.[249] The Red Cross thus insisted that no one must be left unprotected by the Conventions: 'There is no intermediate status; nobody in enemy hands can be outside the law.'[250] The International Tribunal for Former Yugoslavia made a similar mistake with regard to the applicable law in the case *Prosecutor v Delalić*, where the Court held that

> '[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war ... he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied.[251]

This is a highly dangerous position which undermines the core of the Law of War. If such protection is afforded to civilians who take part in hostilities this will hollow out the rules which should protect 'real' soldiers and 'real' civilians.[252] To claim that

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249 For example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (Geneva: ICRC, 2003), 10, available at http://icrc.org/web/eng/siteeng0.nsf/htmlall/5xrdcc; Doswald-Beck, L., *Human Rights in Times of Conflict and Terrorism* (Oxford: OUP, 2011).

250 *Cf.*, Uhler, O.M. and Coursier, H., American Red Cross, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*, 51. Pictet, J.S. (ed.), 1958.

251 Case No. IT-96-21-T, Judgment, 271, 16 November 1998. The only requirement under article 4 is that the persons are not nationals of the State that has detained them. This requirement is also confusing as this would mean that all terrorists could be protected.

252 See, Detter, I., 'Illegal combatants and the Law of War', 75 *Law Journal of George Washington University* (2007) 1701. Here, there is an extensive discussion why the position of the Red Cross is not compatible with the current rules of the Law of War. There were later attempts in the Red Cross to amend and modify their position but much harm had already been done and much prestige had already been lost to this august organisation which has been at the forefront of the development of the Law of War for over a hundred years. See, for a modified view of the Red Cross, their Statement two years later in 2005: ICRC, *Official*

civilians who take up arms are still protected means that the formulation covers 'the civilian by day, terrorist by night' syndrome. Above all, this interpretation of the Geneva Convention is distortive and erroneous and does not reflect the present state of the Law of War.

Article 4 of Geneva Convention IV to which the ICTY referred in the *Delalić Case* provides that

> '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.'

This is also a confusing requirement as, if the Red Cross and ICTY are right in their insistance of there being 'no gap' in the protection of 'anyone', why would the captured 'terrorists/civilians' who fell into the hands of a country where they were citizens, like Yasir Hamdi[253] and José Padilla,[254] then not be 'protected' whereas those who were not citizens would enjoy better treatment?

The discussion and the conclusion drawn appear to lead to absurd results. Yet, this is probably due to a misunderstanding. Rather than trying to extend the application of the Geneva Conventions to areas which their authors may not have contemplated, everything would be clearer if we did not only rely on positive law and on the nebulous 'customary law' of which the contents no one can be sure. A simple recourse to ethical principles or to the now despised rules of natural law would indicate that what we are talking about does not really concern the camouflage of a terrorist or a civilian but rather the decent standard to which all human beings are entitled.[255] Thus, the *jihad* terrorist is certainly not protected by the Geneva Conventions as he is an illegal combatant. This does not mean that we are entitled to fall to his standard and torture or maltreat him: he may not be protected by the Conventions but he does have some minimum rights according to the basic principle of ethics. In law, it is essential to identify the source of obligation: this is not in the Conventions, nor in the Protocols or in the Convention on Civil and Political Rights, nor in 'customary' law, but in a parallel set of rules laid down as minimum rules of ethical behaviour.

Thus, terrorists do have some minimum rights: there are limits to how a capturing State may treat them, in particular with regard to methods to extract information from a detainee. The error by some to seek to afford prisoner of war status to terrorists overlook the fact as unprivileged illegal combatants they can be questioned whereas prisoners or war may not be subjected to interrogation and may only provide their name and number.

Statement, The Relevance of IHL in the Context of Terrorism, 2005, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705.

253 *Hamdi v Rumsfeld* (2004) 542 US 507, 509.

254 *Rumsfeld v Padilla* (2004) 542 US 426, 430.

255 See above, Chapter 5, on the adoption in this work of 'international natural law' or *jus naturale internationalis*.

b Extraordinary Rendition

Extraordinary rendition means the novel practice, mainly used by the United States, to send captured terrorists to another jurisdiction to be questioned there rather than in the home country. The reason for this appears to have been that the United States started using a surprising and fictitious device of extraordinary rendition to avoid stringent rules and guarantees in US law: if suspects are interrogated on US soil it is imperative to respect constitutional guarantees; if, on the other hand, the questioning takes place somewhere outside US territory, such guarantees could be avoided.[256]

'Rendition' from the Latin word '*rendere*' clearly only means 'hand over' or 'to hand back'. Deportation and extradition are therefore also forms of rendition, although rarely referred to as such. It may be important to delimit 'deportation' and 'extradition' from what is now currently called 'extraordinary rendition'.

Deportation involves the 'removing of a person to another country' and extradition involves 'the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged. Extradition, on the other hand, is performed under international agreements,[257] and generally involves transferring a person of a specific nationality to a place where he is alleged to have committed a crime, most often his home country.[258] Straightforward extradition implies the handing over of a person to another country, normally in order for that other country to try the person in its own courts. There is rarely a case for claiming that extradition would violate a person's human rights.[259] Under extradition treaties, however, there is usually a clause that exempts 'political' crimes from the list for which extradition may take place.[260] Nor is a person normally extradited to a country where he may be subjected to harsh interrogation or torture, or to a country that applies the death penalty if the sending country would not impose

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256 See, in detail, Detter, I., 'Extraordinary rendition and the Law of War', *North Carolina Law Journal*, 2008, 667.

257 See, *e.g.*, Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., March 31, 2003, S. Treaty Doc. No. 108-23 [hereinafter U.S.-U.K. Extradition Treaty].

258 See, in greater detail, Detter, I., 'Extraordinary rendition', *op. cit.*, 667 *et seq.*

259 *Öcalan v Turkey*, 41 Eur. Ct. H.R. 45 (2005). Note also the argument of Abu Hamza al Masri, a hate preacher in the mosque of Finsbury Park in London, who claimed his human rights would be violated but who was finally extradited to the United States for trial for terrorist acts, *The Times*, 5 April 2012. But plans to extradite Sheikh Abu Qatada, another hate preacher, to Jordan has been met with threats by Al-Shabaab, the Somali based group linked to the Al-Qaeda terror network, to cause 'disaster' for the British public if Qatada is sent back to Jordan; Al-Qaeda itself warned it would 'open the gates of evil' if the government continues with the deportation. *The Telegraph*, 21 April 2012.

260 'The first provision to protect political offenders appeared in a Belgian extradition act in 1833 and has since been incorporated into most Western extradition treaties.' Petersen, A.C., 'Extradition and the political offense exception in the suppression of terrorism', 67 *Indian Law Journal*, 1992, 767, 774; see also *ibid.* and n.23 (citing an extradition treaty with such a clause between the United States and Germany). The extradition treaty between the United States and the United Kingdom also contains a clause pertaining to political offences. U.S.-U.K. Extradition Treaty, cited above, art. 4.

such sanctions for the suspected crime.[261] On the other hand, the European Convention on the Suppression of Terrorism of 1977[262] was adopted to ensure that specific acts, like the acts of terrorists, would not be classified as 'political' and lead to denial of extradition. In spite of these safeguards, there have recently been numerous problems caused by English Courts being forbidden by the European Court of Human Rights to extradite or deport a terrorist as the ECHR often considers the 'human rights' of a terrorist more important than the security of the State where he is spreading hatred by speeches and propaganda.[263] The 'human rights' afforded to such a detainee are sometimes interpreted to be extensive by the UK Courts, thus including 'the right to family life', an elastic concept not normally accepted as compulsory by other signatories to the Convention. At times, however, there may be a real risk that a person who is extradited or deported will be submitted to torture and that consequence all States are bound to respect and prevent.[264]

Extraordinary rendition, on the other hand, involves the handing over of a person for questioning in another jurisdiction. The significance of extraordinary rendition changed substantially when the practice was introduced by the United States in the 1980s to transfer foreign delinquents to be tried or, more often, interrogated in other countries outside the framework of extradition treaties.[265] Based on the destination countries commonly chosen, one might suspect that detainees are afforded a different level of treatment than what might be expected in the Western world.[266]

In the case of extraordinary rendition there is no link between the person rendered and the country to which he is sent. A person is thus transferred to a

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261 See, *e.g.*, *Soering v United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 8 (1989); *Chahal v United Kingdom* (No. 22), 1996-V Eur. Ct. H.R. 1831, 1855 para. 80; *Nivette v France*, 2001-VII Eur. Ct. H.R. 493, 501 (emphasising that extradition to a State imposing the death sentence violates Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

262 European Convention on the Suppression of Terrorism, January 27, 1977, Europ. T.S. No. 90.

263 *Ahmed Hussein Mustafa Kamil Agiza v Sweden*, Comm. No. 233/2003, UN GAOR Comm. Against Torture, 34th Sess., para. 13.4, UN Doc. CAT/C/34/D/233/2003, 20 May 2005, stating that the fact that diplomatic assurances had been issued was not sufficient where the extraditing country, Sweden, should have known that Egypt resorts to widespread torture of prisoners.

264 See *Mamatkulov and Askerov v Turkey*, 41 EurH.R. *Reports*, 494, 495–497 (2005); see also *Cruz Varas v Sweden*, 14 Eur. H.R. *Report*, 1, 35 para. 75 (1991); *Vilvarajah & Others v United Kingdom*, 14 Eur. H.R. *Report*, 248, 288 para. 107 (1991).

265 For an explanation of rendition taking place outside the framework of extradition treaties and its implications on human rights, see McAllister, E.S., 'The hydraulic pressure of vengeance: *United States v. Alvarez-Machain* and the case for a justifiable abduction', 43 *DePaul L. Rev.*, 2004, 449, 474–476; Gurule, J., 'Terrorism, territorial sovereignty, and the forcible apprehension of international criminals abroad', 17 *Hastings Int'l & Comp. L. Rev.*, 1994, 457, 490–493.

266 See Sadat, L.N., 'Ghost prisoners and black sites: extraordinary rendition under international law', 37 *Case W. Res. J. Int'l L.*, 2006, 309, 320, stating that Egypt, Syria, Saudi Arabia, Pakistan and Uzbekistan are nations known to take part in extraordinary rendition and are identified by the US State Department as countries that practice torture.

country where he is not normally a citizen. During the last few years, extraordinary rendition has been criticised because some States to which such rendition has been effectuated are countries with a questionable human rights record.[267] Such States, it is suspected, might use harsh interrogation techniques or torture to extract information from the person who has been rendered.

According to a Report by a Member of the European Parliament, extraordinary rendition can be defined as 'an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves *incommunicado* detention and torture'.[268] This is not an acceptable definition as extraordinary rendition is not *per se* illegal. Such rendition violates legal rules only if torture ensues.

An acceptable practice of extraordinary rendition thus exists when States hand over a person under a Mutual Assistance Treaty for an arrested person to be interrogated in another country.[269] This can be done independently of extradition treaties in cases where it is more appropriate to interrogate a person elsewhere, such as under Interpol or Europol mechanisms or in procedures involving the European Arrest Warrant.[270] Such procedures resemble in every detail extraordinary rendition as the term is usually understood, but without any indication or presumption of harsh treatment or torture. Extraordinary rendition, if devoid of any issue of torture, might thus be legally acceptable in certain circumstances.

Much of the newspaper reports on extraordinary rendition focus on criticising the previous Bush Republican administration in the United States for its policies in Iraq and for ensuing policies in the 'War on Terror'.[271] It may be useful to underline that it was indeed a Democratic administration that initially allowed such questionable methods of interrogation of detainees. The CIA was granted permission to use

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267 See Radsan, J.A., 'A more regular process for irregular rendition', 37 *Seton Hall Law Review*, 2006, 62, identifying Uzbekistan, Egypt and Syria as nations being used for extraordinary rendition even though these nations have questionable human rights records.

268 Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, para. 36, *Eur. Parl. Doc.* A6-0020/2007 (2007).

269 See, *e.g.*, Treaty on Extradition and Mutual Assistance in Criminal Matters, U.S.-Turk., June 7, 1979, 32 *UST* 3111; Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 *UST* 2019. For a list of Mutual Legal Assistance Treaties to which the United States is a party, see US Dept. of State, Mutual Legal Assistance (MLAT) and Other Agreements, available at http://travel.state.gov/law/info/judicial/judicial_690.html.

270 See Council Framework Decision 2002/584/JHA, 2002 O.J. (L 190) 1, 1–2 (explaining the replacement of extradition procedures between EU Member States with the European arrest warrant). The European arrest warrant is designed to replace formal extradition by requiring each national judicial authority to '*ipso facto* recognize requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities'. *Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between the Member* States, September 25, 2001/ at 2, COM (2001) 522.

271 See, *e.g.*, Satterthwaite, 'Rendered meaningless' *op. cit.*, and Sadat, Rendition, *op. cit.*, at 1200–1206.

rendition in a Presidential Decision Directive signed by President Clinton in 1995.[272] There is ample evidence that the subsequent Democrat administration under President Obama continued the practice of extraordinary rendition.[273]

Admittedly, the practice of extraordinary rendition grew sharply under the Bush administration since the 9/11 attacks.[274] Post-9/11, an enhanced need exists to deal with suspected terrorists using forceful interrogation tactics to pre-empt further attacks on the civilian population. The debate surrounding permissible interrogation techniques must carefully balance the rights of the detainee against the interest and duty of the State to safeguard its citizens. Some detainees, it is alleged, were sent to receiving states such as Egypt, Jordan, Syria, Morocco and Uzbekistan[275] where, reportedly, some interrogation practices are used which might violate basic human rights.[276] The pattern of selected countries dramatically changed after the Arab Spring in 2011 when other destinations were preferred to those in turmoil.

Some factual, but often sensationalist, accounts[277] have been written by journalists, politicians, human right movements, and other advocacy groups on this practice. Much of the relevant literature, however, consists of newspaper articles and more or less tendentious articles. Even international organisations like the UN Human Rights Commission, the European Union and the Council of Europe mostly cite newspaper reports when they make their own assessment as to what extraordinary rendition involves.[278] However, international lawyers have not devoted much attention to the practice of extraordinary rendition.[279] Nor have there been many independent studies as to what is actually involved in

272 US Policy on Counterterrorism, Presidential Decision Directive/NSC-39 (21 June 1995), available at http://www.fas.org/irp/offdocs/pdd39.htm.

273 In addition, the drone attacks on targeted terrorists increased, see above, Chapter 7 B vi, on drones and robots.

274 See Chesney, R.M., 'State secrets and the limits of national security litigation', 75 *Geo. Wash. L. Rev.*, 2007, 1249, 1255; Whitlock, C., 'Europeans investigate CIA role in abductions', *Washington Post*, 13 March 2005, at A1.

275 *Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees Restoring Our Moral Credibility and Strengthening Our Moral Standing: Hearing Before the S. Comm. on Foreign Relations* 10, 36 (2007) (statements of Tom Malinowski, Washington Advocacy Director, Human Rights Watch, and Dr Daniel Byman, Director, Center for Peace and Security Studies, Edmund A. Walsh School of Foreign Service, Georgetown University); *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 4 (2007) (statement of Amnesty International USA).

276 *Extraordinary Rendition in U.S. Counterterrorism Policy*, *op. cit.*, at 4.

277 See, *e.g.*, Grey, S., *Ghost Plane: The True Story of the CIA Torture Program* (St. Martin's Press, 2006); Paglen, T. and Thompson, A.C., *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Melville House Publishing, 2006).

278 See, *e.g.*, Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, above, note 27, paras. 17, 148–149.

279 However, for examples of analysis by lawyers of extraordinary rendition, see Sadat, 'Rendition', *op. cit.*

extraordinary rendition as States have used the privilege of the reserved domain not to allow inspections in their territory.[280]

Some claim that extraordinary rendition violates article 3 of the United Nations Convention Against Torture ('Torture Convention'), which the United States has ratified.[281] The article provides that:

> '1. No State Party shall expel, return ('*réfouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'[282]

The prohibition derives its phrasing from the prohibition of *réfoulement* in refugee law,[283] the rules concerning extradition, and other rules in the field of conflict of laws.[284]

However, article 3(2) of the Torture Convention does not appear to cover extraordinary rendition. The United States is not 'expelling' or 'returning' persons under this scheme.[285] Suspected terrorists are dispatched for interrogation elsewhere and at no stage does the United States relinquish control of the fate of detainees sent for such questioning.[286] These persons will, in due course, be brought back from where they were sent.

The European Convention for the Protection of Human Rights and Fundamental Freedoms allows a contracting state to derogate from certain obligations '[i]n time of war or other public emergency threatening the life of the nation' to the extent derogation is necessary with respect for other so-called 'Nuremberg obligations under international law.'[287] A state bound by the Convention may thus derogate from its obligation under article 5 to not deprive a person of his liberty and its

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280 See, Chapter 2 B viii a on the reserved domain.

281 Satterthwaite, M.L., 'Rendered meaningless: extraordinary rendition and the rule of law', 75 *George Washington Law Review*, 2007, 1367. See, also, Weissbrodt, D. and Bergquist, A., 'Extraordinary rendition and the torture convention', 46 *Virginia Journal of International Law*, 2006, 585.

282 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, adopted December 10, 1984, S. Treaty Doc. No. 100-20, 1465 *UNTS* 85 [hereinafter Convention Against Torture].

283 Refugee Convention, art. 33.

284 For a treaty-specific overview of conflict of laws principles in the field of extradition, see Zilbershats, Y., 'Extraditing Israeli citizens to the United States—extradition and citizenship dilemmas', 21 *Michigan Journal of International Law*, 2000, 297, 301–310.

285 See Convention Against Torture, *supra* note 36, art. 3.

286 See Henderson, B., 'From justice to torture: the dramatic evolution of U.S.-sponsored renditions', 20 *Temple International & Comparative Law Journal*, 2006, 189, 197: 'U.S. participation in a rendition will not serve to insulate the rendered individual from trial in the United States.'

287 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, *opened for signature* 4 November 1950, Europ. T.S. No. 5, 213 *UNTS* 222.

obligation under article 6 to give a fair trial within a certain time period.[288] However, derogations from article 3, which deals with the prohibition of torture and inhuman or degrading treatment, are not permitted.[289] Extraordinary rendition thus appears to remain legal under this Convention in situations of national emergency provided there is no use of torture or other inhuman or degrading treatment.[290] The International Covenant on Civil and Political Rights also provides for the possibility of derogations in time of national emergencies.[291]

The question arises whether thus rules outside the Torture Convention might apply to assess the legality of extraordinary rendition involving some form of torture.

For example, was extraordinary rendition involving torture compatible with international law before the adoption of the Torture Convention in 1984? Extraordinary rendition cases involving torture were reported before the adoption of the Torture Convention, but discussions on extraordinary rendition generally focus on the Torture Convention and rarely discuss ancillary prohibitive rules.[292] Practices involving the subjecting of detainees to torture were prohibited even before 1984 as most strikingly shown by evidence given in the Nuremberg and Tokyo Trials.[293]

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288 *Ibid.*, arts. 5, 6.

289 *Ibid.*, art. 3.

290 In *Arar v Ashcroft*, 585 F.3d 559 (2d Cir. 2009), a dual citizen of Syria and Canada challenged his extraordinary rendition to Syria. The plaintiff alleged violations of his substantive due process rights under the Fifth Amendment, in part based on his alleged detention and torture in Syria. The majority rejected the plaintiff's claim under *Bivens – Bivens v Six Unknown Named Agents*, 403 US 388 (1971) – and thus did not decide whether the plaintiff's treatment in Syria amounted to torture or otherwise violated substantive due process.

291 ICCPR, above, note 12, art. 4(1); *cf.*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, Commission on Human Rights, *Note Verbale Dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva Addressed to the Secretary-General*, Annex, UN Doc. E/CN.4/1985/4 (28 September 1984) (setting forth the Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights). A State may derogate from its article 4 obligations under the International Covenant on Civil and Political Rights 'only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation'. *Ibid.*, para. 39. A 'threat to the life of the nation' is defined as a threat that:

(a) Affects the whole of the population and either the whole or part of the territory of the State, and

(b) Threatens the physical integrity of the population, the political independence of the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

292 For further discussion on fundamental or intrinsic human rights, see Detter, I., *The International Legal Order*, *op. cit.*, 46–51, 119.

293 See Pritchard, R.J. and Zaide, S.M. (eds), 20 *International Military Tribunal for the Far East, The Tokyo War Crimes Trial* (New York: Garland Publishing, 1981), 49, 663–649, 761; *United States v von Weizsäcker (The Ministries Case), in* XII *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10*, at 35–38 (1949); XII *Trial of the*

c Guantanamo Camp, Rendition and Extraterritorial Justification

It would seem that the thought behind extraordinary rendition was similar to that which made the United States establish a detention centre in Guantanamo, a decision that lost the United States much prestige as there were rumours of harsh treatment and, above all, lack of due process and full trial before detainees were placed in confinement. The reason here was that Guantanamo does not form part of US territory but is held on a lease from, surprisingly, the communist government in Cuba. In this sense, some formalistic lawyers appear to have persuaded the administration that in the Camp at Guantanamo, full US rules on treatment of detainees would not apply. In his electoral campaign President Obama held out the dismantlement of the Camp as a priority once he came to power; but little was done as it is a complex situation.

Both in the Guantanamo system and the process of extraordinary rendition, the United States seem to have over-emphasised the territoriality aspect. If captives cannot be subjected to techniques of interrogation legally in the United States, some find it acceptable that they are sent abroad to states where such methods are not illegal. This, however, ignores the fact that the procedure might be illegal under *international law* and it may be futile to use domestic law arguments to evade obligations under the international legal system.[294]

Furthermore, a State may not use its own legislation to escape obligations under international law.[295] The *Alabama Arbitration* illustrates that a State is *under a duty to make sure that its internal laws comply with international law* and, if they do not, the State may incur consequences for the discrepancy between international law and municipal law.[296] The Permanent Court of International Justice also held in *Polish Nationals in Danzig*[297] that a State may not invoke its own constitution or other internal rules to escape obligations under international law. In the same way, then, the United States cannot justify moving detainees to other locations only on the ground that the interrogation techniques to be used are illegal under US law. Such methods are also illegal under international law and the State's responsibility is engaged when seeking to evade obligations under its internal law that, ironically, also apply worldwide under the minimum standard rules of the international legal system. The International Court of Justice has also spoken to a State's responsibility for extraterritorial acts in *Legal Consequences of the Construction of a Wall in the*

Major War Criminals Before the International Military Tribunal, Nürnberg, 14 November 1945–1 October 1946, 1947, at 257.

294 See Detter, I., *International Legal Order, op. cit.*, 168–170.

295 *Ibid.*

296 For a discussion of the *Alabama Claims* and their outcome resulting in the Treaty of Washington see Cushing, C., *The Treaty of Washington: Its Negotiation, Execution, and the Discussion relating Thereto* (New York: Harper & Bros., 1873). For the case presented by the United States stating their claims in the Alabama Claims see *The Case of the United States, to be Laid Before the Tribunal of Arbitration: to be Convened at Geneva under the Provisions of the Treaty Between the United States of America and Her Majesty the Queen of Great Britain, concluded at Washington, May 8, 1871* (New York: Richard Bently & Sons, 1872).

297 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion (1933), PCIJ, *Reports*, 1933, series A/B no. 44.

Occupied Palestinian Territory.[298] Just as much as those responsible for Germany's practices during the Second World War could not escape responsibility for war crimes by claiming that the acts they committed were legal (and even commended) according to their internal legal system, so now a State cannot now claim that because something is illegal in its own state, it would be legal to arrange to have such acts carried out elsewhere.

Therefore, the argument that a State is not liable for what it allows or organises in the territory of other States, or in territories outside its sovereignty, such as Guantanamo Bay, is a fallacy. The argument is based on the faulty premise that territoriality is decisive to assess legality of acts and that consequently, actions beyond a State's territory can somehow be distanced from government action. This is not correct and there is still a question of liability for such action which in due course might mature.

A State can thus not rid itself of its responsibility for torture by delegating interrogation procedures to another State to which it arranges flights from its own territory.

The United States would probably gain far more sympathy even for fierce or enhanced interrogation practices of suspected terrorists if such questioning took place in the United States. But it is not acceptable in international law to seek to escape liability by organising interrogations clandestinely, using torture flights and black sites. It is also beyond doubt that information obtained through torture is notoriously unreliable and it is therefore not wise to engage the State's international obligations (and probably damage its good name) by arranging torture flights abroad.

d Waterboarding and Other Forms of Torture

Extraordinary rendition may not be the most precise term for practices where torture is actual or presumed. Rather than broadening the definition of extraordinary rendition to include torture, it would be more appropriate to speak of 'outsourcing' of practices which a State would rather not perform itself. 'Torture by proxy' could also be used to describe transfers of suspected terrorists to countries for application of harsh interrogation techniques or torture.

The issue of torture also involves a serious evidentiary problem. To what extent are reports correct that suspected terrorists have been flown from the United States or from elsewhere to third States where they have subsequently been subjected to torture? We must clarify to what extent evidence that torture has been inflicted is reliable. Those seeking to challenge extraordinary rendition too often assume the existence of torture. There are two aspects of this problem: we must have proof and evidence of practices assumed to amount to torture and, furthermore, it must be borne in mind that suffering under torture is, like any suffering, highly subjective: there are those who are more vulnerable and others whose threshold of pain is

298 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004), ICJ, *Reports*, 2004, 136.

not the same. There have been a number of cases dealing with what amounts to torture.[299]

On the other hand, at the root of the problem, it is not quite established what sort of practices and in how many cases interrogation practices have exceeded what is permissible under international law. Newspaper reports and evidence given by released detainees, possibly delivered during a post-traumatic state of mind, must be largely discarded and only clear evidence as to excessive interrogation methods must be accepted.[300] The truth about such practices is not easy to establish. Nor is the truth of what is revealed under torture easy to ascertain.

The Torture Convention, unlike the European Convention on Human Rights and the ICCPR, excludes all such possibility of derogation, even in the case of serious national emergency.[301] Even absent a right of derogation, if the Torture Convention were to apply to extraordinary rendition, it would find illegality only if a substantial expectation of torture could be shown.[302] The Torture Convention would not, if applicable, make extraordinary rendition illegal *per se*.

There is no doubt that the United States did find itself in a situation of national emergency after 9/11 but, as shown above, relevant conventions do not allow for derogation from the obligation to refrain from torture even in such situations. Likewise, national courts have not found any need for relaxation of stringent rules forbidding enhanced interrogation methods and have also declined to expand the circumstances under which derogation from applicable human rights laws

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299 In *Vance v Rumsfeld*, which the Seventh Circuit has vacated and agreed to rehear en banc, the plaintiffs were two United States citizens who alleged they were detained for weeks and illegally tortured by US military personnel in Iraq in 2006. See 653 F.3d at 594; in *Ali v Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), four Afghan and five Iraqi citizens captured and held in Afghanistan and Iraq by the US military were held to have been tortured; in *Hilao v Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), an Alien Tort Statute case, it was held that two plaintiffs, Sison and Piopongco, were tortured in the Philippines during the regime of Ferdinand Marcos; in *Al-Saher v INS*, 268 F.3d 1143 (9th Cir. 2001), *amended on another ground*, 355 F.3d 1140 (9th Cir. 2004), an immigration case, it was concluded that the petitioner was entitled to relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) because he had been tortured in Iraq. On one occasion, the petitioner was detained, interrogated and severely beaten for one month. See *ibid.* at 1145; in *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), the plaintiffs were two American citizens imprisoned in Libya, allegedly for political reasons. They alleged that they endured deplorable conditions but were held not to have been tortured as they had not proved severe 'suffering'; in *HCJ 5100/94 Public Committee Against Torture in Israel v Israel* 53(4) PD 817 [1999] (Isr.), *reprinted in* 38 *ILM* 1471, the Israeli Supreme Court considered whether coercive techniques used by Israeli security forces violated international law. The techniques included hooding, violent shaking, painful stress positions, exposure to loud music and sleep deprivation. The court concluded that each of these techniques was illegal, see *ibid.* at 1482–1485, although the court did not address whether they constituted torture rather than cruel, inhuman and degrading treatment, which was also prohibited by international law.

300 See, *e.g.*, Bonner, R., 'Detainee says he was tortured while in US custody', *New York Times*, 13 February 2005, at A1.

301 Convention Against Torture, *supra* note 36, article 2.

302 *Ibid.*, article 3.

may be achieved.[303] The right of derogation may permit the use of extraordinary rendition in situations of national emergency but clearly does not authorise the use of torture.

Numerous States have not ratified the Torture Convention and suspected terrorists have sometimes been sent to such States under extraordinary rendition schemes.[304]

For some time there have been efforts to forbid or condemn torture by express provisions in international law. The Universal Declaration of Human Rights of 1949, in article 5, states that '[n]o one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[305] The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, further develops the prohibition contained in article 5 of the Universal Declaration of Human Rights.[306]

The prohibition against torture is more emphatically confirmed in express treaty provisions, in Europe by the European Convention on Human Rights[307]

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303 See, *e.g.*, *Bundesverfassungsgericht [BVerfG]* [Federal Constitutional Court] February 15, 2006, docket number 1 BvR 357/05, at juris online/*Rechtsprechung*, available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html, declaring the Aviation Security Act, which authorised the shooting down of aircraft controlled by those seeking to use it as a weapon, void as an impermissible derogation from the Basic Law; HCJ 3239/02 *Marab v Commander of IDF Forces in the West Bank* [2002] IsrSC 57(2) 349, case 3239/2002, paras. 26–34, available at: http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_misc.html. In this case there is a discussion on how judicial intervention for detainees is a necessary right that should not be delayed; HCJ 3278/02 *Ctr. for the Def. of the Individual v Commander of IDF Forces in the West Bank* [2003] IsrSC 57(1) 385, para. 24, case no. 3278/2002, available at: http://elyon1.court.gov.il/eng/verdict/search_eng/verdict_by_misc.html; HCJ 5100/94, *Publ. Comm. Against Torture in Isr. v Israel et al.* [1999] IsrSC 53(4) 1, para. 40, stating that 'Even [prisoners] suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of humane treatment and ensure basic human necessities'. Decision available at: http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf. The Court held that the General Security Service does not have the authority to use the 'necessity defense' as a tool for utilising inhumane interrogation tactics; *A (FC) & Others (FC) v Sec'y of State for the Home Dep't* [2005] UKHL 71, paras. 33, 45, 52, 53, [2006] 2 AC 221, 261, 268, 270–272 (appeal taken from Eng.). discussing the potentially broadening scope of what constitutes torture and the admissibility of evidence procured by torture. For a Press Release explaining the German case regarding the Aviation Security Act cited above, see Press Release No. 11/2006, *Bundesverfassungsgericht* [Federal Constitutional Court], Authorization to Shoot Down Aircraft in the Aviation Security Act Void (15 February 2006), available at: http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html.

304 For a list of countries to which suspected terrorists have been rendered, see sources cited above and below in this section. For an updated list of countries who have ratified (or failed to ratify) the Torture Convention, see United Nations, Office of the United Nations High Commissioner for Human Rights, 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, available at: http://www2.ohchr.org/english/bodies/ratification/9.htm (last visited 7 March 2008).

305 Universal Declaration of Human Rights, GA Res. 217A, at 71, 73, UN GAOR, 3d Sess., 1st plen. mtg., UN Doc. A/810 (12 December 1948).

306 GA Res. 3452 (XXX), at 91, UN Doc. A/10034 (9 December 1975).

307 Council of Europe, above, *op. cit.*, article 3.

and by the specific European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, or the European Torture Convention,[308] and in North and South America by the American Convention on Human Rights of 1969[309] and the Inter-American Convention to Prevent and Punish Torture of 1985.[310] The much neglected African Charter on Human and People's Rights of 1981 also contains a prohibition against torture.[311] These Agreements and Declarations, of varying legal importance and with different impact on regional behaviour, still all reflect a universal condemnation of the use of torture in the modern world.

A prohibition against torture is also confirmed in treaties of international, as opposed to regional, scope. Torture is forbidden by article 7 of the International Covenant of Civil, Cultural and Political Rights, ICCPR,[312] and, above all, by the Torture Convention, a treaty entirely dedicated to the prohibition of torture.[313]

The United States has also incorporated provisions prohibiting torture in domestic law through the US War Crimes Act (WCA), as amended by the Military Commissions Act of 2006 (MCA).[314] The Torture Convention Implementation Act of 1994 also incorporates international prohibitions into the domestic law of the United States.[315] The Detainee Treatment Act of 2005 prohibits torturous or, as it is often called, 'enhanced' interrogation practices.[316] Even if the United States had not incorporated the provisions of the Torture Convention, it may be suggested that the United States would still be bound by its provisions that, after all, merely lay down what already exists in international law as binding rules. Acts of Germany during the Second World War still resulted in condemnation and convictions at the Nuremberg Trial although no Conventions prohibiting torture or, indeed, genocide existed, nor did any other human rights treaties restraining a state from

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308 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, November 26, 1987, Europ. T.S. No. 126, 27 *ILM* 1152 (1988) (securing the prohibition against torture and inhuman or degrading treatment found in Article 3 of the European Convention on Human Rights by authorising visits to sites where persons are being denied their liberty by a governmental authority).

309 Organization of American States, American Convention on Human Rights article 5, *opened for signature* 22 November 1969, O.A.S.T.S. No. 36, 1144 *UNTS* 123.

310 Organization of American States, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, O.A.S.T.S. No. 67, 25 ILM 519 (1986).

311 Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights article 5, adopted 27 June 1981, 1520 *UNTS* 217, 21 ILM 58 (1982).

312 ICCPR, article 7.

313 See, Convention Against Torture. On 18 December 2002, an Optional Protocol to the Torture Convention was adopted with the intent to establish a preventive system of regular visits to places of detention by a special Subcommittee and by independent international and national bodies. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 57/199, UN Doc. A/RES/57/199 (18 December 2002).

314 War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 1998 & Supp. 2007); Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632–35 (to be codified at 18 U.S.C. § 2441).

315 18 U.S.C. §§ 2340–2340B (2000).

316 42 U.S.C.A. §§ 2000dd–2000dd1 (West 2003 & Supp. 2007).

certain action. Yet, the Tribunal held that the German leaders had violated existing prohibitions of international law concerning crimes against humanity.

In addition to prohibitions on torture, 'inhuman treatment' is also prohibited by the Torture Convention[317] and under other international instruments.[318] This prohibition has received far less attention from commentators. The difference between inhuman treatment and torture is that inhuman treatment need not be 'intended' to cause suffering.[319] For example, the European Court of Human Rights held in the *Torture Case* that the so-called 'five techniques' amounted to inhuman treatment but not to torture.[320] The five techniques are wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.[321] The border between torture and inhuman treatment, however, is not fixed. Subsequent to the *Torture Case*, the European Court of Human Rights clarified that the same practices today might well be considered to amount, not only to inhuman treatment, but to torture.[322] According to the Court, the high standard demanded today in the field of human rights demands more 'firmness'.[323] The scale has thus moved to indicate that what was held to be 'inhuman treatment' some 35 years ago, meaning harsh treatment but not torture, would now be considered to amount to actual torture.

Despite the Court's indication that the definition of torture may have expanded to include practices formerly considered inhuman treatment, and not torture, the definition of torture remains uncertain. Perhaps behaviour classified as torture under some circumstances may not be considered torture in other circumstances. For example, deprivation of sleep, now often regarded as outright torture, may not unquestionably be classified as torture when seeking to extract information from a suspected terrorist if such information might save the lives of innocent citizens. A definition for various forms of torture may not be workable, or indeed, desirable.

Related to the discussion of interrogation techniques, no one has disclosed what the *quid pro quo* might be when a State sends a person to be interrogated in another State. What does the receiving State receive in return for its interrogation services? This question is rarely, if ever, asked and never clearly answered. It could be that the answer to this question has the potential to generate even more controversy in the debate on extraordinary rendition.

The United States admits that it has schemes allowing for extraordinary rendition, but the US administration has formally denied that such practices entail torture. On 20 July 2007 President Bush clarified in an Executive Order the treatment that

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317 Convention Against Torture, article 1.

318 Council of Europe, *op cit.*, article 3.

319 Convention Against Torture, articles 1, 16. The same absence of subjective criterion is applied to degrading treatment. See *The Tyrer Case*, 26 Eur. Ct. H.R. *Reports*, 1978 (ser. A) at 15.

320 *Ireland v United Kingdom*, 25 Eur. Ct. H.R. *Reports*, 1978 (ser. A) at 67.

321 *Ibid.*, at 41.

322 *Selmouni v France*, 1999-V Eur. Ct. H.R. 151, 183.

323 *Ibid.*

must afforded to detainees and repeated that the United States does not condone torture of captives by intelligence officials.[324]

A whole new language has evolved around the alleged extraordinary rendition activities of the United States. Many now speak of 'torture flights' to signify the chartered planes that have taken some detainees to be interrogated in countries specifically known to practice harsh interrogation methods and torture. A number of private airlines, for example, Jeppesen, a subsidiary of Boeing and Tepper Airlines, has been said to be involved in such torture flights.[325] It is clear that actual, precise evidence is not available: as mentioned above, most reports consist of statements in newspapers that may or may not be reliable.[326] It is, however, highly likely that at least some of these flights have taken place, and that detainees have been taken from one jurisdiction to another, usually to one of these countries where torture is likely to be used.[327] It is the cooperation of other states in these operations that has provoked a series of investigations and reports by various international organisations. A number of states, such as France, Spain, Sweden, Denmark, Norway, Germany, Portugal, Austria, Italy, Poland, Romania, the United Kingdom and Ireland have all been accused of facilitating extraordinary rendition by allowing transit of such flights.[328] In most countries, investigations have been launched only to result in statements that no evidence has been found to support the claim of such cooperation.[329]

The CIA is also said to hold certain 'ghost detainees', prisoners who are not officially registered. Such 'ghost detainees' are kept outside of judicial oversight, sometimes without ever entering US territory.[330]

Some detainees are, according to reports, taken through secret detention centres: so-called 'black sites' are normally used by the CIA in cooperation with other governments.[331] States that cooperate in such schemes may have their

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324 Exec. Order No. 13440, 72 Fed. Reg. 40,707 (20 July 2007).

325 See Complaint, *Mohamed v Jeppesen Dataplan, Inc.*, No. C 07-2798 (N.D. Cal. 30 May 2007) (asserting that Jeppensen aided the CIA in its extraordinary rendition practices). See also Egelko, B., 'Judge dismisses renditions lawsuit in San José', *San Francisco Chronicle*, February 13, 2008, at B2 (reporting that Judge Ware in a San Francisco Court blocked the hearing of a case brought by the American Civil Liberties Union against Jeppesen Data Plan, alleging that the airway company ran 'torture flights'. The Judge held that such matters were a 'state secret').

326 See, *e.g.*, Bilefsky, D., 'European inquiry says C.I.A. flew 1,000 flights in secret', *New York Times*, 27 April 2006, at A12; Hentoff, N., 'Have a nice flight', *The Village Voice*, 7 February 2007, at 14; McGrory, D., 'U.S. torture "were refuelled in Britain"', *The Times*, 16 December 2005, at 16; Woolf, M., 'Torture flights landed in U.K., admit air controllers', *Independent*, 19 February 2006, at 23.

327 Amnesty International, USA, *Below the Radar: Secret Flights to Torture and 'Disappearance'* (Amnesty, 2006), 24–32.

328 See European Parliament, *Report, op. cit.*

329 See, *e.g.*, *Intelligence and Security Committee, Rendition*, 2007, Cm. 7171.

330 *Ibid.*

331 *Ibid.*

responsibilities implicated under various international agreements if the detention precludes the detainee's rights of defence,[332] and if the detention is prolonged.[333]

These sites have been claimed to exist in Afghanistan at the Bagram Air Base[334] and in Iraq[335] at Camp Cropper.[336] It has also been claimed that the Abu Ghraib prison worked as a black site, but there is less evidence of this assertion.[337] In addition Jordan[338] and Pakistan have been claimed to be black site hosts.[339] Black sites are also alleged to exist in Egypt,[340] and Morocco, for example at the al-Tamara interrogation centre near Rabat.[341] But again, as mentioned above, this pattern has probably changed, now excluding States that were involved in the Arab Spring in 2011: it is difficult or impossible to obtain clear facts in view of the political situation.

In Thailand, the Voice of America relay station in Udon Thani has been said to host a black site.[342] Claims have also been made that black sites have existed in several European countries, especially in the post-communist states, such as Poland,[343] at

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332 See, *e.g.*, *Kurt v Turkey* (No. 74), 1998-III Eur. Ct. H.R. at 1185, para. 124, where the European Court of Human Rights stated that 'arbitrary deprivation of ... liberty' and 'the unacknowledged detention of an individual is a complete negation' of the rights guaranteed by Article 5 of the European Convention for the Protection of Human Rights. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, article 5, 4 November 1950, Europ. T.S. No. 5, 213 UNTS 222.

333 See, *e.g.*, *Öcalan v Turkey*, 2005-IV Eur. Ct. H.R. 131 (imposition of death penalty following an unfair trial and prolonged detention violated articles 3, 5 and 6 of European Convention); *Suárez-Rosero Case*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, paras. 90–91 (12 November 1997) (prolonged detention and poor treatment of detainee violated article 5(2) of the American Convention on Human Rights); *Velásquez Rodríguez Case* (1988), Inter-American Court of Human Rights, Series. C) No. 4, para. 187: prolonged detention and poor treatment of detainee violated articles 5(1) and 5(2) of the American Convention on Human Rights; *Polay Campos v Peru*, Comm. No. 577/1994, UN GAOR Human Rights Commission, 61st Sess., paras. 8.4, 8.6–8.7, UN Doc. CCPR/C/61/D/577/1994, 9 January 1998: prolonged detention and poor treatment of detainee violated Articles 7 and 10(1) of the International Covenant on Civil and Political Rights.

334 European Parliament, *Report*, cited above, at para. 160.

335 White, J., 'Army, CIA agreed on "ghost" prisoners', *Washington Post*, 11 March 2005, at A16.

336 McIntyre, J., 'Pentagon: Iraqi held secretly at CIA request', CNN, 16 June 2004, http://www.cnn.com/2004/US/06/16/ghost.prisoner/index.html.

337 White, J., 'Army, CIA agreed on "ghost" prisoners', *Washington Post*, 11 March 2005, at A16.

338 European Parliament, *Report*, cited above, at para. 105.

339 Amnesty, *Report*, cited above, at 8.

340 European Parliament, *Report*, cited above, at para. 107.

341 *Ibid.*, at para. 89; Burke, J., 'Secret world of U.S. jails', *Observer*, 13 June 2004, available at http://www.guardian.co.uk/world/2004/jun/13/usa.terrorism.

342 European Parliamentary Assembly, *Report, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. 11302, 11 June 2000, at n.27; see also Priest, D., 'CIA holds terror suspects in secret prisons', *Washington Post*, 2 November 2005, at A1.

343 Amnesty, *Report*, *op. cit.*, at 15; European Parliament, *Report*, *op. cit.*, at 174 (mentioning Szymany Airport as involved in rendition flights).

Mihail Kogălniceanu near Constanta, in Romania,[344] Armenia,[345] Georgia,[346] Latvia, Bulgaria[347] and Slovakia.[348] Not only ex-communist states have been implicated, but many Western states have been accused of tolerating activities by the CIA, including Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Portugal, Spain, Sweden and the United Kingdom.[349]

The documentary proof of the activity of such sites is sadly lacking. It is in the nature of things that first-hand sources will not be readily available. However, one would have expected some effort by human rights organisations to seek some form of primary sources, at least certain pronouncements or denials by the US government. Even parliamentary reports like those of the European Parliament of the EU[350] and of the Parliament of the Council of Europe[351] (two bodies often confused), as well as the UN High Commission for Human Rights,[352] generally refer only to newspaper articles, and refrain from citing any first-hand documentary sources. This practice of resorting to secondary and even tertiary sources is even used to reference statements by the US government, such as denials or Executive Orders prohibiting torture, for which official documents are readily available.[353] Nevertheless, these international bodies have criticised the system of extraordinary rendition. Additionally, on 23 January 2008, the Parliamentary Assembly of the Council of Europe backed a report saying the use of arbitrary terrorist black-lists by the UN and the EU violates fundamental rights.[354]

However, a State's most important duty is to its own citizens, and in the present volatile world a State is certainly expected to do its utmost to protect its citizens from terrorist attacks. It is possible that this duty cannot be discharged unless certain suspected terrorists are allowed to be subjected to fierce and effective interrogation. If there is no mistaken identity and the arrested person actually is a genuine risk to the citizens in a state, officials must be entitled to question him

344 See The Associated Press, 'Romanian president says CIA flights may have landed in country', 8 February 2006, available at: http://www.tkb.org/NewsStory.jsp?storyID=105414; see also European Parliament, *Report*, *op. cit.*, at 149.

345 Amnesty, *Report*, *op. cit.*, at 16.

346 *Ibid.*

347 *Ibid.*

348 *Ibid.*

349 European Parliament, *Report*, *op. cit.*

350 *Ibid.*

351 See, *e.g.*, Eur. Parl. Ass., *Report from the Comm. on Legal Affairs & Human Rights: Lawfulness of Detentions by the United States in Guantánamo Bay*, Doc. No. 10497, § III 2005, available at: http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10497.htm (citing *Washington Post*, *New York Times*, *Guardian*, *Observer* and *Vanity Fair*).

352 See Office of the United Nations High Commissioner for Human Rights, Comm. against Torture, *Conclusions and Recommendations of the Committee against Torture*, UN Doc. CAT/C/USA/CO/2, at 5 (25 July 2006).

353 See, *e.g.*, Exec. Order No. 13, 440, 3 Fed. Reg. 40, 707 (20 July 2007). This document is rarely cited and often replaced by a secondary newspaper reference.

354 See European Parliamentary Assembly, *United Nations and European Union Blacklists: Resolution 1597*, 5th Sitting (23 January 2008), available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm.

using some form of pressure, limited by common sense. It cannot be right – or even efficient – to subject a person to torture. Nor can it be right to be so lenient that the arrested person feels no pressure to part with vital information, for example with regard to a planned terrorist attack.

In 2004 United States Assistant Attorney General Jack Goldsmith stated that 'protected persons' apprehended in Iraq could be subjected to extraordinary rendition and sent to be 'interrogated' in another state.[355] 'Protected persons' are those who form part of the civilian population in an occupied area. Under the Geneva Convention IV on Civilians such people must not be moved. Article 49 of the Geneva Convention IV of 1949 concerning Civilians states that:

> 'Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'[356]

However, the Assistant Attorney General referred to the captured people as 'protected persons', by mistake: the people taken for interrogation were not such civilians: they were unlawful or illegal combatants who do not enjoy any protection under the Law of War. In other words, these captured persons were not 'protected persons'. If a person takes up arms and engages in hostilities, as some of the transferred people have allegedly done, they have lost their status of 'civilians' and are no longer 'protected persons'.[357]

It is of considerable importance, however, that the often cited Memorandum of 19 March 2004 is marked as a 'Draft'. It is not compatible with correct legal assessment to treat this document as if it were an official and final document authorising extraordinary rendition. According to unconfirmed claims that surround the process of extraordinary rendition, the CIA is said to have 'used' the March draft memo as legal support for secretly transporting detainees out of Iraq to be interrogated elsewhere for a 'brief but not indefinite period', and for permanently removing persons deemed to be 'illegal aliens' under 'local immigration law'. Another OLC draft memorandum from 1 August 2002 is said to

355 *Draft Memorandum from Jack Goldsmith, III, Assistant U.S. Attorney General, to Alberto R. Gonzales, U.S. Attorney General, regarding the Permissibility of Relocating 'Protected Persons' from Occupied Iraq* (19 March 2004), hereinafter *The March Draft Memo*.

356 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49.

357 See Detter, I., 'Illegal combatants', *op. cit.*, at 1060 and above, Chapter 4 B vii. It was also unfortunate that the Memorandum specifically refers to article 49, claiming that transfers would be compatible with this provision in the case of 'illegal aliens'. The Memo states: 'The United States may, consistent with Article 49: (1) remove "protected persons" who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate "protected persons" (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period, as long as adjudicative proceedings have not been initiated against them'.

exist that again authorises the removal of suspected terrorists from Iraq and from other locations.[358]

In making any determination about the international law protection of suspected terrorists, a point must be made initially about the importance of establishing the true identity of a suspected terrorist. There have been some scandals involving cases when innocent persons have been held and treated as possible terrorists. In some cases persons have certainly been subjected to erroneous rendition, usually as a result of mistaken identity. In December 2005, the CIA's Inspector General admitted that the CIA was investigating what the Agency called 'erroneous renditions'.[359] Khalid El-Masri is one such case.[360] Another incident concerned the radical Islamist cleric Hassan Mustafa Osama Nasr, also known as Abu Omar, who was kidnapped in Milan on 17 February 2003, and sent to Egypt, where he was held until 11 February 2007, when an Egyptian court ruled his imprisonment was 'unfounded'.[361]

Furthermore, it is important to retain the qualification of 'combatants' to ensure that the Law of War protects those that most deserve to be protected, that is to say real soldiers and real civilians. To enjoy full protection under the Law of War a combatant must wear a distinctive sign or uniform showing that he is a soldier, be under military command, carry arms openly and follow himself the rules of the Law of War. 'Illegal' or 'unlawful combatants' may, on the other hand, enjoy certain basic rights under the peremptory minimum standards.[362]

The second question concerns what actually constitutes 'torture'. It is clear that to some extent some forms of treatment may be experienced differently by different people. Some, with a low threshold of pain, may consider even light pressure as unbearable and would consider this as torture. Other, more courageous persons, may find, when subjected to fierce interrogation, that they do not place this on the level of torture.

Nevertheless, there is normally a vague agreement that any considerable physical harm inflicted on a person does constitute torture. What is more difficult to ascertain is whether psychological pressure, which can be far more effective in terms of interrogation, amounts to torture. Clearly, non-physical torture may cause the greatest suffering and mental pressure can sometimes be worse than brutal physical attacks.

There is also an ancillary question as to whether threats to harm other members of a person's family amounts to torture; such threats can cause immense suffering to a person held for questioning.

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358 See, *e.g., Memorandum Jay S. Baybee, Assistant U.S. Attorney General, to Alberto R. Gonzales, Counsel to the President, regarding Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, in Greenberg, K.J. and Dratel, J.L. (eds), *The Torture Papers: The Road to Abu Graib* (New York: CUP, 2005), 172–217 .

359 Priest, D., 'Wrongful imprisonment: anatomy of a CIA mistake', *Washington Post*, 4 December 2005, at A1.

360 *Ibid.*

361 The Associated Press, 'Abducted Egyptian cleric released', *Washington Post*, 12 February 2007.

362 See, Detter, I., 'Illegal combatants', *op. cit., loc. cit.*

With regard to the treatment of captured terrorists by the United States – the country that has been the prime target of the *jihad* terrorists – it is relevant to note that the United States has made some significant reservations to the Torture Convention. The term 'cruel, inhuman or degrading treatment' will be interpreted according to US rules.[363]

The Torture Convention itself is slightly unhelpful with regard to the definition of torture. Article 1 provides that:

> '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.'[364]

It is vital to note the very last sentence, which removes all authority from the prohibition, because any state involved in extraordinary rendition programmes would argue that the interrogation methods are part of the lawful sanctions of suspected terrorists. Furthermore, the condition that pain and suffering must have been inflicted by an 'official', or by someone with 'official' sanction, also removes certain scenarios from the ambit of the Convention. In any event, the States to which extraordinary rendition flights are said to have been sent are virtually all non-signatories of the Torture Convention.

Thus, the core of the question is actually a matter of the territorial reach of prohibitions on torture. Some assume that states which have not signed the Torture Convention (or other binding treaty on the matter) are free to practice torture. Others appear to think, as some in the US administration do, that, although a ratifying state is not free to practice torture in its own territory, it is

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363 Namely, 'cruel, unusual and inhumane treatment' or punishment is interpreted through the law of the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. See 136 Cong. Rec. 17,486 (1990) (resolution of ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). This evokes the famous reservation that the United States appended to its accession to the Statute of the International Court of Justice, stating that the United States itself would decide what question concerns national security for which the ICJ is not competent. See *Reservation to the Optional Clause of the ICJ by the United States*, 61 Stat. 1218, 1946 WL 25470 (US Treaty).

364 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, S. Treaty Doc. No. 100-20, 1465 *UNTS* 112.

free to do so elsewhere, or that it is free to delegate the task of applying torture in interrogations.[365] Hence the expression 'torture by proxy'.[366]

But this territorial argument is a fallacy. To apply some historical perspective to the question, the German government during the Second World War had not signed any treaties or conventions on genocide (indeed the Genocide Convention had not even come into existence). Nor had wartime Germany adhered to any binding agreements forbidding torture (or other gruesome practices) outside its own territory, for example in Auschwitz in Poland. Yet the War Crime Tribunal in Nuremberg came to the conclusion that Germany had severely violated international law for which even individual responsibility could be incurred.[367]

An additional component to the question concerning the territorial reach of the prohibition of torture is linked to the next problem discussed here, that of minimum standards in international law.

One question concerns whether the application of the Law of War has territorial limitations. The theatre of the War on Terror may be global and the rules that are part of the Law of War, for example those concerning the prohibition of torture, may *appear* to apply. Some then insist that it is by virtue of the rules of the Law of War, that the torture of suspected terrorists is prohibited while others would contend that this is so on the basis of the Torture Convention.[368] On closer analysis, neither of these assumptions may be correct: there might be a prohibitive rule because of *another basis of obligation*, for example a prohibition under peremptory rules of international law. These are the other rules of international law, outside formal treaties, which cannot be ignored when assessing the legality or illegality of torture. The test why this proposition may be correct is clearly that the peremptory rule is binding *erga omnes*, that is to say even on States that have not ratified the Torture Convention. Furthermore, it is binding even outside the Law of War since terrorists do not qualify as combatants, nor as civilians, and are therefore devoid of protection under the rules of the Law of War. On the other hand, they do enjoy some minimum protection under certain peremptory rules.

365 See Forcese, C., 'A new geography of abuse? The contested scope of U.S. cruel, inhumane and degrading treatment obligations', 24 *Berkeley JIntL*, 2006, 908, 908–909, explaining Attorney General Alberto Gonzalez's account of the US position regarding the applicability of the Torture Convention to treatment of aliens beyond the nation's borders.

366 On the prohibition of torture in areas outside the territory of the State see *R. (on the application of Al-Skeini) v Sec'y of State for Def.*, 2004 WL 2810920 (Q.B.D. Admin. Ct. Dec. 14 2004) (holding that the fundamental scope of jurisdiction under Article 1 is territorial). But see, *Loizidou v Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) 513, 515 (1995) (preliminary objections) ('the responsibility of Contracting Parties *can* be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory').

367 See, e.g., Tomuschat, C., 'The legacy of Nuremberg', 4 *Journal of International Criminal Justice*, 2006, 830, 839–840.

368 See International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 9, 2003, available at: http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf.

Courts in many countries have also claimed that torture is forbidden under general international law.[369] For example, the European Court of Human Rights has also confirmed that the prohibition on torture extends to areas under effective control of the state.[370] The same attitude has been taken by English courts.[371] Occupied territories over which a state has established authority thus come within the ambit of the human rights obligations of the state.[372]

In other words, States may be held responsible for acts they have procured or allowed in areas under their control or occupation, or for acts committed in territories to which they have deliberately dispatched a person for interrogation.[373] States, companies and individuals that connive in such transport where torture might be the foreseeable result may also have their responsibility implicated as they, too, have the duty to prevent torture.[374]

The method that has caused much discussion is the practice of waterboarding. This has been widely condemned as excessive torture in many quarters. It may, on balance, be concluded that waterboarding is prohibited under general international law (again, not under 'customary law', as some pretend, as 'negative custom' is an absurd and most unhelpful notion).[375] At any rate, some pressure must be allowed, such as sleep deprivation, in cases such as when a suspected terrorist

369 See Detter, I., *International Legal Order*, *op. cit.*, at 290. General international law is clearly a wider concept than 'customary international law', even though many in the United States use the terms interchangeably. But general international law obviously also includes treaties and agreement, as well as rules on ethics and on *jus cogens*. None of which are necessarily tied to 'customary' law; see also Detter, I., 'Illegal combatants', *op. cit.*, at 1054, noting the absurdity of a 'negative custom', and above, Chapter 5 C vi.

370 See *Loizidou v Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) 513, 515 (1995) (preliminary objections) ('The responsibility of a Contracting State can also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory').

371 See *R. (on the application of Al-Skeini) v Sec'y of State for Def.*, 2004 WL 2810920 (Q.B.D. Admin. Ct. Dec. 14, 2004).

372 See, *e.g.*, Coomans, F. and Kamminga, M.T. (eds) *Extraterritorial Application of Human Rights Treaties* (Antwerp: Internsentia, 2004), for a comprehensive publication devoted to this subject.

373 See *Issa v Turkey*, no. 31821/96, 71–74 (Eur. Ct. H.R. 16 November 2004), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=issa%20%7C%20turkey&sessionid=6048954&skin=hudoc-en; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) I.C.J. 136, 179 (9 July); *López Burgos v Uruguay*, No. 52/1979, Views of the H.R.C., 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (29 July 1981); *Casariego v Uruguay*, No. 56/1979, Views of the H.R.C., 10.3, UN Doc. CCPR/C/13/D/56/1979 (29 July 1981); *Coard et al. v United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. 37 (1999), available at: http://www.cidh.org/annualrep/99eng/Merits/UnitedStates10.951.htm; *Alejandre et al. v Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 6 rev. 23 (1999), available at: http://www.cidh.org/annualrep/99eng/Merits/Cuba11.589.htm.

374 *See Z and Others v U.K.*, No. *29392/95*, 10 Eur. Ct. H.R. 384 (2001), available at http://www.echr.coe.int/eng, see also *A v U.K.* No. 100/1997/884/1096, 5 Eur. Ct. H.R. 137 at para. 22 (1998), available at: http:// www.echr.coe.int/eng; see also *Ilascu and Others v Mold. Russ. 9* (2004) Eur. Ct. H.R. 48787/ at para. 318, available at: http://www.echr.coe.int/eng.

375 See above, Chapter 5 C vi and Detter, I., 'Illegal combatants', *op. cit.*, at 1054.

has information pertaining to a bomb that might kill a great number of people. It is not that the suffering of one is worth that of thousands, but a matter of common sense, that interrogation must be allowed to use some form of minor force.[376]

It is clear that some interrogations have yielded valuable results in the sense that projected terrorist attacks have been foiled. According to the White House, interrogation by the CIA has often pre-empted serious terrorist attempts.[377] For example, the interrogation of Abu Zubaydah and Ramzi Binalshibh helped to break up a cell of Southeast Asian terrorist operatives preparing attacks in the United States, foil an Al-Qaeda operation to develop anthrax, expose planned strikes on a US Marine camp in Djibouti, as well as on the US Consulate in Karachi, and finally thwart plots to hijack passenger planes and to fly them into installations and buildings at Heathrow Airport and in London's Canary Wharf.[378] Further, on 26 December 2005, it was reported that the capture of Al-Qaeda leaders Ramzi Binalshibh in Pakistan, Omar al-Faruq in Indonesia, Abd al-Rahim al-Nashiri in Kuwait and Muhammad al Darbi in Yemen were all partly the result of information gained during interrogations.[379]

On the other hand, States must be aware that torture is prohibited under international law so no State can escape responsibility for inflicting harm on individuals during interrogations. It should also be underlined that the State cannot claim that its security services have irresponsibly exceeded their power because a State has a duty to supervise and closely monitor such activities. On the other hand, it is clear that some form of pressure is allowed to extract information from suspected terrorists but there is also a certain level beyond which questioning should not proceed.[380]

A case in point is *Filartiga v Pena-Irala*, where a US court held that the torturer has become 'like the pirate and the slave trader before him – *hostis humani generis*, an enemy of all mankind'.[381] Recently it has been possible to claim that it is the terrorist who has become such an outlaw and enemy of mankind.[382] However, by resorting to torture the torturer places himself on the same unacceptable level as the terrorist.

It is clear that the prohibition of torture is one of the basic tenets of *jus cogens*, the peremptory rules from which no derogation is permitted.[383] Along with slavery

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376 See *The Ireland Case*, *op. cit.*

377 President George W. Bush, President Bush Discusses Global War on Terror at Wardman Park Marriott Hotel, Washington, D.C. (29 September 2006), available at http://www.whitehouse.gov/news/releases/2006/09/20060929-3.html.

378 Eggan, D. and Lizner, D., 'Secret world of detainees grows more public', *Washington Post*, 7 September 2006, at A18.

379 *Ibid.*

380 See *Klass and Others v F.R.G*, No. 5029/71, 2 Eur. H.R. Rep. 214 at para. 71 and 75 (1980), available at http://www.echr.coe.int/eng. See also *Leander v Sweden*, No. *9248/81*,9 Eur. H.R. Rep. 433 at para. 84 (1987), available at http://www.echr.coe.int/eng.

381 *D. Filartiga and J. Filartiga v Pean-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

382 See Detter, I., 'Illegal combatants', *op. cit.*, at 1096.

383 Vienna Convention on the Law of Treaties article 53, 23 May 1969, 1155 *UNTS* 331.

and genocide, it must be noted that torture is also forbidden by these fundamental and intrinsic rules of international law.[384]

In a landmark case before the House of Lords in England in 2005 it was decided that evidence obtained through torture is not allowed in English courts.[385] The main reason for this attitude is clearly that such evidence is not sufficiently reliable to form the basis for ensuing convictions. The same attitude should prevail in the international field and it should be accepted that torture is rarely the appropriate method to arrive at the truth.

e Minimum Standard of Treatment of Detainees and Terrorists

There is room for suggesting that even though certain countries have not ratified the Torture Convention, and even though the harsh interrogations takes place outside the territory of the United States, *all states* have an obligation under international law to behave in a civilised way and refrain from torture or other inhumane treatment of individuals.[386]

It is essential to establish that the minimum standards evoked in this context are not necessarily those found in treaties and international conventions. It may be that the rules laid down in articles 27–78 of the Fourth Geneva Convention and the provisions of article 75 of the Second Protocol of 1977 to the Geneva Conventions *correspond*, roughly, to the minimum standards. But it is most important to underline that terrorists are not protected by the Law of War as they do not wear uniforms and do not qualify as soldiers, and neither as civilians.[387] The obvious point about wearing uniforms or other distinctive marks is that unless this is done, the enemy will not be able to distinguish who is a combatant and who is a civilian.

A further highly relevant difference between detainees and prisoners of war is that although detainees may be questioned, prisoners of war are only required to provide their name and number.

To assess the level of minimum standard to which detainees are entitled some comments may be made. As mentioned in several contexts in this work, such a

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384 See, *e.g.*, The Tokyo and Nuremberg Trials, cited above; see also *Prosecutor v Furundzija*, 38 ILM 1999, 317, 349 and above, Chapter 5 C v and Detter, I., *The International Legal Order*, Chapter 3 E iv, on natural law, 197.

385 *A (FC) and Others v Secretary of the Home Department, 2005 U.K.H.L. 71* (2005). The unanimous judgment confirmed that, under English law, 'torture and its fruits' could not be used in evidence in court. See *ibid.* at para. 51. But the information obtained could be used by the police as 'it would be ludicrous for them to disregard information [about a ticking bomb] if it had been procured by torture'. *Ibid.* at para. 68. The Law Lords thus dismissed, to some extent, concerns about the accuracy of information obtained under torture.

386 See Detter, I., 'Illegal combatants', *op. cit.*, at 1089.

387 See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, 12 August 1949, 6 *UST* 3316, 75 *UNTS* 135 (explaining the criteria that establish whether a combatant will be protected by the Geneva Conventions, including the requirement that a soldier wear a uniform or other distinctive dress). The point about uniforms is clearly the question of *distinction* that you show to your enemy that you are a member of the armed forces. Although the Law of War allows ruses and surreptitious practices, it does not allow soldiers to be disguised as civilians; see also, above Chapter 4 C.

minimum standard has little to do with 'custom', and even less with 'negative custom', but is rather a binding peremptory norm accepted as civilised behaviour.[388] Certain parts of such a minimum standard, for example the part that concerns prohibition of serious torture, form part of the binding body of *jus cogens* from which neither States nor individuals may derogate. Thus, if they violate such peremptory rules, both States and individuals engage their responsibility, and even individuals may be held personally liable as demonstrated in the Nuremberg and Tokyo Trials.

Furthermore, such minimum standards have little to do with any direct application of conventional provisions of the Law of War. When setting out rules on the treatment of terrorists,[389] President G.W. Bush was possibly wrongly advised to refer to the requirements of Common article 3 of the Geneva Conventions;[390] this article is not applicable in situations involving suspected terrorists. The article only protects 'real' combatants and 'real' civilians, not those who do not wear a uniform but clandestinely take up arms to commit terrorist acts.[391] Instead, the Order should have referred to international minimum human rights standards as the basis for a prohibition on torture of detainees.[392]

But a similar mistake was perhaps made by the Supreme Court in *Hamdan v Rumsfeld*,[393] a case which involved Osama bin Laden's driver. Here, the Court held by a curious literary invention that Common article 3 – which only applies in internal strife – would apply as 'non-international' meant 'not between States' and, since terrorists are not States, the Court would use that level of behaviour as guidance. It would have been preferable to argue that the level of treatment of Common article 3 lays down what is civilised behaviour as it proscribes violence, murder, mutilation, cruelty and torture. If Courts, and academics, were not so shy to adopt the set of rules used some 250 years ago in international law, the so-called 'natural law', things would be clearer and simpler. The Court should not have found that, in law, Common article 3 applies but rather that standards mentioned in that article correspond to what is applicable anyway in a parallel system, not based on any nebulous and negative 'customary' law but on basic ethical standards. It is important to identify the source of obligation thus found, not in conventional

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388 See above, Chapter 5 C vi.

389 Exec. Order No. 13440, 72 Fed. Reg. 40,707 (20 July 2007) and see further above on extraordinary rendition.

390 See article 3 in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Common article 3 provides some minimum guarantees to soldiers and shipwrecked as well as to the civilian population. Detter, I., 'Illegal combatants', *op. cit.*, at 1057. Article 3 of the above Geneva Conventions is referred to as 'Common article 3' because it appears in the same form in all four Conventions. *Ibid.* at 1079, n.191.

391 See Detter, I., 'Illegal combatants', *op. cit., passim* (discussing reasons why Common article 3 may not apply to terrorists).

392 *Ibid.* at 1058–1060.

393 *Hamdan v Rumsfeld*, US Supreme Court, 548 US (2006); 126 S. Ct. 2749; 2006 US Lexis 5185.

provisions, nor in 'negative custom', but in the binding minimum standard which ensures the survival of the State and of mankind.[394]

Part of the minimum standard rule concerns the right for detainees to have access to a court. A 'court' means, if we are guided by the practice or, for example, the European Court of Human Rights, a body which has a 'judicial' character; that is, it must be 'independent' both of the executive and of the parties to the case.[395]

This, however, does not preclude it from being an administrative organ exercising a judicial function. It is obvious that evidence in some terrorist trials will be sensitive and, as it is the State's primary duty to protect its citizens it would be unrealistic to claim that all shall be discussed in open court. It is desirable to try terrorists in ordinary Courts. However, if there are strong reasons to believe that the nature of the evidence will be such that it cannot be adduced in a normal court, other special mechanisms, can be used.[396]

In the United States military commissions have been used and although some have criticised this form of procedure, it must be conceded that military courts are sometimes more apt to deal with terrorist crimes which often have military aspects. It is to be expected that the accused has legal representation but clearly an attorney may have to be vetted and may be obliged to have a heightened level of confidentiality, as is the rule in other legal proceedings with other accused who are unprotected under the Law of War, as, for example, spies.[397]

As an example, when the Red Cross suggested that no one must be left unprotected by the Law of War, that organisation did no service to the soldier in the field, nor to the real civilian: both would suffer by a dissipation of the rules of protection under the Law of War.[398] If we dilute the contents of the law to protect those who do not deserve to be protected we will alter the whole essence of the Law of War and make such rules worthless. This would expose legitimate soldiers and the civilians to much danger.

In support of non-treaty and non-Law-of-War-based minimum standards, the International Court of Justice has repeatedly insisted that *all* states are bound to respect *fundamental human rights*.[399] Some 32 years ago the Court stressed this point in the *Hostage Case* and stated:

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394 On the 'hypothetical goal' see, Detter, I., *The Concept, op. cit.*, 46. *Cf.*, Detter, I., 'Illegal combatants', *op. cit.*, at 1086–1092.

395 *Lawless v Ireland*, 1 Eur. Ct. H.R. (ser. A), 29, 36 (1961); *Neumeister v Austria*, 8 Eur. Ct. H.R. (ser. A) at 44 (1968); see *Matznetter v Austria*, 10 Eur. Ct. H.R. (ser. A) at 31 (1969).

396 See Home Office, (UK) Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society, 1 (2004). Detention orders can be made under Part 4 of the Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 23 (UK).

397 On spies as being deprived of protection under the Law of War, see my 'Foreign warships', *op. cit.*

398 See ICRC 2003 *Report, op. cit.*; see also Detter, I., 'Illegal combatants', *op. cit.*, at 1058–1059.

399 See, *e.g.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16, 57 (21 June); see also Detter, I., *International Legal Order, op. cit.*, at 290.

> 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.'[400]

Here the Court did not even mention torture but only 'hardship', which clearly sets a lower level for what is acceptable as treatment of others. The Court, however, inserts the proviso of '*wrongfully*' that just might exclude certain forms of interrogation of suspected terrorists.

The numerous cases in the early War Crimes Tribunals in Nuremberg and Tokyo indicate that the level of behaviour with regard to torture are, above all, to be found in minimum standards that are not laid down in treaties or international or national legislation but rather in the norms which used to be qualified as natural law, thus by what is normal in a society to avoid its self-destruction.[401] Furthermore, these views are compatible with the fact that individuals are direct subjects of international law, thus bearers of international rights and duties. In other words, writers who cannot explain the role of 'non-State' bodies, nor of 'terrorists' in their theoretical constructions, should perhaps reconsider the role of fundamental rule, binding in law, but based on human conscience. Thus, these minimum rules are legal rules that are rooted in public conscience and from legal minimum standards of civilised behaviour.

On the other hand, it must be remembered that rules of the Law of War are universal but the rules on what constitutes fair trial varies between States. Citizens outside the United States or the British Commonwealth may be surprised to hear that there are no *habeas corpus* actions in civil law countries and there is not outright prohibition of hearsay evidence``: such evidence is allowed but its weight may be reduced.

Although, it must be insisted, the suspected terrorist does not have the right to be protected as a prisoner of war nor enjoy the protection of the Law of War as a civilian, there are some minimum standards that apply. States may not treat suspected terrorists as they please. The detaining power is obliged to grant certain limited privileges to *jihad* terrorists with regard to court procedure and with regard to general treatment of detainees. However, there is little ground for claiming that a state must afford such treatment under any contractual obligations under the Geneva Conventions which, as stated above, do not apply to terrorists. Nor is this treatment purely discretionary or granted *ex gratia*. The better view is that, because the State is not obliged under the Geneva Conventions to grant privileged treatment to terrorists, it does so to comply with a *legally binding international minimum standard of civilised behaviour*.

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400 (1980) ICJ *Reports* 1980, 42.

401 See, Detter, I., *The International Legal Order, op. cit.*, Chaper 3 E 3 iv, 197 *et seq.*; Detter, I., *The Concept, op. cit.*, 37 on the 'hypothetical goal' of any society; and above, Chapter 5 C v on 'ethics of warfare'.

PART III: CONSEQUENTIAL ASPECTS OF THE LAW OF WAR

Chapter 10
Effects of State of War

A THE TIME SPAN OF WAR

i Inception of War

This work has discussed in some detail the question when war starts[1] and whether or not a declaration of war is necessary for war to exist.[2] It is fairly clear that objective elements now guide the question whether war has started although there will remain an area of doubt as to whether the relevant threshold of hostilities has been crossed and there is no longer a question of merely intermittent hostilities.[3] The time span of war thus stretches from the point when hostilities intensify into a sustained pattern of action.[4]

ii The End of War

Hostilities may often end by the conclusion of an armistice agreement, in writing or orally, with general or local application. An armistice agreement implies only the provisional suspension of hostilities and constitutes thus merely *either a* brief cessation of fighting on the battlefield *or* the prologue to the very end of a war. An armistice agreement must, in any event, be of a certain duration or, as just mentioned, it must concern a definitive and final ending of hostilities. The latter turn of events is historically often the case.[5] Sometimes, there are formal peace treaties at the end of a war – but not always.[6]

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1 Above, Chapter 1, section B iii.

2 Above, Chapter 1, section B ii.

3 Above, Chapter 1, section B iii b.

4 Above, Chapter 1, section B iii d on the definition of war.

5 Klawkowski, A., 'Les formes de cessation de l'état de guerre en droit international', *RCADI*, 1976, i, 217. *Cf.*, Rousseau, Ch., *Conflits armés, op. cit.*, 188–191.

6 *Hackworth*, G.H.,, *Digest of International Law* (Washington, DC: US Government Printing Office, 1943). On historical examples, *cf.*, Phillipson, C., *Termination of War and Treaties of Peace* (London, 1916), 55 *et seq.*

The fervent objections to the existence of war without a declaration of war[7] are not coupled with similar concern for when war ends. For if it is denied that war existed initially, whatever the objective circumstances seemed to indicate, there is no need to acknowledge the end of something which allegedly never existed. If, on the other hand, the initiation of war without a declaration is allowed, as current practice and law seems to indicate,[8] such concession to formlessness leads to a natural disposition to accept that war ends when actual hostilities have ceased.

Occasionally, the operation of treaties have not come into operation until a date after the actual end of hostilities, and a point such as the repatriation of prisoners of war, or the cessation of functions of UN forces, has been chosen.[9] But it may be assumed that such dates do not mark the end of war but follows upon the legal end of war.

Special national announcements often clarify when war will no longer affect private law transactions of individuals.[10] For example, it is usually specifically announced that, after a certain date, trade with the former enemy may resume.[11] Again, such announcements follow later than the legal end of war in international law and are repercussions of the effect of such an end. For war must have ended when hostilities finally ceased for it is this definitive end of war that gives rise to numerous obligations on the part of belligerents, above all with respect to repatriation of prisoners of war.[12]

In the war *sui generis*, the 'War on Terror', we are facing an on-going situation which also implies that it will be impossible to perceive an 'end' of the war. It could, of course, become a situation when the *jihad* terrorists see sense and realise that their actions are not justified or permissible according to the real precepts of their religion, Islam. Or there could be a sudden realisation on the part of the terrorists that their system does not make sense: this had happened before when the communist system crumbled. Or there could be an *appeasement* following lengthy discussions with other leaders: this has also happened before with a series of liberation movements. The first step might be to seek some form of dialogue.

B EFFECTS ON COMMUNICATIONS

Communications in war will, of course, often be disrupted by the very factual effects of warfare that prevent mail being forwarded and railroads being used. Apart from such factual effects there will also, by special national legislation, be further severance of communications.

Letters and other communications to the enemy may be more damaging to the war effort on one side than the supply of arms and ammunition.[13] By clear

7 Above, Chapter 1, section B ii.
8 Above, Chapter 1, section B ii.
9 See, below, in this Chapter, section C i.
10 Above, Chapter 1, section B ii.
11 6 *Hackworth* 330–331; 431.
12 Above, Chapter 9, section B iii f.
13 *Cf.*, Pearce Higgins, A., 'The treatment of mails in time of war', *BYIL*, 1928, 31.

powers of the eminent domain[14] belligerents may therefore, to secure their war effort, subject any agency of communication in immediate control when public safety so demands.[15] Common orders include prohibition for any kind of mail to be transmitted to enemy States during hostilities as well as for other countries if any transit through enemy territory is required.[16]Other usual measures include censorship of varying degree.[17]

The Conventions of the Universal Postal Union (UPU)[18] are not terminated,[19] but belligerents may suspend their execution insofar as they themselves are concerned.[20] On the other hand, the UPU Conventions on closed mail probably apply in war.[21] Due to vigorous suggestions by some negotiators at the 1907 Hague Conferences[22] it was held that international law, as it then stood, lacked effective guarantees for the transportation of postal correspondence in war, particularly at sea. It was therefore agreed that Hague Convention XI would include specific rules to guarantee the inviolability of the correspondence of both belligerents and of neutrals.[23]

The mail found on board a captured ship, a neutral or even an enemy ship, was to be forwarded without delay by the captor, except to a blockaded[24] port.[25] Furthermore, neutral merchant ships carrying mail were to be exempted from search[26] except if such a measure was 'absolutely necessary'.[27] During the First World War it was often clear that belligerents did consider the exercise of the power of search necessary.[28]

Other means of communications, for example by radio, remain regulated by the rules of the International Telecommunications Union (ITU)[29] although a State at war will exercise far going measures to restrict any transmissions of persons within their jurisdiction and also often proceed to jamming techniques.[30]

Telephone contacts are often disrupted in war as telephone lines suffer material damage and broadcasting facilities fail to operate, either by enemy attacks or by government intervention. This might also happen in attacks by the *jihad* terrorists:

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14 On the concept of acquired rights, see Detter, I., *Finance, op. cit.*, 61.

15 *E.g.* United States, Trading with the Enemy Act, 1917, para. 3(d) on the powers of the President to 'cause to be censored' any communication by mail, cable or radio; *cf.*, 3 Hyde 1719.

16 *E.g.* United States, Order by the Postmaster General, 1918, For. Rel. Suppl. 2, 412; 6 *Hackworth* 316.

17 On British censorship in South Africa, see 10 *AJIL*, 1966, Suppl., 413, 416.

18 On relevant rules see, Detter, I., *Law Making, op. cit.*, 217 *et seq.*

19 *Cf.*, below, in this Chapter, section ii on suspension of treaties.

20 2 Oppenheim 304.

21 Pearce Higgins, A., 'Treatment', *op. cit.*, 38.

22 *E.g.* by M. Henri Fromageot; see Pearce Higgins, A., 'Treatment', *op. cit.*, 31.

23 Articles 1 and 2.

24 Above, Chapter 8, section B iii.

25 Hague XI, article 1.

26 Below, in this Chapter, section C iii a (2)

27 See below, Chapter 12, section B i a on military necessity.

28 Pearce Higgins, A., 'Treatment', *op. cit.*, 33–34, 38–39.

29 On relevant rules, see Detter, I., *Law Making, op. cit.*, 223 *et seq.*

30 Above, Chapter 8, section B i.

during the 7/7 attack in London in 2005, all mobile phone contacts were cut off for several hours.

C LEGAL EFFECTS

Some of the effects of war described above include certain 'legal' effects insofar as the situation of individuals, in law, may be affected. But there are some more general effects of this type which should be mentioned.

i Entry into Force of Certain Rules of the Law of War

The most immediate effect of a state of war is that it activates the Law of War itself. This may be a simple way of expressing things; for from the point of view of logic, it is by the force of the Law of War itself that we can establish that a war has commenced. But if we discard this correct, but practically unhelpful argument, it is clear that the network of the rules of warfare will apply only when and if there is a war. This, at least, is the traditional position and this attitude also explains why some writers still avoid speaking of 'war' and prefer the term 'armed conflict',[31] as if there were a block of rules which would complicate the life of States and individuals if they entered into force prematurely or without a good foundation.[32]

But a close scrutiny of the Law of War seems to indicate that the rules can conceptually be conceived as latently present, providing rights and duties, and there are few real complications, either to States or to individuals, as to when the rules are activated. States will apply the rules of neutrality and respect blockades when there are objective demands to do so; individuals will be much guided in their approach to overseas trade or business by instructions flowing from their own government.

Since the 9/11 attack there are even more arguments for the above-mentioned standpoint, that rules of the Law of War are already *latently present*. This view is not accepted by the Red Cross, which claims that rules of the Law of War only operate in areas of actual armed conflict, that is to say, in 2012, in Iraq and Afghanistan. Elsewhere, they say, there is no 'war'.[33] This attitude clearly causes problems with regard to the assessment of what right an apprehended terrorist has outside the battlefield. The Red Cross considers him still a 'civilian' and deserving protection as there must be 'no gap' in the protective system of humanitarian law.[34]

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31 Above, Chapter 1, section B iii.

32 See on the importance of a 'state of war' for certain rules to come into effect, Chapter 1 B ii.

33 In the opinion of the Red Cross, the 'War on Terror' is no more a 'war' than the 'war on drugs', the 'war on poverty' or the 'war on cancer': see, e.g., the Official Statement by ICRC President Kellenberger, 14 September 2004, available at: http://www.icrc.org/Web/eng/siteeng0.nsf/html/66EMA9.

34 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2010, 10, 2003, available at http://icrc.org/web/eng/siteeng0.nsf/htmlall/ 5xrdcc.

ii The Effect of War on Treaties

There is considerable controversy whether the state of war has any effect on treaties and, if so, which type of treaties are affected.[35] The *Institut de droit international* has been considering the question of the effect of war on multilateral treaties.[36] Some of its members have provided examples of treaties to show that some had, and others had not, been affected by war.[37] A Draft Resolution was put forward in 1981 by which treaties between belligerents and third States would remain in force in their mutual relations, whereas multilateral treaties binding parties to an armed conflict would be 'suspended if there is such a fundamental change of circumstances that the performance of the treaty would be unduly hampered'.[38] Furthermore, the existence of an armed conflict between some of the parties to a treaty establishing an international organisation would not 'in itself affect the operation' of the treaty unless, again, performance were unduly 'hampered'.

But this Draft was not adopted and another revised Draft Resolution was put forward, entirely different from the first one, eliminating the references to criteria like 'unduly hampered'.[39] The *Institut* discussed the revised Draft in 1985 and produced a final Resolution. In this Resolution[40] the Institute dispenses with the unfortunate expression of 'unduly hampers' and declares, instead, that the outbreak of war does not *ipso facto* suspend any treaties (whether bilateral or multilateral) between the belligerents,[41] or bilateral treaties between a belligerent and a third party,[42] or multilateral treaties to which some belligerents are parties.[43] A treaty establishing an international organisation is not at all affected.[44] Treaties may only be suspended in the exercise of self-defence in accordance with the Charter[45] or to ensure compliance with a Security Council Resolution with respect to 'the peace, breaches of the peace or acts of aggression'.[46] The Resolution, as it stands, offers little guidance on the effect of war on treaties.

35 Schätzel, W., *Der Krieg als Kündigungsgrund von Verträgen* (Berlin, 1911); Anzilotti, D., 'Effeti della guerra sui trattati internazionale', *Rivista*, 1918, 53; McNair, A.D., 'Les effets de la guerre sur les Traités', 49 *RCADI*, 1937, i; 527; Scelle, G., 'De l'influence de l'état de guerre sur le droit conventionnel', *JDI*, 1950, 26; Monaco, R., 'La sospenzione delle norme giuridiche internazionale in tempo di guerra', *Jus*, 1941, 236; Capotorti, F., 'L' extinction et la suspension des traités', 134 *RCADI*, 1971, iii, 554–555; Klein, F., 'Kriegsausbruch und Staatenverträgen', 3 *JIR*, 1954, 30; Hurst, C., 'The effect of war on treaties', *BYIL*, 1921–2, 37 *et seq.*; Rank, R., *Einwirkung des Krieges auf die nichtpolitischen Staatsverträge* (Uppsala: Harry Ax:son Iohnson Institutet, 1949), 24.

36 59 *Annuaire* i 1981, 1.

37 *Ibid.*, ii, 267 (Schindler); see further, *Reports*, i, 201–293 and *Debates*, ii, 175–244.

38 *Ibid.*, 276.

39 61 *Annuaire* 1985 i 2.

40 Resolution 28 August 1985, unpublished.

41 *Ibid.*, article 2.

42 Article 5(1).

43 Article 5(2).

44 Article 6.

45 Article 7.

46 Article 8.

But there are presumptions and there are distinctions. For example, treaties relating to restrictions of territorial sovereignty of a belligerent in favour of another belligerent are invariably suspended in time of armed conflict.[47] For a belligerent could not allow restrictions of the exercise of its sovereignty *in its own territory* in case of war, in favour of another belligerent.[48] Other treaties that always cease to have effect are those which establish alliances with another belligerent, or ensure assistance, guarantees or subsidies to such a State.

Could one envisage the armed conflict between two Powers of a defence alliance without such a treaty being suspended between the belligerents? At the very least, the treaty would, if not temporarily suspended, be of 'temporary irrelevance' as a situation developed at variance with the contingency provisions of the treaty.

For other treaties there are other fairly clear presumptions. Courts have emphasised that States have the power to suspend treaties that have a purpose incompatible with war. For example, treaties on immunity of State-owned ships can thus be suspended.[49] Other treaties may grant nationality status to aliens, like the Treaty of 1795 between the United States and the United Kingdom, under which all US citizens who held land in the United Kingdom on 28 November 1795, and their heirs and assigns, are considered as UK citizens. But such a treaty has a purpose which would be incompatible with war between the two parties and would be suspended by such an occurrence.[50] Other treaties, again, which would invariably be suspended are those which restrict territorial sovereignty in one State in favour of the enemy.[51] Furthermore, treaties under which individuals claim rights are usually not suspended by war. For example, the Madrid Convention on Registration of Trade Marks of 1891 was not suspended as it belonged, said a court, to 'that category' of treaties.[52]

It is not a question of rights acquired under a treaty[53] but a question of a framework for claims of which a person would be deprived were the relevant treaty considered as suspended or terminated. Thus, a treaty, in the event on rights of claims for workmen's compensation of 1928, was held to be in force so that claims could be presented by individuals.[54]

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47 This may even be the case of a State changes its foreign policy: see Detter, I., *The Independent State*, *op. cit.*, 218.

48 *Ibid.*, and also Detter, I., *The International Legal Order*, *op. cit.*, on my doctrine of *continuous consent*, and above, Chapter 2, section B v on my doctrine of *abstract consent*.

49 *The Christina* (1937) 4 *All ER* 313.

50 *Sutton v. Sutton* (1830) 1 R & M 663.

51 On military base agreements and my theory of *continuous consent*, see my *Independent State*, *op. cit.*, 141 *et seq.*

52 *The Trade Mark Registration Case*, German Federal Patent Court, 6 *Fontes juris gentium* 1966–1970, A II, 262; 59 *ILR* 480.

53 For criticism of the theory of acquired rights, see Detter, I., *Finance*, 2nd edn, *op. cit.*, 105.

54 *The Miletich Case* (1946) 12 *AD*, 1943–5 456 on a Convention on compensation between Argentina and Yugoslavia of 1928. For similar views that individual rights are in a special category, see Gialdino, A.C., *Gli effetti della guerra sui trattati* (Milan: Giuffrè, 1959), 251; *cf.*, de la Pradelle, A., 'The effect of war on private law treaties', *ICLQ*, 1948–9, 570.

The Brazilian Foreign Ministry went into great detail on this point in the context of the question of the Havana Convention of 1928, incorporated into the laws of Brazil in 1929.[55] The internal legislation of Brazil dealt with termination of treaties but did not specify rules for the contingency of war or armed conflict. The Brazilian Foreign Ministry stated that the 'absolute' theory of abrogation, depriving treaties in general of effect in war, cannot be accepted. On the other hand, certain treaties which do cease to have effect are political treaties with the other belligerents, particularly those assuring alliance, for such treaties that have been abrogated by action. Another group of treaties that are suspended are those the interpretation of which gave rise to the dispute.[56] Again, could one envisage an armed conflict about a border treaty where that treaty was not suspended between the belligerents?

It was fortunate that the *Institut* exempted treaties which establish international organisations from any suspension along the criterion of 'unduly hampered'; but the Institute should have added that there is a presumption that also conventions, and regulations, incidental to the treaties establishing international organisations retain their force in war.[57] It is often these which are of real practical importance, such as the implementing rules of the Universal Postal Union (UPU) and the International Telecommunications Union (ITU).[58] But since these rules usually have a unilateral character[59] they presumably fell outside the scope of the Institute's Resolution on treaties.

iii Private Law Effects

It has been shown above that certain State property, for example forming part of the cultural assets of a country, are specially protected under the Law of War.[60] Other State property as well as certain private property may often be entitled to special protection as belonging to the civilian population and, as such, forming part of non-military objectives of bombardment.[61] Furthermore, already the Hague Regulations prohibited destruction or seizure of public or private enemy property unless such acts were demanded by the necessities of war.[62]

On the other hand there are numerous situations when public and private property will be subjected to the hazardous destruction of war and there are few remedies individuals have to obtain compensation. However, in one much overlooked case it was held that any party to a war who was unable to keep its

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55 Decree 18.956 of 22 October 1929.

56 Pareceros dos Consultores juridicos do Ministerio das Relaçoes Exteriore, 19351945, Dept. de Imprensa Nacional 1961, 599, reproduced in Cançado Trindade, A., *Repertorio pratica brasileria do direito internacional* (Brasilia, 1984), 338; *cf.*, Lafayette, A., 2 *Principios de direito internacional*, para. 317; Bevilaqua C., *Direito publico internacional*, VII para. 179; Accioly, H., 2 *Tratado de direito internacional publico*, No. 1548.

57 Above, in this Chapter, section B.

58 See Detter, I., *Law Making*, *op. cit.*, 217 *et seq.*

59 *Ibid.*, *passim.*

60 Above, Chapter 8, section A iii b (9).

61 Above, Chapter 8, section A iii b (1).

62 Below, Chapter 12, section B i a.

destructive effects to military targets was liable for compensation to a private citizen who had suffered injury and damage due to the inability of a pilot to avoid destroying private property.[63]This case furnishes new dimensions to the problem of indiscriminate weapons[64] as well as it throws some light on the position of civilian property in a war situation.

Apart from the factual destruction caused by war there are special situations when public or private property may be taken by the enemy. These areas are of decreasing size as the power to take enemy property is gradually diminished.

a The Effects of War on Property

(1) Booty

According to traditional rules of war title to taken property on the battlefield or in the war area passes to the taking State without any court order.[65] All movable property could, in the past, be taken provided it is owned by the enemy State.

However, the Hague Regulations introduced new prohibitions to protect private property: such property could, for example, not be confiscated by an occupying Power,[66] nor would pillage be allowed.[67] Under the Hague Regulations cultural property of the State or of municipalities would, however, be 'treated as private property'.[68] Under the Hague Convention for the Protection of Cultural Property[69] all forms of taking or damaging cultural property by the enemy is categorically outlawed.[70]

Such regulation has, it appears, put a stop to the traditional wide rules on booty and restricts the former rights of a belligerent considerably. But an area of possible booty remains in the case of state property which is not subsumed under the category of cultural property.

Private property, on the other hand, is outside the ambit of booty. The taking of such property from civilians or from enemy soldiers constitutes pillage, expressly

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63 *The Zeppelin Case, Coenca Frères v Germany, 7 RIAA* 683; *cf.*, above, Chapter 8, section A iii a.

64 Above, Chapter 5, section C v and Chapter 7, section B.

65 See, Downey, W.G., 'Captured enemy property, booty of war and seized enemy property', 44 *AJIL*, 1950, 488; Freeman, A.V., 'General note on the law of war booty', *AJIL*, 1946, 795.

66 Article 46.

67 Article 47; *cf.*, Freeman, A.V., 'Responsibility of states for unlawful acts of their armed forces', 88 *RCADI*, 1955, ii, 325. According to a proposal of the *Institut de droit international* of 1880, private property should be protected as the purpose of war is only to weaken the *military* strength of the enemy. On the principle that the less possible damage to private property should be caused and for a commentary of discussion in the Institute; see Bentwich, N., *The Law of Private Property in War* (London, 1907), 27 *et seq.* On protection of private property see below, in the next section.

68 Article 56.

69 Above, Chapter 8, section A iii b (9).

70 Article 4(3). But see, below, Chapter 12, section B i a on military necessity.

forbidden in numerous treaties.[71] Claims to treasure troves are not normally allowed in war. A claim to 150,000 dollars found in a cave in Vietnam was thus refused and it was held that the money constituted public property of the home State of the soldier who had found it.[72]

(2) Prize and Confiscation of Contraband

Enemy merchant ships may be taken by warships as 'prize'. The capture is confirmed by well settled rules in civil prize proceedings in special prize courts.[73]

When war has broken out[74] all enemy merchant vessels are liable to capture. Even aeroplanes have been held subjected to such law of prize[75] and several States have promulgated national legislation to allow for the seizure of aircraft as prize.[76] Enemy warships,[77] the natural target for attack at sea, are not, however, subject to the law of prize but may be taken outright by the enemy.[78]

Most countries have clear and detailed rules on prize proceedings.[79] Jurisdiction for prize has existed in England at least since the fourteenth century.[80] The details of a body of law developed over the centuries and become more or less uniformly settled by all major maritime States, usually through the special Prize Courts.[81] These courts and their jurisdiction present a wealth of interesting problems to the international lawyers but have recently attracted little attention. One reason for this is undoubtedly that the practice of prize has dwindled as a type of maritime strategy, and it is this dislocation from naval warfare that makes it more suitable to

71 Hague Regulations, article 28 for assault situations; article 47 for occupation; Hague IX, article 5; Geneva I, article 15; Geneva II, article 18; Geneva III, article 33; Hague Convention on the Protection of Cultural Property 1954, article 4(3).

72 *Morrison v United States* (1974), US Court of Claims, 422 F. 2nd. 1219.

73 See Reuter, P., *Etude de la règle 'toute prise doit* être *jugée'*, Nancy, diss., (Université de Nancy), 1933; Sico, L., *Toute prise doit* être *jugée, Il giudizio delle prede nel diritto internazionale* (Naples: Jovene, 1971). But the idea that private property, for example merchant ships, may be taken as a prize constitutes an exception to the rule that private property is 'inviolable'. See de Boeck, C., *De la propriété privée ennemie sous pavillon ennemi* (Paris: Durand Date, 1982), 493. *Cf., ibid.*, 493–513 on the work of the *Institut de droit international* to bring about a new prize regime. *Cf.*, Ranft, 'Restraint of war at sea before 1945' in Howard, M. (ed.), *Restraints of War, op. cit.*, 43 *et seq.*

74 Above, Chapter 1, section B ii and iii.

75 See UK Prize Act 1939, 2 & 3 Geo. 6 ch. 65, s. 1(1) and *The Yankee Clipper Case* (1945) AC.

76 Italian Decree 8 July 1938, articles 239–240, 256; UK Prize Act 1939, s 1; *cf.*, Dutch Prize Regulations, Rousseau, *Conflits armés, op. cit.*, 361.

77 For definition, above, Chapter 4, section B.

78 See, Pearce Higgins, A., 'Ships of war as prize', 6 *BYIL*, 1925, 103.

79 Colombos, C.J., *A Treatise on the Law of Prize* (London: Longmans, 1926); Kunz, J., 'British prize law', *Law Quarterly Review*, 1945, 49; Kunz, *ibid.*, 1946, 237; Parfond, P., *Le droit de prise et son application dans la marine française* (Paris: Les Editions Internationales, 1955); Gervais, A., 'La jurisprudence italienne des prises maritimes durant la seconde guerre mondiale', *RGDIP*, 1950, 251 *et seq.*, 433 *et seq.*; *idem*, 'La jurisprudence allemande des prises maritimes durant la second guerre mondiale', *RGDIP*, 1951, 481 *et seq.*; on the procedural burden of proof in various prize jurisdictions, see Colombos, *Prize, op. cit.*, 184 *et seq.*

80 Colombos, C.J., *Law of Prize, op. cit.*, 1.

81 *Ibid.*, 38 *et seq.* For subsidiary rules on recapture see, Rousseau, *Conflits armés, op. cit.*, 313.

include rules on prize in the section of this work which deals specifically with the effect of war on property. For it is as such that the law of prize must be conceived, implying, as it does, the right to interfere and take, without compensation, public and private property, contrary to other trends in international law to protect at least certain such property.

The law of prize is different from other parts of international law in its very 'international essence'. Other sections of international law are often deflected by national or regional preferences, applying their stamp on the very substance of rules. But the prize courts use, unquestioningly, uniform international law.[82] Furthermore, they do so without any such rules having been converted into national rules.[83] The rules of prize therefore show the most immediate impact of international law in the internal law of States and on municipal courts. It is as if the writers who claim that there is a complete separation between international and internal law[84] had never studied the precedents of prize law.

The area where prizes may be taken are the high seas or enemy waters. Prizes must not be taken in neutral territorial waters.[85] Such rules also indicate how important it is to have clear knowledge of the width of territorial waters[86] and of the methods by which these are measured.[87] Nor may prizes be taken in internal waters, in rivers, ports, river basins or lakes.[88]

The type of vessels that must not be taken include hospital ships[89] and those carrying the wounded or medical supplies.[90]

Fishing vessels are not subject to prize[91] provided they are only engaged in coastal shipping[92] and provided they do not take part in hostilities.[93] Vessels engaged in small local trade are also exempt,[94] again on the condition that they do not join hostilities.[95] Ships for religious purposes are also protected on the analogy with hospital ships.[96] There are special rules for ships under construction.[97] Neutral vessels are not subject to prize as laid down in the Declaration of Paris of 1856.[98]

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82 *The Zamora* (1916) 2 AC 77, 91 550.

83 Above, Chapter 6, section B ii.

84 For example, Triepel, H., 'Les rapports entre le droit international et le droit interne', 23 *RCADI*, 1923, i, 77.

85 *E.g. The Vrow Anna Catharina* (1805), 6 C. Rob. 45.

86 For the relevance to prize law, see Colombos, C.J., *Law of Prize*, *op. cit.*, 110.

87 O'Connell, D.P., 'The juridical nature of the territorial sea', *BYIL*, 1971, 303.

88 For cases, see Rousseau, *Conflits armés*, *op. cit.*, 284–285.

89 Hague X, article 3; *cf.*, Geneva II, articles 22 and 24; *cf.*, articles 26, 27, 29, 30, 34, 35 and 48; Protocol I of 1977, article 22; *The Ophelia* (1915) P. 129; Colombos, C.J., *The Law of Prize*, *op. cit.*, 145 *et seq.*; for violations, see Rousseau, *Conflits armés*, *op. cit.*, 295.

90 Geneva II, article 38; Geneva IV, article 21; Protocol I of 1977, article 23.

91 *The Young Jacob and Johanna* (1798) 1 C. Rob. 19.a.

92 *The Stoer* (1916) 5 L.R.P.C. 18; *The Paquete Habana*, *The Lola*.

93 Hague XI, article 3(2).

94 Hague XI, article 3(1). But tugs and lighters are not protected: *The Atlas* (1916) 2 B & CPC 470.

95 Hague XI, article 3(2).

96 Hague XI, article 4; *The Paklat* (1915) 1 B & CPC 515.

97 *The Hermes, Schiffahrt Treuhand and Others v H.M. Procurator General* (1953) AC 232.

98 Article 2.

In this respect the Declaration clarified and entrenched a controversial rule.[99] According to the same Declaration neutral property on board enemy ships is also immune from prize.[100] The Declaration of Paris was soon regarded as codifying the law of nations.[101]

Does the law of prize only apply to private ships? There is naturally a problem of imbalance in case the 'international'[102] law of prize cannot be applied to all political systems equally. The law of prize passed through an era of some 70 years this century when in the so-called socialist States there were no 'private' ships. Nowadays there are only a handful States left which deny the right of private property and which have exclusively State-owned ships.[103] It is suggested that the law of prize applies to all merchant ships which are not warships, even those which are State-owned. Such rules would be consistent with new attitudes on loss of immunity of States for commercial activities.[104] But State practice is somewhat hesitant, as the interception of the Soviet ships *Selenga* and *Vladimir Mayakowski* in 1940 may show. These ships were transferred to the French authorities for 'administrative reasons' but then released.[105]

Enemy character[106] is usually assessed in the Anglo-Saxon world by the domicile[107] and elsewhere by the nationality.[108] For companies, the registration[109] or actual enemy control[110] is usually decisive.

In the case of ships the normal rule of attaching enemy character is the flag,[111] but such rules are probably supplemented to cater for the case of flags of convenience.[112] The possible enemy nature of the cargo is assessed by the

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99 Colombos, *The Law of Prize, op. cit.*, 164.

100 Article 3.

101 *E.g., The Marie Glaeser* (1914) P. 218. 233; *Cf., The Kronprinsessan Margareta* (1921) 1 AC 486, 503; *The Schlesien* (1914) 1 B & C PC 13; *The Miramichi* (1915) P. 71; *The Batavier* (1918) P. 66; *The Roumanian* (1916) AC 124.

102 Above, in this section.

103 Some of these have a large number of vessels, for example, Cuba and North Korea.

104 See my 'Foreign warships', *op. cit.*, 57–60.

105 Rousseau, *Conflits armés, op. cit.*, 289–290.

106 Above, Chapter 4, section B.

107 *The Anglo-Mexican* (1918), AC 422.

108 The nationality principle is adopted and applied by all States of Western and Eastern Europe except for the United Kingdom. Only in case of 'formal' nationality will exceptions be made to this general rule: *Desirée v Withold Szwabowics* (1956) NJA 337.

109 *The Poona* (1915) 1 B & CPC 275; *cf., The Tommi* (1914) P. 251. For the United States, see *Fritz Schuls Co. v Raimes & Co.* (1917) 164 NYS 454, 458.

110 *Continental Tyre & Rubber Co. Ltd. v Daimler Co. Ltd.* (1916) 2 AC 307.

111 *The Vrow Elizabeth* (1803) 5 C.Rob.2; *The Unitas* (1950) AC 536 (PC); *The Hamborn*, AD 1919–1922, 425.

112 Rousseau, Ch., *Conflits armés, op. cit.*, 298–299 on other criteria. There are special rules for the effects of change of flag, see Declaration of London, 1909, articles 55–56, involving similar precautions as in bankruptcy and tax cases on presumptions and time limits: thus, transfers may be held valid if they take place more than 60 days before opening of hostilities; later transfers are only valid if certain presumptions of illegality are not rebutted: Dacia, 'Conseil des prises français', *RGDIP*, 1915, 83; *ibid.*, 1917, 45.

domicile of the owner[113] or by his nationality, supplemented by a rule of inherent enemy character of all produce of enemy soil.[114] There is also a presumption for enemy character of the cargo of an enemy merchant ship.[115]

There are temporal limitations to the right of capture. There are sometimes days of grace for neutral vessels in the port of a belligerent at the time of commencement of war.[116] If a merchant ship is in enemy port at the outbreak of hostilities it will either be allowed to depart at once or after some interval, or, alternatively, ordered to remain in port until hostilities have ended when it must be released. The port State retains a requisitioning power, against adequate compensation, but has no right of capture.[117] According to most authorities, the right of capture is suspended during armistice. Yet, German doctrine claims that the right still exists.[118]

A neutral vessel can lose its privilege of not being subjected to prize whether by carrying contraband or by performing other 'un-neutral services' of a direct or indirect nature. Among such services is the carrying of information, despatches or transmitting such information by telegraphy[119] or by carrying military personnel in however small numbers.[120]

Neutral merchant vessels are subjected to a belligerent's right of visit and search so that the nature of its cargo can be established.[121] After inspection of the cargo and the ship's papers a neutral merchantman must be allowed to sail.

Enemy cargo may always be taken as prize together with the ship or independently of the ship. But cargo on a neutral ship may only be captured if it constitutes contraband.[122] This applies to cargo owned by the enemy, at least as far as private goods are concerned.[123] The right of prize is even extended to ancillary depots in port.[124] Types of contraband that will make neutral vessels and neutral cargo liable to seizure were initially classified in groups of 'absolute' and 'conditional' contraband. Types of absolute contraband are, according to the London Declaration

113 *The William Bagaley* (1866) 5 Wall. 377, 408; *cf.*, Lewis, 'Domicile as a test of enemy character', 4 *BYIL*, 1923–4, 60, 62.

114 *The Phoenix* (1803), 5 C.Rob. 20, 21; *cf.*, Declaration of London 1903, article 58, 3 *AJIL* 1909 Suppl. 186.

115 *Cf.*, Declaration of London 1909, article 59.

116 Colombos, *Law of Prize*, *op. cit.*, 121 *et seq.*

117 Hague VI, articles 1–2.

118 *The Goulfar*, II, Hamburg Prisengericht, 19.12.1940; *The Leontios Tergazos* and *The Paolina Perla*, *AD*, 1943–5, 141, 167, 466; 1969, 414. *RGDIP*, 1950, 301. Kappelhoff Wulff, E., *Die Zulässigkeit der Ausübung des Prisenrechts während eines Waffenstillstandes* (Hamburg, 1973).

119 *The Edna* (1921) AC 735, 745.

120 *The Orozembo* (1807) 6 C. Rob. 430, 434; French Conseil des prises, *The Federico*, 10.5.1915, J.O., 1915, 2995; *ibid.*, 17.8.1916, *J.O.* 7505.

121 *The Marianne Flora* (1826) 11 Wheaton 3; Colombos, J.C., *Law of Prize*, *op. cit.*, 711; Pearce Higgins, A., 'Visit, search and detention', 7 *BYIL*, 1926, 3.

122 *Cf.*, Declaration of Paris of 1856, article 2, 1 *AJIL* 1907, Suppl. 89.

123 On public goods, see Smith, H.A., 'The Declaration of Paris in modern war', 55 *Law Quarterly Review*, 1939, 237.

124 *Roumanian*, *AD*, 1919–2, 299; *Anichab*, *AD*, 1942, 483; *Salmonpool*, *AD*, 1943–5, 471; *Kanto Maru*, *ibid.*, 496.

of 1909,[125] goods like weapons and ammunition, and other articles designed for war. Conditional contraband is what may be used either for war or for peaceful purposes.[126] According to the London Declaration[127] certain raw material can never be considered as contraband.

However, in practice this sharp division between different types of contraband has been difficult to maintain[128] and often other criteria than the adaptability for war use have been thought relevant. The condition that contraband must be susceptible to belligerent use has gradually been abandoned as any goods can be useful to the enemy. The identification of contraband was, already during the First World War, widened by the operations of numerous presumptions of belligerent use, for example in the case goods were destined for the use of an enemy government or its administration,[129] or if they were destined to enemy port. Such considerations of belligerent use applied even in the case of foodstuffs[130] by the reasoning that food for the civilian population will indirectly raise the rations of food given to the armed forces.[131]

It could be questioned whether such reasoning is compatible with the new prohibitions of starvation methods of war.[132] The prohibition may not affect blockade,[133] but the capture by prize would have very much the same effect provided such capture concerned sufficient quantities of foodstuffs.

The theory of 'infection' – that innocent goods lose their quality of being innocent if they are shipped together with contraband – was first laid down in the Declaration of London of 1909 and widened considerably the right of capture by prize. The theory depended, in its practical application, on the relative proportion of contraband in relation to the whole cargo[134] and was widely applied,[135] although States were not technically bound by the London Declaration.[136]

The theory was usually applied by objective criteria and the personal *culpa* or knowledge of the owner or master was irrelevant,[137] or knowledge would be

125 Article 22; the list was elaborated by the Fourth Committee at the 1907 Hague Conference.

126 *Ibid.*, article 24.

127 *Ibid.*, articles 28–29.

128 Garner, J.W., 'Violation of maritime law by the Allied powers during the World War', 25 *AJIL*, 1931, 26, 33.

129 *The Kim* (1915) P. 215.

130 *The Håkan* (1918) AC 148, 151.

131 Similar arguments were put forward during the massive humanitarian aid effort, by UN and numerous aid agencies, in Bosnia in 1993–5 which largely assisted the Serb army rather than the civilian population for whom the aid was intended.

132 Above, Chapter 8, section A iv b on starvation as a method of warfare.

133 Above, Chapter 8, section B iii.

134 *The Håkan* (1916) P 284.

135 *The Frédéric*, French Conseil des prises, 19.5.1922, *J.O.*, 1922, 5277; *The Kyzicos*, Italian Corte di prede, 24.5.1916, *Gazz. Uff.*, 1916.

136 Above, Chapter 8, section B i.

137 *The Kronprinsessan Margareta* (1921) 1 AC 486, 505; *The Lorenzo* (1914) 1 B & CPC 226; but for earlier views on the relevance of subjective criteria see, *The Ringende Jacob* (1798) 1 C.Rob. 89.

'inferred' from the quantity of carried contraband.[138] But in later decisions at least English Courts have required knowledge of identity of the shipowner of the nature of the cargo before a ship could be forfeited.[139] This applies even if the ship is under charter when knowledge of the charterers does not dispense with the shipowner's knowledge.[140] In conjunction with the criterion of susceptibility to belligerent use, the actual enemy destination has been decisive and the assessment of such destination includes transit and transhipment.

This area of law is still of topical importance, as is shown in numerous cases relating to goods bound for Israel. At one stage Egypt intercepted contraband bound for Israel in the Suez Canal,[141] but the Security Council has held that this is an abuse of the right at sea of visit, search and seizure.[142]

The ultimate destination is objectively assessed, independently of the intention of shipper or master,[143] and is subject to the doctrine of a construed 'continuous voyage'.[144] This doctrine has been applied to all types of contraband[145] but does not apply to blockades.[146]

Any shipment by an endorsable Bill of Lading may create a presumption of hostile destination.[147] The same applies in the case of blacklisted consignors and consignees[148] in what has been called 'statistical' cases[149] where the presumption of hostile destination is caused by a sudden and disproportionate increase in imports to a neutral country: by the sheer quantity criterion some goods are 'likely' to be reexported to the enemy.[150] There is even a constructive enemy destination if neutral territory is used by the enemy for supplies[151] or if a State is under 'strong influence' by one of the belligerents.[152]

The rules on contraband, developed in detail for the law of prize, have been analogously applied to justify confiscation of contraband elsewhere than at sea. Here, too, criteria of likely belligerent use has often been held to be decisive. Thus,

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138 *The Håkan* (1916) P. 266.

139 *The Zamora* (1921) 1 AC 810.

140 *The Ran* (1919) P. 317.

141 On Suez traffic, see Brown; 'World prize law applied in a limited war situation', 849; Cross, M., 'Passage through the Suez Canal of Israel bound cargi and Israeli ships', 51 *AJIL*, 1957, 530.

142 *E.g.*, SC, S/2322, 1951. *Cf.*, Mapidoth, R., 'The reopened Suez Canal in international law', *Syracuse Journal of International Law and Commerce*, 1976, 37.

143 *The Norden*, Hamburg Prisengericht (1917), 1 *Grotius Annuaire International*, 1917, 272; *The Pacific* (1920), 5 Lloyd's 103, 106.

144 *The Balto* (1917), P. 79: there are stringent requirements for breaks in the chain; *The Kim* (1915), P. 215, 249.

145 *The Kyzicos*, Italian Corte di prede (1916), *Gaz. Uff.*, 24.5.1916, No. 122.

146 *Cf.*, article 19 of the Declaration of London 1909.

147 *The Louisiana* (1918) AC 261; *The Kim* (1915) P.215; French Conseil des prises; *The Fortuna*, 14.6.1915, *J.O.*, 3903; *ibid.*, 27.4.1917, *J.O.*, 1917, 3362.

148 *The Stanton* (1917) AC 380.

149 Colombos, *The Law of Prize*, *op. cit.*, 195.

150 *The Baron Stjernblad* (1918) AC 173.

151 French Conseil des prises, 21.5.1918, *J.O.*, 1918, 4464.

152 *The Blommersdijk* (1917) Hamburg Prisengericht, 1 *Grotius Annuaire International*, 1917, 245.

in considering whether 'oil' constitutes 'munitions of war' has attached importance to the fact that it had to be refined before it could be put to military use and that, therefore, in the event, it did not constitute contraband.[153]

(3) Requisition

There are provisions for the protection of private property, and of certain State property, during assault and during occupation.[154] The Hague Regulations introduced new prohibitions to protect private property: such property may, for example, not be confiscated by an occupying Power,[155] nor is pillage allowed.[156] Under the Hague Regulations cultural property of the State or of municipalities is also treated as private property.[157]

However, an occupying Power has a right to levy taxes provided this is done, as far as possible, in accordance with the rules of assessment in force.[158] An occupying Power has also a far-reaching power of requisition for the 'needs' of the army of occupation. Such requisitions must be in proportion to the resources of the occupied country.[159] Furthermore, there must be a real military necessity for the taking.[160] The Power may only take what belongs to the occupied State or its citizens. Ownership of property to be taken should be verified before seizure.[161] There is a provision that the occupying Power shall pay for requisitions 'as far as possible in cash'.[162] If this is not possible, a receipt shall be given and 'the payment of the amount due shall be made as soon as possible'.[163]

The Power in occupation may take possession of cash and all other movable State property as well as appliances for the transmission of news or adapted for transport and other 'munitions' of war, even if owned by private individuals.[164] This constitutes what might be called 'vital' property for the war effort and slightly different rules apply with regard to promptness of compensation. All vital property and must be returned after the end of war when also compensation must be fixed

153 *NV de Bataafsche Petroleum Maatschappij and Others v War Damage Commission* (1956) Singapore Court of Appeal, 23 *ILR* 810.

154 Above, Chapter 6, section A vi.

155 Article 46.

156 Article 47; *cf.*, Freeman, A.V., 'Responsibility of states for unlawful acts of their armed forces', *RCADI*, 1955, ii, 325.

157 Article 56. For protection of cultural property, see also above, Chapter 8, section A iii (9) on the Hague Convention for the Protection of Cultural Property.

158 Hague Regulations, article 48; *The Lighthouse Case* (1956), FrenchGreek Arbitration Tribunal, *RGDIP*, 1959, 282.

159 *Ibid.*, article 52(1); Franklin, W.M., 'Municipal property under belligerent occupation', *AJIL*, 1944, 383; Jessup, P., 'A belligerent occupant's power over property', *AJIL*, 1944, 457; Woolsey, L.H., 'The forced transfer of property in enemy occupied territory', *AJIL*, 1943, 282.

160 *Cf.*, *The Beth El Case* (1978), Supreme Court of Israel, reported in Shamgar, M., *Military Government in the Territories Administered by Israel 1967–1980* (Jerusalem: Harry Sacher Institute, 1982), 371; *cf.*, *The Matityahu Case* (1979), *ibid.*, 398.

161 *Cf.*, Dominice, C., *La notion de caractère ennemi des biens privés dans la guerre sur terre* (Geneva, diss., 1961).

162 *Ibid.*, article 52(3); *cf.*, Austria, BGH (1951) *ILR*, 1951, 694.

163 Hague Regulations, article 52(3).

164 *Ibid.*, article 53(1) and (2).

if not already assessed and paid.[165] However, there have been cases where property was confiscated without compensation.[166] Requisitions of private property without compensations in violation of these rules are equivalent to theft.[167] Even heirs can sue for compensation if property has been wrongly taken.[168] If property is taken without compensation extraterritorial effect of the transfer may also be denied.[169]

But it may be difficult for persons to retrieve property or obtain compensation by suing in foreign courts as States often are granted immunity for requisitions.[170]

The right of requisition may also exist vis-à-vis neutrals but full compensation must be paid.[171] However, the remedies under the rules of *postliminium*[172] might assist a rightful owner after occupation has ceased to retrieve requisitioned goods which were taken from him.[173]

There is also a right over enemy property situated in the territory of a belligerent.[174] Thus, private enemy assets in a country which is not occupied may be taken. Sometimes such assets are used to indemnify a State's own nationals for war damage. This was the case with regard to taken enemy assets in the United States under the War Claims Act of 1962.[175]

(4) Angary

Angary implies the right to take *foreign* merchant ships for own use against compensation. The property at risk under such a right is thus the property of nonbelligerents, and very often the property of neutrals.[176] Established rules of naval warfare stipulate that such seizure may only take place in territorial

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165 *Ibid.*, article 53(2).

166 *Cf.*, *The Interhandel Case*, *ICLQ*, 1961, 495.

167 *Rosenberg v Fischer* (1948) Swiss BGH, *AD*, 1948, 467.

168 See *The French Company Compensation Case* (1966), Federal Supreme Court of Germany, *AD*, 1966, 454, where the German administration had taken property in 1940 and transferred it to a French-German partnership; compensation was due by the heirs of the German partner to the heirs of the French partner.

169 *E.g. United Bank v Cosmis International Incorporated* (1976) 542 2d 868, on nationalisation in Bangladesh without compensation; effects were denied in the United States as far as debts in that country were concerned; *Tran Qui Than v Blumenthal* (1979) US District Court, Northern District California, 469 F. Supp. 1202.

170 See *Ministry of Foreign Affairs v Federici and Japanese State* (1968) Trib. of Rome, 65 *ILR* 275, 279; *cf.*, *NV Exploitatie Maatschappij Benkalis v Bank of Indonesia* (1963) 65 *ILR* 348; *cf.*, also *The Oder-Neisse Expropriation Case* (1975) Oberlandesgericht, Munich, *NJW*, 1975, 2144; 65 *ILR* 127.

171 *Norwegian Shipowners Claim* (1922) 11 *RIAA* 237.

172 Castberg, F., *Postliminium* (Uppsala, 1944), 28.

173 *E.g.* Poland, *AD*, 1919–22, No. 342; Belgium, *ibid.*, no. 343; Italy, *ibid.*, 1927–8, no. 384.

174 *Cf.*, Turlington, E., 'Treatment of enemy property in the United States before the World War', *AJIL*, 1928, 270; Gathings, J.A., *International Law and American Treatment of Alien Enemy Property* (Washington, 1940).

175 Domke, M., 'The War Claims Act of 1962', *AJIL*, 1963, 354.

176 Albrecht, E., 'Requisitionen von neutralen Privateigentum inbesondere von Schiffen', 6 *ZaöRVR*, Suppl., 1912.

waters.[177] The right of angary is mainly designed for emergencies[178] and can only be exercised in cases of clear 'necessity'.[179] The existence of necessity comes near usual arguments on military necessity[180] and some have linked the two concepts.[181]

The nature of angary is different from requisitions. Angary leaves ownership unaltered and, therefore, there is a clear distinction between angary and requisitions or forms of expropriations.[182]

But the right of angary has often been abused and shows yet another instance where 'military necessity' distorts, rather than adapts, the Law of War.[183] The leading case is said to be the *Duclair Case*, when German troops sank six, possible seven, British coal ships to block the passage of the Seine in 1871 during the German war with France. Bismarck suggested that this was permissible under the Law of War as the action was caused by necessity and the action taken formed part of *jus angariae*.[184] Bismarck even claimed that France should pay compensation for the neutral coal ships but, to avoid British intervention in the Franco-German War, Germany eventually offered to pay compensation. It is remarkable that there were no protests from the United Kingdom with regard to the legitimacy of the action and to the claims that such measures would form part of the right of angary.[185]

The right of angary is, if it is ever legitimate, explained as interference with property, against compensation, for the war effort. It is not, on the one hand, meant to deprive the owner of assets of his property, as in the case of requisition or expropriation, but, as ownership remains, to use property on some limited time basis. The property may, subjected as it will be to the hazards of war, be destroyed, but that is a contingency to be taken into account when compensation is assessed and does not form part of any original intention.

Some have defended the *Duclair Case* as actually illustrating the right of angary, rather than the illegitimate interference with neutral goods, as the incident rather seems to suggest. Such writers have argued that it is merely the time limit which is different in the case of typical angary and, in the event of that case, if there had been a time gap between the taking and the destruction of the ships it would

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177 Schröder, A.H., *Das Angarienrecht, Die Beschlagnahmne von Handelsschiffen im Kriege* (Kiel, 1965), 21 *et seq.;* for a discussion of definitions, see, Arnsberg, R., *Das Angarienrecht* (Greifswald, diss., 1922), 49.

178 Arnsberg, R., *Das Angarienrecht, loc. cit.;* Balladori Pallieri, G., 3 *Diritto internazionale pubblico, La guerra* (Padua: Cedam, 1946), 403; 1 Dahm, *Völkerrecht* (Hamburg: Kohlhammer, 1958), 638: angary is *'ein Notstandrecht'*.

179 3 Phillimore 84 speaks of 'overriding necessity', *cf.*, 3 Calvo 138 on 'necessité d'ordre supérieur'.

180 Below, Chapter 12, section B i a.

181 Bluntschli, J.C., *Das moderne Völkerrecht* (Nördlingen: Beck, 1878), 795; den Beer Poortugael, J.C. *Het internationaal maritiem recht* (Breda: Broese, 1888), 413.

182 Constantinides, J.S., *La requisition des navires* étrangers (Marseilles: Issoudun: Editions Internationales, 1942); *cf.*, 4 *Moore* 3791.

183 *Cf.*, below, Chapter 12, section B i a.

184 21 Staatsarchiv, *Urkunden*, 4498.

185 See letter from Lord Granville, *ibid.*, 4505; *cf.*, Hartley, J.E., 'The law of angary', 13 *AJIL*, 1919, 290.

have constituted a normal case of angary; even though there was no such gap the taking comes under the same heading.[186]

The use of angary has sharply declined and few modern examples can be furnished.[187] There has also been a tendency to preclude the use of any such right by prohibition by treaty.[188]

(5) The Uneven Right of Taking

The right to capture ships as prize is a right of States. Title to property passes to the taking State without any court order.[189] Any attempt by a resistance movement or guerrilla group to take a ship of any kind[190] would be classified as hijacking, terrorism or theft, or, in some cases, piracy.

But the right to requisition has been thought to be a right also of resistance forces who, in this respect, are put on an equal footing with a State. However, only resistance movements of considerable consolidation in emergency situations in wartime have been held entitled to requisition property.[191]

It must also be remembered that most State practice relating to resistance forces in this respect is mostly of historical interest. On the other hand a new phenomenon has been added to the present scenario and that is piracy practised by a new form of terrorists, mainly off the coast of Somalia.

b The Effect of War on Contracts

Contracts between citizens of a belligerent State and alien enemies are normally not allowed and in the Anglo-Saxon world often regarded as *ipso facto* dissolved and terminated. Earlier contracts will be suspended if necessary.[192] The Peace Treaties after the First World War[193] and after the Second World War[194] followed the Anglo-Saxon practice of holding private contracts concluded with the enemy void. Courts in France had similar attitudes[195] even earlier and will now normally consider contracts with the enemy null and void as being contrary to public policy.[196] Other contracts relating to war situations considered null and void and contrary to public

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186 Le Clere, J., *Les mesures coércitives sur les navires de commerce* étrangers, *Angarie-Embargo* (Paris: LGDJ, 1940).

187 But see, Greek-Bulgarian Arbitration Commission (1926), *AD*, 1925–6, 456; *The Zamora* (1915) (PC); Tribunal de Commerce de Marseille (1945), *AD*, 1946, 238.

188 See Schröder, A.H., *Das Angarienrecht*, *op. cit.*, 40 *et seq.*

189 See, Downey, W.G., 'Captured property, booty of war and seized enemy property', 44 *AJIL*, 1950, 488; Freeman, A.V., 'General note on the law of war booty', *AJIL*, 1946, 795.

190 *E.g.*, the taking of *The Achille Lauro* in 1985.

191 For France, *The Herzog Case*, Conseil d'Etat, 15.6.1951, *RGDIP/RDP*, 1953, 1131; Italy, Turin, 11.7.1947, *AD*, 1948, 428; Rousseau, Ch., *Conflits armés*, *op. cit.*, 77 *et seq.*

192 *AD*, 1919–22, 394.

193 Treaty of Versailles, *e.g.* article 299.

194 *E.g.* Peace Treaty with Italy, 1947, Annex 16.

195 Markovitch, *Des effets de la guerre sur les contracts entre particuliers* (Paris, 1912).

196 Rousseau, *Conflits armés*, *op. cit.*, 52.

policy are those that concern raising money for military expeditions against another country. One such case is *In re Florsheim* before the Seine Tribunal in France.[197]

Citing that a contract would be against a government's foreign policy has also been cited by courts to declare a contract in war situations null and void. The court held this in *Kennet v Chambers*, a Case that concerned a sale of land to raise money for the war in Mexico.[198]

Although national legislation often existed on the prohibition on payment to the enemy, practice in Germany has not regarded any contracts *ipso facto* dissolved but often decided *in casu* whether there had been impossibility, as in any private contract situation.[199]

However, contracts with the parties in an enemy State are generally regarded as frustrated[200] or affected by impossibility at least as far as regards certain executory contracts.[201] Such contracts are not even revived after peace.[202]

The rationale of this rule is that no contract must benefit the enemy. Consequently, contracts between enemy aliens, both resident in another State, may be upheld.[203] In a similar vein, specific performance may be obtained for a contract under which the plaintiff had taken possession of the relevant property when war broke out and there was no gain accruing to the enemy by the execution of a deed.[204]

Conversely, a contract with a 'loyal citizen' in enemy country will be prohibited if, as a result of his actions, resources will be furnished to the enemy.[205] It is not the war that prevents the performance of a contract but acts done in furtherance of actual war. A contract, in the event of a charter party, was held not to be automatically frustrated by the Iran–Iraq War.[206] A contract may come to an end because it amounts to 'trading with the enemy'.[207] But apart from that doctrine a court will consider whether a contract is affected by the war and, secondly, whether the duration of the war will cause the factual impossibility of performance.[208]

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197 (1932) 31 AD 1938, 31. On military expeditions see further Garcia-Moram M.R., 'International law of hostile expeditions', 27 *Fordham LR* 1958, 320.

198 (1852) 55 US (14 How.) 38.

199 2 Berber 205.

200 McNair, *Legal Effects*, *op. cit.*, 4th edn, 133.

201 *2nd Russian Insurance Co. v Miller, Alien Custodian* (1924), 297 Fed. 407; (1925), aff'd 268 US 552; *Heidner v St. Paul & Tacoma Lumber Company of New York* (1923), 124 Wash. 652.

202 *Neumond v Farmers Feed Co. of NY* (1926), 244 Fed. 202.

203 *Kannengiesser v Israelowitz* (1919), 107 Misc. 349, 176 NY Suppl. 535.

204 *Hoshang and Others v Eddie Barucha and Others* (1966) High Court of Pakistan, PLD Karachi 752; 53 *ILR* 607.

205 *Sutherland (Alien Property Custodian) v Mayer*, (1926) 271 US 272.

206 *Finelvet AG v Vienna Shipping Co. Ltd., The Chysalis*, 1983, 2 Lloyds LR 658 *per* Mustill J.; *cf.*, *AS Nord-Östersjö Rederiet v E.A. Casper Edgar & Co. Ltd.*, (1923), 14 LLoyds LR 203. *Cf.*, *Geipel v Smith* (1872), LR 7 QB 404 on difficulties of performing during the French-German war; and *Horlock v Beal* (1916) 1 AC 486 on contracts being affected by acts during the First World War.

207 Above, in this section.

208 *AS Nord-Östersjö Rederiet v E.A. Casper Edgar & Co.* (1923) 14 Lloyds LR 203 at 207 *per* Lord Sumner.

The projected length of war will be decisive to a court's attitude as to whether performance is realistically possible.[209] In contract, it is thus mainly a question of delay of performance, a delay which, if it is likely to be substantial, will lead to frustration of the contract. If the cause of the delay is 'coterminous' with the war itself, or with an act in the furtherance of war, such as, for example, blockade, a presumption arises that the contract is frustrated.[210]

An executory contract which is to be considered abrogated must either 'involve intercourse (with the enemy), or its continued existence must in some way [be] against public policy as that has been laid down in decided cases'.[211]

If a contract does not require execution by transactions with the enemy, it will normally not be terminated.[212] Furthermore, 'acquired rights'[213] are not affected according to some authorities, often by asserting that the transaction is of no benefit to the enemy.[214]

Some executory contracts relating to rights of property, especially between landlord and tenant, are not avoided by war.[215] Interest may also be payable on a debt as 'incidental' to another transaction.[216]

Occasionally an alien may be refused to take inheritance under the national laws,[217] but in other cases it has been held that such private rights, especially if entrenched by treaty, are unaffected by war,[218] even if a disposition was made to a resident in enemy country,[219] as such taking did not come within the Trading with the Enemy Act.[220]

An enemy alien is often deprived of the power to sue in local courts. The normal rule is that an enemy alien cannot sue[221] but he has the right to defend himself.[222] Trading with the Enemy Acts often contain provisions to deprive enemy aliens

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209 *Kodros Shipping Corp. v Empresa Cubana de Fleta, The Evia* (1982) 3 All LR 350 *Cf., e.g. Bank Line Ltd. v Arthur Capel* (1919) AC 435; *Denny Mott & Dickson Ltd. v James B. Fraser & Co* (1944) 1 All ER 678 AC.

210 McElroy and Williams, *Impossibility of Performance* (Cambridge: CUP, 1941), 176.

211 *Ertel Bieber & Co. v Rio Tinto Co. Ltd.* (1918) AC 260, 269.

212 For a secondary 'viable' contract arising out of a previous terminated one, see, *Ottoman v Jebara* (1928) AC 269 *per* Viscount Dunedin.

213 But for a criticism of the doctrine of acquired rights, see Detter, I., *Finance, op. cit.*, 2nd edn, 105 *et seq*.

214 *E.g. Tingley v Muller* (1917) 2 Ch. 144.

215 *E.g. Halsey v Lowenfeld* (1916) 2 KB 707, 716 where a contract on rent due to alien enemy was not avoided by war; *Tingley v Muller* (1917) 2 Ch. 144 on a viable contract to buy a leasehold.

216 *Hicks (Alien Property Custodian) v Guiness* (1925) 269 US 71.

217 *Techt v Hughes* (1920) 229 NY 222.

218 *Goos v Brocks* (1929) 117 Nebr. 750; *In Roeck's Estate* (1922) 119 Misc. 190, 195 NY Supp. 505.

219 *Gregg's Estate* (1920) 266 Pa. 189, 109 Atl. 777.

220 Above, in this section.

221 *Ass. Cement Cos. Ltd. v Pakistan,* (1972), Pakistan PLD Lahore 201; *Guru Das Saha v Deputy Custodian of Enemy Property* (1969) PLD Dacca 841.

222 *Province of East Pakistan v Allahbad Bank Ltd.* (1968) PLD Dacca 1; *Haji Mohiuddin v Sirajul Alam Chowdhury* (1967) PLD Dacca 515.

of certain judicial remedies.[223] Such restrictions sometimes only affect those who owe allegiance to an enemy country.[224] In other cases courts have inferred enemy character from residence or from the 'likely gain' to the enemy if the suit is allowed.[225]

Identification of 'enemy alien' status in a Trading with the Enemy Act may depend solely on residence. The result of this is that aliens not classified as 'enemy aliens' may continue their business and trade unhampered, 'without the slightest governmental supervision'.[226] Sometimes courts have even held that 'mere' residence does not lead to enemy character.[227]

There is a complicated question on where a company is to be of enemy character. Such character has been held to attach if the company was under 'enemy control'.[228]

c Effect of War and Terrorism on Insurance Contracts

Apart from the effect that war has on contracts with the enemy there are also problems relating to contracts concluded between citizens in any one country, for example, with regard to insurance of goods or transactions affected by a war. For example, in the Iran–Iraq War a group of London underwriters decided, some six months before the outbreak of war, that rates for the area of the Gulf, west and north of the Straits of Hormuz, were to be increased. As for land, war risks have not been written since the Spanish Civil War, when, in 1937, it was decided by consensus of underwriters, that such insurance was no longer prudent.[229]

War risk now covers *inter alia* marine insurance. Rates are increased from the normal risk of 0.025 per cent to about 0.05 in time of actual war. Underwriters are not concerned whether there is an inter-State or internal war and whether war has been declared or not: they will assess factual risks according to objective circumstances as reported to them.

In the Falklands War one substantial claim under war risk was made to Lloyds for a US tanker hit in the area. This vessel had been well outside the zone.[230] Had it been inside the zone itself it would have entered on its own peril or possibly been guilty of non-disclosure of its planned course which must be informed to the insurance brokers for accurate assessment of the rate of premium.

War risk insurance normally covers damage due to acts of war, including invasion, insurrection, rebellion and hijacking. This type of insurance is most commonly used for ships and aircraft but also for exports to areas that are considered to suffer from

223 *E.g.* (UK) Trading with the Enemy Act, 1917, article 7(b), 40 Stat. 411, 417.

224 *Ozbolt v Lumbermen's Indemnity Exchange* (1918) 204 SW 252.

225 *Re Ref. No. 1 of 1965* (1966) High Court of Pakistan, PLD Karachi 160; 53 *ILR* 613.

226 *Tortoriello v Seghorn* (1918) 103 Atl. 393.

227 *S.A. Latif v J.B. Dubash* (1970), Karachi PLD 220.

228 *Daimler Co. Ltd. v Continental Rubber Co. (GB) Ltd.* (1916) AC 307, 345. For detailed rules see McNair, *The Legal Effects of War*, 3rd edn (CUP, 1948), 44–69; *cf.*, 4th edn, by McNair, A. and Watts, A. (Cambridge: CUP, 1966); for new rules that may be relevant in war situation as well, see *Barcelona Traction Case*, ICJ, 1970, 42.

229 Gibb., D.W., *Lloyds of London*, 1957, 231.

230 Above, Chapter 6, section A viii.

war risk. Recent policies also cover damage due to weapons of mass destruction. Insurance of War Risk Liability covers persons and cargo and is calculated based on the indemnity amount. This is normally supplemented by insurance for War Risk Hull, which covering the ship and is calculated based on its value.

After 9/11 war risk insurance for aircraft was temporarily cancelled. However, the US federal government set up a terror insurance programme to cover commercial airlines. Later insurance cover was reinstated with substantially lower indemnities.

Lloyd's Joint War Committee (JWC), composed of underwriting delegates from both the Lloyd's and the Interruption Underwriting Agencies (IUA), representing the interests of those who write marine hull war business in the London market, established a list of areas exposed to war risk. The Committee reviewed the Listed Areas in December 2011 and added Syria and Ivory Coast to the list but took Mindanao and Qatar off the List.[231] The added premium payable varies according to whether other policies are in place, for example, Marine Kidnap & Ransom Insurance, or whether other protective measures have been taken.

Some Member States of the International Civil Aviation Organization (ICAO) have agreed to revise the Convention On Damage Caused By Foreign Aircraft To Third Parties On The Surface of 1952 (the Rome Convention) to provide further compensation to victims of an aircraft accident caused by terrorist attacks resulting in damage to people and property on the ground.[232] A new Convention, the so called Ground Damage Convention, was adopted in 2009. However, very few States have ratified the Convention and it is unlikely, at present, to come into effect within the foreseeable time.

There are, at present, two further Conventions, adopted at ICAO in 2009, but both far from coming into effect until ratified by 35 States. One Convention is on Compensation for Damage Caused by Aircraft to Third Parties in Case of Unlawful Interference (The Unlawful Interference Convention) and a further Convention on Compensation for Damage Caused by Aircraft to Third Parties (the General Risks Convention).

231 Countries and areas (or parts thereof) included in the War Risk List in 2012, are the Arabian Sea, Bahrain, Djibouti, Georgia, Gulf of Aden, Gulf of Oman, Indian Ocean, Indonesia, Iran, Iraq, Israel, Ivory Coast, Libya, Malaysia, Nigeria, Pakistan, Philippines, Saudi Arabia, Southern Red Sea, Sri Lanka, Venezuela and Yemen. In many of these countries and areas only certain ports or cities are considered to be exposed to war risk. In several cases transit passage is exempt from war risk. In high risk areas like Somalia, vessels or craft must stay 40 nautical miles to the north of Somalia when transiting the Gulf of Aden to be covered by their insurance.

232 Compensation under the new convention would be funded through contributions from airline passengers and cargo shippers.

Chapter 11
Execution of the Law of War

Execution of an international convention implies the implementation of its provisions in practice. Without such execution the document's value in practical terms will be much reduced, even if it may still have important guiding functions for the behaviour of parties.

The shortage of rules on execution in conventions is notorious. Often States can unilaterally denounce treaties and then mechanisms for execution become demoted even further; for if a State is allowed to rid itself from the obligations under a treaty it may prefer to do so rather than to subject itself to any apparently 'compulsive' procedure of implementation. On the other hand, there is a growing body of opinion in many States that certain treaties could not be denounced, especially those in the field of human rights or Law of War, as such treaties often lay down basic rights that are either valid already under international law[1] or under respective national constitutions.[2]

A METHODS OF IMPLEMENTATION

i The Weapons Conventions

The considerable problems of verification of compliance with the Weapons Conventions have been discussed earlier.[3] These problems, which have given rise to considerable literature on the subject,[4] have been more in focus than legal problems concerning breaches. For verification seeks to ensure the compliance with a treaty whereas provisions on breaches only become relevant once a breach

1 See, above, Chapter 5, section C v on the underlying obligation.

2 See, for example, the French Constitution of 1958, embodying in its Preamble numerous human rights; it might even be that international law derived certain formulae on human rights from this Constitution.

3 Above, Chapter 3, section C iii b (3) and Chapter 8, *passim*.

4 See further, for example, Hafenmeister D.W, Tsipis, K. and Janeway, P. (eds), *Arms Control Verification: The Technologies that Make it Possible* (Washington, DC: MIT, 1986).

has been verified. Verification has thus a two-fold purpose: by various inspection methods and by the very existence of certain mechanisms, verification is intended to *preclude* that any breaches occur; and, secondly, by the same methods or mechanisms verification will furnish actual evidence and *prove* that there has been certain breaches of the obligations under a convention.

Apart from the verification procedures, which in themselves are weak and rudimentary in the weapons conventions, there are generally no specific provisions for breaches in these treaties and the rules on legal effects of breaches are left to general international law.[5] In one treaty, the En-Mod Convention, which stands halfway between weapons agreements and treaties on warfare methods,[6] there is no clause on denunciation. On the contrary, the treaty is said to be for 'unlimited duration'.[7] However, such a stipulation would not normally preclude the denunciation of a treaty.[8] On the other hand, there are specific provisions on revision[9] although such rights for amendment exist, without special authorisation, under general law of treaties.[10] The En-Mod Convention also has a report system for breaches which implies that a party which has 'reason to believe' that there has been a breach may lodge a complaint with the Security Council. This provision is accompanied by a curious statement that a complaint must include 'all relevant information' as well as 'all possible evidence to support its validity'.[11] Surely, any 'evidence' will come under 'relevant information' and it would therefore have been clearer if the provision had used the word 'including' instead of the misleading expression 'as well as'.

The State Parties undertake to cooperate in any investigation which the Security Council may initiate in accordance with the Charter.[12] There are thus no sanctions for breaches incorporated in the Convention itself. On the other hand, when relevant information is brought to the notice of the Security Council it may proceed to other powers it has under the Charter and determine, *ex officio*, that there is a threat to the peace warranting enforcement action. In this indirect way, therefore, one could possibly say that there are sanctions for certain breaches of this particular Convention.

ii Treaties on Methods and Humanitarian Rules

In the field of rules on warfare methods and humanitarian issues the position is different. Here, it is not the lack of provisions for implementation but the difficulty in applying these in practice which has given rise to problems. Thus, the Geneva Conventions have been difficult to implement although they had provisions

5 See, on the effect of breach in general, Mazzeschi, R.P., *Risoluzione e sospensione dei trattati per inadempimento* (Milan: Giuffré, 1984).

6 Above, Chapter 8, section E.

7 Article VII.

8 See Detter, I., *Essays*, *op. cit.*, 89 *et seq.*

9 Article VI.

10 See Detter, I., *Essays*, *op. cit.*, 71 *et seq.*

11 Article V(3).

12 Article V(4).

dealing with execution.[13] There had been numerous armed conflicts when the Geneva Conventions had applied only through the mediation of the Red Cross.[14] Protocol I of 1977, but not Protocol II, included provisions to ensure its execution. There is a stipulation that the High Contracting Parties *and* the parties to the conflict shall take all necessary measures to implement their obligations under the Protocol.[15] For its execution Protocol I thus relies on the assistance of groups which are not States.

The elaboration of new humanitarian obligations would be a hollow and futile exercise if there are no effective steps to bring about the compliance of assumed obligations.[16] However, when it came to ensure that the Protocols were coupled with adequate enforcement mechanisms most States at the Conference refrained from action. Virtually all States present 'were responsible for the failure to include enforcement mechanism'.[17] Protocol I provides that all parties shall, without delay, take all necessary measures for the execution of their obligations under the Protocol.[18] Such measures are more comprehensive than the previous provisions in the Hague Regulations which only referred to orders to the land forces[19] or the Geneva Conventions.[20] Under article 84 all legislative and other measures must be communicated to the other parties of the Protocol.[21]

a Protective Power System

For the implementation of humanitarian rules the Geneva Conventions have adopted another system. The Geneva Conventions rely on a Protective Power system[22] but the system has not been a success in practice. It had only been used twice, in Suez and in the Goa affairs in 1956 and 1971 respectively.[23] In the 1971 Bangladesh crisis, Switzerland was nominated as a Protective Power but the nomination was not accepted by India.[24]

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13 Convention I articles 49–50; Convention II, article 50; Convention III, articles 126–128; Convention IV, articles 142–147.

14 *Cf.*, above, Chapter 6, section B ii d and below, in this Chapter, section c on mediation.

15 Article 80.

16 *Cf.*, United States, A/C.6/37/SR.19.5, para. 16.

17 Forsythe, D.P., 'Legal management of internal war', *AJIL*, 1978, 294.

18 Article 80.

19 Article 1 and above, Chapter 4, section C ii.

20 Above, Chapter 1, section B ii.

21 Article 84. See, further, Abi-Saab, G., 'Le mécanisme de mise en œuvre du droit humanitaire', *op. cit.*, 177.

22 See Convention I, articles 8–11; Convention II, articles 8 and 11; Convention II, articles 8 and 11, and Convention IV articles 9 and 12.

23 Also before the Geneva Conventions there had been problems to appoint an *ad hoc* protective power, for example to supervise the treatment of prisoners of war in enemy territory. For example, a request for such appointment by Finland in the Winter War was refused by the Soviet Union, see, Wulf, *Handbok i folkrätt under krig*, *op. cit.*, 241. On the traditional right of belligerents to select a protecting power to safeguard their interests when diplomatic relations have been suspended, see Rousseau, Ch., *Conflits armés*, *op. cit.*, 36–52.

24 See Forsythe, *Humanitarian Politics*, *op. cit.*, 166.

Protocol I mentions Protective Powers in various contexts[25] and it is clear that a similar system to that of the Geneva Conventions has been adopted. By the definitions in the Protocol[26] it is clear that a neutral State, or a State not party to the conflict, may be appointed as Protecting Power and carry out functions under the Protocol. An 'impartial' body can presumably also undertake this task if the parties so agree.[27]

At the Conference there was a specific offer by the Sovereign Order of Malta to this effect and the representative underlined that the Order would be pleased to cooperate with the ICRC, a body which, of course, is of great importance in this context.

There had been an attempt to secure an automatic appointment of the ICRC if other Protective Powers failed to be nominated.[28] The confidence of States in the ICRC was repeatedly assured[29] but the article failed to be adopted.

The Protocol 'missed the opportunity of making an advance in the system of implementation of humanitarian law' by not making an offer to act as Protective Power compulsory.[30]

However, it was made clear that other organisations would also be prepared to assist as Protective Powers if so requested, for example the Organisation of African States.[31]

b Fact-Finding Commissions

The 1929 Convention on the Wounded and the Sick[32] provided for inquiries to be instituted in the case of alleged violations of the Convention. The ICRC was called on, in this context, in the Italy-Abyssinian War in 1936 and in connection with the Katyb Affair in 1943.[33]

The Geneva Convention also includes some provisions on inquiries.[34] Although called upon under the relevant articles to inquire into the alleged use of bacteriological weapons in the Korean War in 1952, the ICRC showed reluctance to carry out any investigation as it 'would be the first step of a judicial procedure which does not lie within its purview. Moreover, by assuming that role [of a body responsible for inquiries] the ICRC would find its neutrality called in question by at least one of the parties, to the detriment of the unquestionably useful humanitarian

25 Articles 2, 5, 6(1), 11, 33, 45, 60(2), 78(1) and 84.

26 Article 2(c).

27 *Cf.*, resolutions of the *Institut de droit international*, on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which the United Nations Forces may be Engaged, and Bindschedler-Robert, D., *Reconsideration, op. cit.*

28 *E.g.* Greece, CDDH/SR.37. vol. 6, 78.

29 *E.g.* Belgium, CDDH/SR.47, vol. 6, 76.

30 Egypt, *ibid.*, 77.

31 Nigeria, *ibid.*, 80.

32 Above, Chapter 9, section B ii.

33 ICRC, *Action by the ICRC in the Event of Breaches of International Humanitarian Law*, Geneva, 1981, 5.

34 Geneva I, article 52; II, article 53; III, article 132, and IV, article 149.

activities carried out on that party's territory'.[35] The United Nations Secretariat sometimes dispatches an inquiry team to verify compliance with the Law of War. Thus, a mission of the Secretary General was requested in 1985 to report on treatment of prisoners of war in the Iran–Iraq War.[36] The ICRC had suspended its protection activities in Iran as a result of continuing difficulties due to which the ICRC found itself unable to fulfil its obligations under the Geneva Convention.[37]

Under Protocol I of 1977 an international Fact-Finding Commission will be established if not less than 20 States accept its competence.[38] Only if States make an Optional Declaration, modelled on the Optional Clause of the Statute of the International Court of Justice, will they be bound by the findings of the Commission. This compromise was reached after some discussion and may show how sensitive States still are to allow inspection groups in their territory. It must also be noted that the prospective Commission was not even granted any powers of decision but can only make recommendations.

The Commission, once established, will have the power to 'make enquiries' into alleged grave breaches of Protocol I and restore, through its good offices, the respect for humanitarian values.[39] Its Chambers may invite parties to a conflict to produce evidence and it will 'seek' other evidence as it finds appropriate. All evidence will be disclosed to the parties[40] but will not be made public.[41]

The Commission will, to some extent, be institutionalised having special administrative facilities granted by Switzerland[42] and will be financed by contributions.[43]

The working of the Commission may well prove to be valuable and more effective than the 'condemning' practice of the General Assembly of the United Nations.[44]

A dramatic fact-finding mission was sent to Iraq to search for weapons of mass destruction (WMDs), widely thought to be held by Saddam Hussein and effectively used as a justification for the intervention and the ensuing war. The Iraq Survey Group (ISG) was a fact-finding mission sent after the 2003 invasion of Iraq. It consisted of a 1,400-member international team organised by the Pentagon and the CIA to search for WMD stockpiles, including chemical and biological agents and any supporting research programmes and infrastructure that could be used to develop WMDs. Its final report is commonly called the Duelfer Report. The Iraq Survey Group replaced the UN Monitoring, Verification and Inspection Commission

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35 ICRC, *Action by the ICRC, op. cit.*, 5.

36 S/16962, 19 February 1985.

37 ICRC, *Second Memorandum of the ICRC to State Members Parties to the Geneva Convention of 1949 Concerning the Conflict between the Islamic Republic of Iran and the Republic of Iraq*, 10 February 1984; *cf.*, CICR, *Appel*, 7 May 1983.

38 Article 90(1)(b).

39 Article 90(2)c ii.

40 Article 90(4)(b).

41 Article 90(5)(c).

42 Article 90(1)(f).

43 Article 90(7).

44 See Kalshoven, F., 'Reaffirmation and development', *op. cit.*, 122.

(UNMOVIC), which had been mandated by the Security Council to search for WMDs. None was found; but there were lingering doubts in some quarters as chemical and biological are easily hidden and can, in some cases, be lethal in very small doses that could have been fitted, for example, in the warhead of aeroplanes.

Other dangers are also represented by the type of harmless chemical agents which, combined with other agents, could produce binary lethal weapons, also easily disguised or camouflaged.

c Mediation

Mediation may prove a useful method of settling an armed conflict once it has commenced.[45] The ICRC has played an important role in mediation. This study has often referred to the role of the ICRC[46] and the functions of the ICRC may be underlined further in the context of mediation in armed conflicts as such mediation provides a means to ensure the application of humanitarian rules. In a paradoxical statement one commentator has summed up the role of the ICRC stating that 'The ICRC is too weak to be feared and that is the source of its strength'.[47] The ICRC may prove valuable as a mediator to ensure the application of Protocol I and may also, unofficially, contribute as a mediator for Protocol II. It has mediated in numerous hijacking and kidnapping incidents[48] and has experience of mediating in Indochina, both during the French phase[49] and during the American phase.[50] It also mediated in Algeria.[51]

The reason for the success of the services of the ICRC in wars is undoubtedly that it is considered to be 'above the battle'. It was, for example, the only relief organisation able to assist in the Hungarian Revolution in 1956.[52] It was also the ICRC which, after the Suez debacle in 1956, provided the first airliner between Israel and Egypt since the beginning of the war in Palestine in 1948.[53]

The ICRC is empowered under its own Status to take 'cognizance' of complaints regarding alleged breaches of the humanitarian Conventions,[54] but has also in practice intervened on its own initiative.[55] There is perhaps a distinction to be made between the intervention by the ICRC in some instances after reports of violation and in cases where the ICRC more clearly sets out to mediate between the parties to a conflict. But both types of action can be subsumed under a wide heading of mediation if this is construed to include all efforts to achieve compliance with the humanitarian Conventions.

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45 Above, Chapter 3, section C iv.
46 For example, above, Chapter 5, section A.
47 Forsythe, *Humanitarian Politics, op. cit.*, 248.
48 *Ibid.*, 29.
49 *Ibid., op. cit.*, 144 *et seq.*
50 *Ibid.*, 152 *et seq.*
51 *Ibid.*, 47 *et seq.*
52 Joyce, *Red Cross International and the Strategy of Peace* (New York: Oceana, 1959), 167.
53 *Ibid.*, 148.
54 Article 6(4).
55 ICRC, *Action by the ICRC, op. cit.*, 2–3.

One advantage of the ICRC mechanism is possibly the 'discretion' principle, which reassures States that no evidence will be disclosed to the outside world. The ICRC has often shown that it would not communicate any facts on alleged violations of the European Conventions of Human Rights to the Council of Europe on the *Greek Case*, although prompted to do so by the Scandinavian States.[56] There may have been, in that instance, a formal agreement between the ICRC and the Greek government,[57] but even if there had been none States could rely on the discretion of the ICRC.

The ICRC is not always able to visit detainees and prisoners of war when it so wishes.[58] But the Red Cross may, in other ways, contribute towards solutions of problems by good offices if allowed to engage in full discussions with the authorities that have detained persons.

The recognition of the ICRC of certain national Red Cross groups has great importance for the claimed statehood of certain factions[59] but this issue must not be confused with its potential function to mediate between established States and liberation movements under Protocol I.

For a considerable time, Red Cross officials certainly proved impartial in practice and devoid of any allegiance to certain States.[60] However, from the moment in time when the ICRC ceased to be independently funded but started to receive heavy State contributions, there have been a number of incidents when the impartiality of the ICRC has been put in doubt.[61] It may be that, from that moment on, the ICRC was no longer 'too weak to be feared'.[62]

d The Role of Individuals

Various treaties on the Law of War grant rights and protection to individuals. Certain duties are also imposed in that rebels, too, must wage only certain types of warfare and grant combatants and civilians the level of treatment stipulated. On the other hand, the mechanisms of execution of the certain instruments of the Law of War, especially the Geneva Conventions and the Protocols of 1977, also depend on the assistance of individuals, as is acknowledged expressly by these treaties.

For example, the famous Martens clause which figures in numerous treaties and conventions relevant to the Law of War, is one where individuals play an important part: all in war will enjoy the protection and the rule of the principles of the law of

56 *Ibid., op. cit.*, 43.

57 *Ibid., loc. cit.*

58 On the difficulties to visit Palestinian prisoners, see PLO-Observer, A/C.6/37/SR.19,6, para. 19.

59 See further, *ibid.*, 16 *et seq.*

60 Some officials carry a Swiss passport in addition to the Red Cross *laissez passer*. See, further, Boissier, P., *De Solférimo a Tschoushima, Histoire du Comite International de la Croix-Rouge* (Paris: Plon, 1963); Huber, M., *The Red Cross: Principles and Problems* (Geneva: ICRC, 1941); Knitel, H.G., *Les Délégations du CIRC* (Geneva: IHEI, 1967).

61 Above, Chapter 9, section iii.

62 Above, in this section.

nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience.[63]

e Dissemination

New rules cannot be implemented unless they are known. The Geneva Conventions and the Protocols provide that their content is disseminated.[64] States have been urged by the Secretary General of the United Nations and by the ICRC to organise Conferences to better understand and learn the contents of humanitarian rules.[65]

In spite of their above-mentioned commitments under treaties to disseminate knowledge of the Law of War, many States also fail to instruct their military commanders, and their soldiers, in the contents of the Law of War. States also fail to encourage universities in their territory to teach the Law of War. It may be noted that the Law of War does not form part of courses on international law in numerous universities and does not form part of any of the modern standard textbooks on international law. The result of this double failure, of universities and of States, can only contribute to further brutalisation in armed conflict.

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63 See above, Chapter 5 on the Martens clause.

64 Protocol I, article 83; Protocol II, article 19.

65 See *AFDI*, 1982, 686.

Chapter 12
Suspension of the Law of War

A DENUNCIATION

The weapons conventions contain drastic rights for denunciation. The Biological Weapons Convention[1] of 1972 thus provides that 'Each State Party to the Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardised the supreme interests of its country'.[2] Such a provision clearly leaves great latitude to States in deciding subjectively[3] what are their 'supreme interests'. However, the adjectives 'extraordinary' and 'supreme' both convey some heightened obligation of States to show that objective circumstances warrant their subjective assessment. The provision appears to be an escape clause which leaves a loophole for States in case unusual action has to be taken. The way the clause reads it also suggests that it may have to be a question of some emergency caused by some overhanging and immediate threat. But considering that the Convention mainly deals with the destruction of biological weapons stock[4] it is difficult to visualise a situation where States would feel justified to safeguard their 'supreme interests' by taking up further production of biological weapons. But the organisation of production of new biological weapons would involve some time and this time element is difficult to reconcile such a decision with the implied situation of emergency.

Similar clauses of denunciation were included in the 1998 Chemical Weapons Convention.[5] Earlier discussion and the two major Drafts of the convention reflect the anxiousness of States to risk their national interests. Thus, the United Kingdom Draft of 1976 thus referred to denunciation for 'supreme' national interests and the United States 1984 Draft referred to a right of a State to withdraw from the

1 Above, Chapter 7, section D.
2 Article XIII(2).
3 *Cf.*, above, Chapter 8, section A ii c on subjective criteria.
4 See further above, Chapter 7, section D.
5 Above, Chapter 7, section D iii.

Convention 'if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardized the supreme interests of its country'.[6] The State would have to notify other States and the Security Council of the United Nations of what such extraordinary events involve.[7]

The Conventional Weapons Convention of 1981[8] lays down a time limit for denunciation, a method which is not uncommon in treaty technique,[9] but which has a special significance to a weaponry treaty. The treaty allows specifically that it may be denounced by a party[10] but it also stipulates that such denunciation will only take effect one year after receipt of notification of the denunciation.[11] Furthermore, the Convention will continue to apply to any war or armed conflict, and these situations include liberation wars[12] in which a party is 'engaged' at the expiry of the one year period. Such obligation to be bound by the Convention continues

> 'until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or reestablishment of the person protected by the rules of International Law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peacekeeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.'[13]

The application of the Convention is thus lengthened to make it difficult for States to denounce the Convention because of any actual involvement in war. The State would remain bound until the end of that war. It is to be noted that the Convention applies both to wars and to liberation wars[14] and it may be suggested that the only time when a State would find it politically expedient and legally possible to denounce the Convention because of actual armed conflict would be in the situation of an internal war which did not qualify as a liberation war.

It is interesting that the Weaponry Convention prolongs its own application after denunciation even up to the stage of repatriation of prisoners of war, which usually takes places after the end of hostilities.[15] But if hostilities have ceased the need for weapons will also have discontinued and the regulation of their use seems chronologically unwarranted. It may be that the phrase 'repatriation' was chosen to indicate what is normally held to be the final phase of termination of war.[16]

Another matter which should be clarified is the ambiguous reference in the denuniciation clause to the UN forces or missions. The way the article reads

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6 Article XVI(2).
7 *Loc. cit.*
8 Above, Chapter 7, section A.
9 See Detter, I., *Essays, op. cit.*, 87.
10 Article 9(1).
11 Article 9(2).
12 Above, Chapter 7, section A ii.
13 Article 9(2).
14 Above, Chapter 6, section B i b.
15 Above, Chapter 10, section A ii.
16 Above, Chapter 10, section A ii.

suggests that these forces or missions have been given specific functions under the Protocols and that such functions also could lengthen the application of the Convention. But this is not so. The only Protocol that refers at all to the UN forces and missions is Protocol II on Treacherous Weapons[17] which provides for enhanced protection of such forces and missions in a mined or booby-trapped area: the reason for the presence of such missions and forces lies outside the Protocol. But indirectly this means that it is ultimately the Security Council, or in exceptional cases, the General Assembly,[18] that will have the power to decide that the Conventional Arms Convention will continue to apply in a war after the engaged State party has denounced the treaty, by prolonging the mandate of the UN forces or missions in the area.

The Geneva Conventions, as well as the Protocols of 1977, can be denounced by mere unilateral declarations[19]

If the normal rules for breach of a treaty apply parties could still have the right of denunciation if there is breach by another side.

B BREACH

Reasons for violating rules of war are often put forward as 'justifications' of breaches.

i Grounds for Deviations

a Military Necessity

The existence of military necessity was recognised in treaty law already in the St Petersburg Declaration of 1868[20] which established that there are 'technical limits at which military necessities ought to yield to the requirements of humanity'. By implication, there are thus cases when such limits will not yield. On the other hand, the defence plea of military necessity has sometimes been rejected completely as one 'condemned by the civilized world'.[21] There is no need to emphasise that it is a dangerous and harmful doctrine[22] providing as it does a loophole, an excuse, for every conceivable situation. There are endless cases where the defence plea has been raised to justify the suspension of virtually every rule of the Law of War. The concept is usually known as military necessity but also *Kriegsraison*[23] or military security[24] have been used to cover similar ground. Military necessity suspends the criminal character of certain war 'crimes' and converts them into legitimate acts.

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17 Above, Chapter 7, section A ii d.

18 Under the Uniting for Peace Resolution, see my *Law Making, op. cit.*, 38–39.

19 Geneva I, article 63; Geneva II, article 62; Geneva III, article 142; Geneva IV, article 158; Protocol I, article 95; Protocol II, article 25.

20 18 *NRGT* 1 sérïe 474 and above, Chapter 3, section C v.

21 *The Rauter Case* (1948), *AD*, 1949, 543.

22 Downey, W.G., 'The law of war and military necessity', 47 *AJIL*, 1953, 251.

23 Above, Chapter 1, section D i.

24 *E.g. The Mannstein Case* (1949), *AD*, 509.

But military necessity is a vague concept; often relying on a presumption that the principle *vae victis* will pre-empt investigations as to justifications of acts of the victor in a war after the end of hostilities.

There is great difficulty to reconcile any humanitarian rules of warfare with 'military necessity'. On the one hand, a State already engaged in a war is doing its utmost to win the war but, on the other hand, this objective may be easier to attain if the State resorts to inhumane warfare. The elusive blanket phrase 'military necessity' may undermine any advances made in the humanitarian field since, again, it is a matter for the subjective assessment of the State whether such necessity exists. Yet, there appeared to exist a core of identifiable needs which determined whether a belligerent may take certain action and possible to ascertain at least drastic excesses.[25]

The question of military necessity becomes most acute if there is a question of shortening the war as a whole. Some have mentioned Churchill's 'abhorrence' to liquidate German officers on a large scale even if it would have shortened the war.[26] Some may, at the same time, defend the dropping of the atom bomb on Japan during the Second World War as the decision had been taken 'in acute tension'.[27]

In terms of the Law of War, the decision to use the Hiroshima Nagasaki atom bomb, with the effects on the largely civilian population, appears to be questionable even if it was 'effective' in the sense that it shortened the war. With regard to the 'tension' in which the decision makers found themselves a sharp distinction must be made between such a deliberate act, relatively slow to put into effect, involving the cooperation of numerous persons, and the overwhelming necessity that hallmarks any right to self defence, or legitimate acts of necessity.

There arises, in any armed conflict, a question of balance between principles of humanity and demands of military necessity. Already at the Hague Conferences in 1907 there were arguments suggesting that too strict application of the Law of War would lead to military disadvantage, particularly with regard to stringent rules for treatment of prisoners of war.[28] Equally, retreats from a campaign often entailed, for military reasons, the burning of civilian property, which the withdrawing forces would set alight to safeguard themselves. At sea, it is often difficult for a vessel, engaged in strategic operations, to abandon its planned pursuits to rescue shipwrecked people.

The Hague Conventions recognised the conflict between military necessity and strict application of humanitarian rules and admitted certain exceptions to the Conventions. Hague Convention IV[29] thus stipulates that 'it is especially forbidden

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25 *Cf.*, the allegation at the Nuremberg Trials that some German generals had confused military necessity with convenience, *e.g.*, *United States v List et Al.*, XI *Nuremberg Trials of War Criminals*, 1252–1255.

26 Holsti, K.J., *International Politics: A Framework for Analysis*, 4th edn (New York: Prentice-Hall, 1983), 381.

27 *Ibid.*, *loc. cit.*

28 *Cf.*, the reservations to the 1907 Conventions with regard to interrogation of prisoners of war, above, Chapter 9, section B iii f.

29 Article 23.

... (g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'.

The 1929 Convention on Prisoners of War also contained provisions that recognise military necessity as a means of mitigating strict application of the Convention. Thus, the Convention allows derogations due to military necessity until a taken person has reached a prisoner-of-war camp.[30]

The Geneva Conventions of 1949 contain several limitations such as the Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave them with a part of its medical personnel and material to 'assist in their care'.[31] There are numerous other examples in the Geneva Conventions[32] and Convention IV even contains an escape clause wide enough to exempt all protected persons under its aegis. The Convention thus prescribes that 'the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of war'.[33]

Military necessity may also justify, in terms of the Geneva Conventions, destruction of civilian property,[34] and a similar exception clause was inserted in the Hague Convention of 1954 on the Protection of Cultural Property.[35] Cultural property, in general, may be attacked in case of military necessity[36] and even specially protected property[37] may be attacked in case of 'unavoidable' military necessity. Geneva Convention IV on Civilians also permits derogations from the rights of Protecting Power over food supplies and medicines.[38]

The escape clauses in the Geneva Conventions even made some writers doubt whether 'the equipoise thus sought to be established between the principles of military necessity and humanity is realistically a durable one'.[39] It may be that any derogation from the Conventions must be substantiated as compelling military necessity as no one can be held to do the impossible.[40] However, at the root of the

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30 Article 1.

31 Geneva Convention I, article 12.

32 Convention I, article 42 concerning obligations to make emblems of medical units visible to the enemy; similar rules on identification are contained in Convention IV, article 18 on civilian hospitals; Convention III, article 8(3) on duty of Protecting Powers to take into account such necessity; aricle 23 on prisoner of war camps; article 76(3) on rights of correspondence; article 126(2) on visits to prisoners; Convention IV article 83 on camps on internment; Convention IV article 49 mass forcible transfers; *ibid.*, article 78 on 'assigned residence' and internment of civilians; Convention III, article 126 concerning restrictions of visits of Protection Powers to prisoner of war camps; Convention IV, article 55 on verification of the state of food and medical supplies by Protecting Powers; *ibid.*, article 16 concerning search for the killed and wounded.

33 Article 27, *in fine.*

34 Convention IV, article 53.

35 249 *UNTS* 240, article 4(2).

36 Article 4.

37 Above, Chapter 8, section A iii b (9).

38 Article 55.

39 McDougal, M.S. and Feliciano, F.P., *Law and Minimum World Public Order* (New Haven: Yale University Press, 1961), 684.

40 *Cf.*, ICRC, *Report on 1947 Conference of Government Experts*, *op. cit.*, 114, and Diplomatic Conference, II a, 323, and II B, 280.

difficulty is doubtlessly the uncertainty as to what exactly military necessity implies: it cannot be the global aim of 'overpowering the enemy',[41] which is a definition so wide as to be useless.[42] It is somewhat surprising that in the number of war cases before ICTY, the tribunal has made little effort to define military necessity and has contributed little to illustrate in which situation is may be offered as a proper defence.[43]

Any wide definition of necessity would wholly undermine the network of the Law of War. Indeed, the equation of military necessity and the purpose of war reiterates the condemned[44] German theory of primacy of *Kriegsraison* over *Kriegsmanier*, *i.e.* the doctrine that any 'reason' or 'necessity' of war displaces provisions on the customs of war.[45] Thus, even military success of an individual operation may be subsumed under such a wide definition.[46]

Such a wide concept of military necessity is no longer accepted as shown in ample case law. In the *Peleus Case* it was emphasised that the proper way for a submarine to avoid detection after sinking another ship is to depart as quickly as possible rather than to shoot all survivors under a cloak of military necessity.[47] Thus, if there is an alternative course of action the plea will not be accepted; and there is usually some such course albeit affording less effective and immediate military advantage. These restrictive rules also apply to any plea of military necessity to help the 'war effort', such as when Armament Minister Speer ordered civilians from occupied territories to work in munition factories.

Similarly, the use of anticipatory force to destroy property in an occupied State to prevent incursions by enemy forces has been condemned.[48] General Jodl ordered the destruction of real property in northern Norway to make the advance of Soviet troops more difficult. The Court held that such destruction could not be warranted by any military necessity as the Soviet troops had not yet crossed the border. Thus, military necessity cannot afford protection in cases where the imminent danger of attack has not yet materialised.

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41 Oppenheim thus equates military necessity with the purpose of war, 2 *Oppenheim*, 1952, 232.

42 McDougal, M.S. and Feliciano, F.P., *Law and Minimum World Public Order*, *op. cit.*, 1038–1039.

43 *Prosecutor v Brđanin*, Case No. IT-99-36-T, Sixth Amended Indictment, 10 (9 December 2003) ('[u]nlawful and wanton extensive destruction and appropriation of property, not justified by military necessity'); *Prosecutor v Blaškić*, Case No. IT-95-14, Second Amended Indictment, count 11 (25 April 1997) ('extensive destruction of property'); *Prosecutor v Kordić* Case No. IT- 95-14/2, Amended Indictment, counts 37, 40 (30 September 1998) ('extensive destruction of property'); *Prosecutor v Naletilić & Martinović*, Case No. IT-98- 34-PT, Second Amended Indictment, count 19 (28 September 2001) ('extensive destruction of property'); *Prosecutor v Rajić*, Case No. IT-95-12-PT, Indictment, count 5 (23 August 1995) ('destruction of property'); *ibid.*, count 9 (13 January 2004) ('extensive destruction not justified by military necessity and carried out unlawfully and wantonly').

44 See, Stone, J., *Legal Controls*, *op. cit.*, 353.

45 2 *Oppenheim*, 1952, *loc. cit.* argues in the same vein that the Law of War is not suspended, merely its usages.

46 2 Meurer, C., *Kriegsrecht* (Munich: Schweitzer, 1907), 14.

47 1 *War Crimes Report*, 1946, 1.

48 *The Jodl Case*, UK, *Trial of Major German War Criminals*, London, 1948, 415.

The Protocols of 1977 mark an advance on the previous pattern of exception clauses insofar as there are comparatively few such clauses. However, if there is 'imperative military necessity' a party to a conflict may be entitled, under Protocol I, for example to destroy foodstuffs or agricultural areas although these may be 'indispensable to the survival of the civilian population'.[49] Such a provision was included to enable a party to use the 'scorched earth' technique of withdrawing forces to defend their own national territory from attack. There were protests at the anti-humanitarian formulation but it was the 'most demanding standard that would be acceptable' to States.[50] Activities of relief personnel may be limited in case of imperative military necessity[51] and for similar reasons civil defence personnel may be restrained in their tasks.[52]

The denunciation clauses in the weapons conventions can also be thought to be an expression of the military necessity doctrine. Here, it is not the actual necessity in combat which suspends the rules of the Law of War. However, the clauses can be perceived to safeguard State interests in another situation of military necessity to denounce obligations. In this sense, the denunciation clauses in these treaties reflect a general overall political or military threat to State 'security'. In the operation to bring about suspension of otherwise valid treaties the doctrine of military necessity and the theory of necessity of State[53] come near each other.

It is not only treaties and conventions that may be suspended in their application by dubious claims of military necessity but also general uncodified rules on methods, including rules on targets, and humanitarian rules. The legal position today, after a considerable body of case law has developed, appears to be that rules of the Law of War must only be suspended in case of 'clear' military necessity; that the burden of proof is increased for the suspension of any rules exempting targets from attack; and an especially enhanced burden of proof applies in the case of suspension from humanitarian rules. The degree of military necessity is also increased in proportion to violation of these three groups; the presumption exists that no military necessity can justify violations of rules of the Law of War.

b Anterior Breach

Most treaties can be denounced if there is a substantial breach on the part of one of the Co-Contracting parties.[54] The rules in this respect, followed for a very long time indeed, were codified in the Vienna Convention on the Law of Treaties of 1961.[55] However, a curious exception was made in the article to treaties of a 'humanitarian' character: a breach by another party would, according to the Vienna Convention, not entitle a party to denounce a 'humanitarian' Convention.[56] Which are these

49 Article 54(5) and 54(2).

50 CDDH/407/Rev1, 51 and Bothe et al., *New Rules on Victims of War, op. cit.*, 342.

51 Article 71(3) of Protocol I.

52 Article 62(1).

53 Above, Chapter 10, section C iii a (3) on requisition.

54 See Detter, I., *Essays, op. cit.*, 91.

55 Article 60.

56 Article 60(5).

'humanitarian' Conventions? Are they all the treaties bearing on the Law of War? If that is so, how is the loss of right to 'denounce' a treaty for breach compatible with the right to 'denounce' for even less than that, without there having been a breach, a right entrenched in most of the Conventions on the Law of War?[57] Do different rules apply to the effect of a breach of a treaty on weapons or methods of war and to the effect of violations of conventions on humanitarian law? Not everyone will accept that there is a set of norms regarding binding standards irrespective of specific adherence and irrespective of reciprocity. It does seem difficult to reconcile these two positions and serious questions arise as to the nature of the legal obligation of the treaties of the Law of War and the problem of reciprocity.[58]

c Repression of Breaches

The Geneva Conventions provide rules as to what a party may do when there is alleged breach of the Convention.[59] There is no existing framework for the solution of disputes on breaches but States have undertaken to proceed to *in casu* settlement. If such discussions do not lead to amicable understanding the parties shall appoint arbitrators.[60] There are few undertakings by contracting parties to repress breaches of the weapons conventions by internal legislation.[61] On the other hand, the Geneva Conventions have a detailed network of rules for duties of contracting parties both to implement relevant rules in national legislation, and to 'search' for persons who have committed violations of substantive provisions.[62] Special provisions are made for punishment of certain 'grave' breaches.[63]

The Contracting Parties bind themselves to repress breaches of the Geneva Conventions,[64] Protocol I,[65] but not of Protocol II. Certain breaches shall, under Protocol I, be considered as 'grave'[66] and, as such, warrant special repression. Among such 'grave' breaches are those that violate rights listed in the catalogue of fundamental rights in the two Protocols.[67]

Although not systematically presented it appears that Protocol I relies on the *aut dedere aut punire* (to either handover or to punish the offender) method adopted

57 Above, in this Chapter, section A.

58 Below, section B ii a.

59 Geneva I, article 52; Geneva II, article 53; Geneva III, article 132; and Geneva IV, article 149.

60 *Cf.*, Patrogic, J., 'Control of the application of humanitarian conventions', *RDPMDG*, 1966, 405.

61 On general problems of transformation, above, Chapter 6, section B ii.

62 Geneva I, articles 49–51; Geneva II, articles 50–52; Geneva III, articles 129–131; Geneva IV, articles 142–148.

63 *Ibid., loc. cit.*

64 Geneva I; articles 49–51; Geneva II, articles 50–52; Geneva III, articles 129–131; Geneva IV, articles 142–148.

65 Article 85.

66 Article 85(3).

67 Above, Chapter 9, section iii.

by the hijacking Conventions.[68] But the system is relying on an assumption that it is individuals under the control of a State who are guilty and who must be found and prosecuted. There is a real possibility that it is the State itself, or rather, persons in charge of the State, for example, members of the government, who may be guilty and, for such cases, the Conventions and the Protocols do not offer any mechanisms for complaints. But if it is shown that members of a government are implicated in war crimes it must be noted that they do not enjoy immunity for such crimes, with the exception of the Head of State and the Foreign Minister as long as they remain in office.[69]

With regard to the individual responsibility of persons covered by the Protocols it appears that Protocol I recognises the possibility of such personal responsibility. Until the Second World War only States had been held responsible under international law but due to the growth of rights accruing to individuals under this system, symmetric duties also developed. Thus, individuals are protected but they have also duties not to infringe the rights which they themselves enjoy.

Protocol I states emphatically that a soldier may not avail himself of the *respondeat superior* defence, that is to say to claim that responsibility for an action should rest with the officers or command who issued an order.[70] On the other hand, the responsibility of superior authorities may be engaged as well to the extent they had knowledge, or constructive knowledge, of any breaches of the protocol. There will therefore be cases of double responsibility under Protocol I. Such double responsibility is rare under international law and should probably only cover proper 'war crimes'.[71]

It may therefore go beyond the limits of present international law to impose personal responsibility for apartheid and to equate such acts, at any level, with war crimes. Yet, one may understand the attitudes of developing countries and their ambition to include apartheid among the grave breaches of the Protocol. However, in practice, the inclusion may create certain problems.

A provision on compensation which is a normal consequence of responsibility is somewhat dislocated in an article organically separated from other rules on responsibility.[72] Under this article only a 'party' to a conflict may be required to pay compensation. In other words, individual responsibility cannot be coupled with any obligation to pay such compensation. On the other hand, a liberation movement may conceivably be liable for such compensation as it, and a State, may be party to an armed conflict.

68 The Hague Convention, 1970, 860 *UNTS* 105; *cf.*, the Montreal Convention, 1973, 10 *ILM* 1151.

69 See further below in this Chapter under immunity.

70 Article 86(2) and see further, *infra*, section C ii c.

71 See Detter, I., 'Foreign warships', *op. cit.*, 70. In the case of Captain Powers, pilot of a U2 reconnaissance plane shot down over the then Soviet Union, there was such double responsibility: Powers was sentenced to 10 years in prison in the USSR as a spy although President Eisenhower also claimed responsibility for the pilot's actions, *ibid.*, *loc. cit.*

72 Article 91.

ii The Problem of Reciprocity

The requirements for combatant and belligerent status have been discussed at length earlier in this work.[73] Certain questions are incidental to such status and concern the nature of the legal obligation; some of these questions are specific to the nature of the Law of War and present problems which are not acute in other parts of international law.

a General Principles

Reciprocity is at the root of the international legal system itself,[74] although it is a notion which cannot explain the existence of all rules. It is a concept which is particularly important to the Law of War. Reciprocity affects the Law of War in many ways. In one sense a war-waging party must always consider what effects his actions will have and what reciprocal actions his adversary may take once he is in a position to counteract. Such actions may be delayed until peace-time and may not themselves violate international law but merely represent the resentment created by the practices in a previous war. Thus, no State should resort to such practices in war that will undermine future relations in peace-time.[75]

In this sense reciprocity will always be important to the behaviour of parties in armed conflicts. But reciprocity can be used in another sense, that of explaining whether a mutual element of obligation is necessary for States to be bound by any particular rules. Some still view the restriction of war and the rules of behaviour in armed conflicts as based on reciprocity,[76] whereas others claim that such rules do not rest on any such principle.[77]

There has certainly for long been, and perhaps still is, a reluctance to allow the existence of any obligations without strict reciprocity. This is, some claim, true as far as regards explanations for the basis of obligation of international law as whole.[78] It is also often true as regards substantive *quid pro quo* – that is to say what benefits you obtain in return for signing on – which a party to a treaty claims to be the reason for adhering to a convention.[79] It is even true for the way international acts are construed: for example, even decisions by international organisations have

73 Above, Chapter 4, section B and C.

74 *Cf.*, Verdross, A. and Simma, B., *Universelles Völkerrecht, Theorie und Praxis*, 3rd edn (Berlin, 1967), 63; Virally, M., 'Le principe de réciprocité dans le droit international contemporain', 122 *RCADI*, 1969.

75 *Cf.*, Kant, I., *Zum ewigen Frieden* (Königsberg, 1795), sec.1, art.6: '*Es soll sich kein Staat im Kriege mit einem anderen solche Feindseeligkeiten erlauben, welche das wechselseitige Zutrauen im künftigen Frieden unmöglich machen müssen.*'

76 *E.g.*, Rosas, *The Legal Status of Prisoners of War*, *op. cit.*, 17, 52.

77 *E.g.*, Bothe, 'Conflits armés et droit international humanitaire', *RGDIP*, 1978, 93.

78 See, for example, Verdross and Simma, *Universelles Völkerrecht*, *op. cit.*, 63; Virally, 'Le principe de réciprocité dans le droit international contemporain'; see also my *International Legal Order*, *op. cit.*, Chapter IX and my *Concept*, Part IV, for a detailed discussion on reciprocity as one of several bases of obligation in international law.

79 On unequal treaties, see, Detter, I., *Independent State*, *op. cit.*, 2nd edn, 195 and Detter, I., 'Unequal treaties', *op. cit.*, 1069.

been claimed to constitute 'disguised' treaties and attempts to explain the activity as a unilateral regulatory function are not common.[80]

There is, in any treaty, a presumption of such reciprocity and the violation of one party of substantive provisions is normally a ground for denunciation for breach.[81] One could even suggest that reservations to treaties regarding reciprocity, *i.e.* stipulating that the treaty will only apply on such basis, are unnecessary.

The legal obligation is not as clear as one may first assume. The 1899 and 1907 Hague Conventions are multilateral conventions with relatively few reservations.[82] The Conventions stipulate that they only apply to the parties and also contain the *si omnes* clause, implying that they apply only if all parties to a conflict are bound by the Conventions.[83] But sometimes strict reciprocity is factually impossible: that was the case of Serbia which had ratified the maritime Conventions although she has no sea border. But such factual circumstances, of which the Contracting Parties had been well aware, could not influence the application of the Conventions.[84]

The violation of the Hague Conventions of 1899 and 1907 by Germany during the Second World War raised the question whether such substantial breaches did not release other belligerents from their obligations.[85] It may be that flagrant violations, construed as repudiation, give rise to a right to accept that repudiation. But unless that acceptance is coupled with a certain behaviour, the relevant Convention will still be binding and a party will not be released from its obligations under the instrument.[86]

The numerous reservations of this type made to the Geneva Gas Protocol[87] only restrict the application of the treaty regime.[88] But they cannot affect rules which already form part of international law. If that Protocol only states what is already binding in international law,[89] reservations cannot affect the ambit of such rules.

Yet, reservations to the Geneva Protocol provide that a State will consider itself released from its obligations if there are violations by the enemy.[90] On the other hand, some of the States making such reservations assumed, at the same time, that provisions of the Protocol were binding on third parties by virtue of forming part of general international law. But these two legal attitudes are incompatible: either

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80 But see Detter, I., *Law Making, op. cit., passim*, Detter, I., *International Legal Order*, 2nd edn, Chapter IV and Detter, I., *Concept, op. cit.*, 2nd edn, Part IV: it is preferable to admit the possibility of States binding themselves by unilateral decisions of an organisation for which they have given their *abstract consent* in advance in the Charter of the relevant organisation.

81 *Cf.*, Vienna Convention on the Law of Treaties, 1961, *UNTS*, article 60(5); *cf.*, GAOR, 1st sess., 1968, 354–360; *ibid.*, 1969, 112–115; *cf.*, Schwelb, E., in *Archiv des Völkerrechts*, 1973, 14–27.

82 But see above, Chapter 9, section B iii f.

83 Below, section B ii d.

84 *Cf. The Blonde* (1922) AC 313.

85 Colombos, *Law of Prize, op. cit.*, 8.

86 *The Blonde* (1915) P. 129, 176; *The Germania* (1916) P. 5.

87 See for list, Schindler and Toman, *Documents, op. cit.*, 2nd edn, 115 *et seq.*

88 See Detter, *Essays, op. cit.*, 49.

89 Above, Chapter 5, section 5 C v, on ethics.

90 *E.g.*, reservation by France; *cf.*, Meyrowitz, H., *Les armes biologiques et le droit international* (Paris: Pédone, 1968), 64.

the obligations are binding between parties alone, on the basis of reciprocity, or, if third parties are bound this indicates that the root of obligation is not to be found in the treaty, but in international general international law, in which case the ambit of the rules is beyond amendment by a single State.

In the field of weapons restrictions there have been efforts to dispense with reciprocity. The Conventional Weapons Convention[91] thus stipulates[92] that 'when one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations' and thus suggests that a State is only bound on the basis of strict reciprocity.[93] Under the Weaponry Convention of 1981,[94] a State could thus consider itself released[95] from any obligations under the Convention as soon as, for example, a liberation movement in the conflict ceases to apply the Geneva Convention and/or the Weaponry Convention.[96]

Reliance on common rules would, say some, explain the difficult question why a rebel movement can be legally bound by the assumption of certain obligations by the State which the movement opposes.[97] It has been said that when States adhere to the Geneva Conventions their undertakings do not concern the 'interchange of benefits' which may be normal in treaty relations, but lay down 'guarantees to which every human being is entitled'.[98] A unilateral undertaking to apply certain rules may not be unknown,[99] but the whole system of a set of rules to which States adhere without any requirement of reciprocity is new. And it has been claimed that everyone must apply the rules as binding regardless of reciprocity.[100] The rules would even amount to *jus cogens*.[101]

Some statements have suggested emphatically that this is not so.[102] Others have widened the issue and claimed that rules in general for the protection of persons in war do not rest on any strict principle of reciprocity.[103] But when the principle of reciprocity is refuted it is done in terms of arbitrary practical considerations, rather

91 Above, Chapter 7, section A ii.

92 Article 7(1).

93 Above, Chapter 7, section A ii c.

94 Above, Chapter 7, section A ii.

95 Under article 7(4)(b). See above Chapter 7, section A ii c on the system of indirect obligation of this Convention.

96 Roach, J.A., 'Certain conventional weapons conventions: arms control or humanitarian law?', 105 *MilLR*, 1984, 3 at 26.

97 *Cf.*, ICRC, CDDH/I/SR,59, vol. 9. 239. *Cf.* Forsythe, *Humanitarian Politics, op. cit.*, 156.

98 13 *IRRC*, 1973, 640.

99 For example Japan had undertaken to apply the 1929 Convention on Prisoners of War *mutatis mutandis* although it was not a party to the Convention, see ICRC, *Report on Activities During the Second World War*, 1948, vol. 1, 229.

100 Pictet, J., *Humanitarian Law and the Protection of War Victims, op. cit.*, 19; *cf.*, Pictet in the 1983 and 1985 editions.

101 de la Pradelle, A., 18 *Annales de droit international medical*, 1968, 9; *cf.*, Wilhelm, R.J., 'Problèmes relatifs a la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international', 137 *RCADI* iii, 1972, 367. On *jus cogens*, see Detter; I., *International Legal Order, op. cit.*, Chapter III.

102 Rosas, A., *Legal Status, op. cit.*, 17, 52.

103 Bothe, M., 'Les conflits internes', *RGDIP*, 1978, 93.

than by the more obvious reasoning based on treaty technique. The statement in the Geneva Conventions that the obligations assumed under them will be binding 'in all circumstances' is not necessarily any indication that the condition of reciprocity is abandoned. Any treaty may stipulate that its provisions will be binding 'in all circumstances' but this does not necessarily mean that conditions of reciprocity are abandoned.

The Nuremberg Tribunal acknowledged that the Hague Conventions of 1907 apply to non-signatories, and that for example Czechoslovakia was bound although it had never ratified.[104] Even those who hold that parties to a conflict can agree to 'keep the situation outside the application outside the Geneva Convention'[105] in certain limited military operations, would agree that if the situation escalates and constitutes an armed conflict in a 'sociological and objective way' the relevant Geneva Convention will enter into operation even for parties to a conflict who have not adhered to the Convention in question. The reason this is so is because it can be deduced from the obligation to refrain from reducing rights under the Convention[106] by special agreement; such further agreement must not 'adversely affect' rights granted by the Convention.

The 1977 Protocols are even less dependent on such reciprocity in non-international conflicts as it is 'a question of respecting, with regard to one's own nationals, a few basic humanitarian rules'.[107]

b The Application to Third Parties

First of all, contracting parties to a treaty cannot make that treaty bind third States. To such third States the treaty is legally not binding for it is a transaction between others, a *res inter alios acta*.[108]

Secondly, we have seen that some guerrilla groups will be bound by the provisions of a treaty by the fact that the treaty so provides.[109] Other guerrilla groups may be bound on the basis of equality if they are combatants in a war.[110]

Thirdly, nationals of a State may well be bound by virtue of internal application of the Law of War.[111] There may also be rights enjoyed by nationals under a treaty, at least as far as some protection of the person is concerned. The United States clarified at the Diplomatic Conference for the 1977 Additional Protocols that

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104 Judgment 1 October 1946, IMT, vol. 54. *Cf.*, the Military Tribunal for the Far East, in the *Hirota Case* (1948), *AD*, 1948, 365.

105 Rosas, *Legal Status*, *op. cit.*, 233. The Geneva Convention in the event was Convention III.

106 In the event of prisoners of war, *ibid.*, 234.

107 ICRC, CDDH/I/SR.59, vol. 9, 240. But see below in the next section on the interpretation of article 96 by certain authorities.

108 See Detter, I., *Essays*, *op. cit.*, 100 *et seq.*

109 Like the Conventional Weapons Convention in certain circumstances, see above, Chapter 7, section A ii c; or the Protocols of 1977, above, Chapter 6, section B ii.

110 Above, Chapter 1, section B on equality and Chapter 4, section C on requirements for combatant status.

111 Above, Chapter 6, section B ii.

persons protected under Protocol I include a State's own nationals.[112] But the matters under discussion in that context concerned the most basic rights, such as the right not to be subjected to mutilations or medical experiments.[113] There were some proposals on application of the Conventional Weapons Convention to third parties.[114] But who are these third parties? Are they other States or are they guerrilla groups? Or are they even individuals inside the territory of a State?

c Application to Non-States

With regard to the 'intra-State' Protocol II of 1977 where is the basis of obligation? How can an insurgent group be bound by the acts of its own government against which it has risen in arms?[115] Some suggest that ratification by a State also binds emerging subjects on its territory at least 'provisionally'.[116]

Some commentators have questioned whether rebels will respect the rules of the Law of War.[117] However, the instruments on the Law of War, of which the 1977 Protocols and the Conventional Weapons Convention accord special status to rebels, are more designed to stimulate rather than to preclude such respect.

Must both parties apply Common article 3 of the Geneva Conventions? Reciprocity may not have been made an express condition for the application of the standards of this article.[118] Some claim that a party is released from certain obligations under the Geneva Convention if an adversary has violated their provisions.[119] Yet, in practice considerations of reciprocity may still be decisive.

The question which concerns the standing of non-State belligerents leads, on the one hand, to that such units may today be recognised as belligerents.[120] But if they do not, at the same time, assume duties under the Law of War, the State will be unilaterally bound vis-à-vis belligerent insurgents or guerrilla groups: the non-State party to the conflict will not be bound. This is so, say some, because only States, and possibly certain international organisations, can be subjects of international law and only States and such organisations can therefore be parties to treaties. This may be true for international law in general and it specifically entrenched in the Vienna Convention on the Law of Treaties of 1961, supplemented by the Convention on Treaties by International Organisation, drafted by the International

112 CDDH/SR.37, vol. 6. 81.

113 *Ibid.*, and Protocol I, article 11.

114 A/CONF.95/WG/L.9 1979 (Netherlands). *Cf.*, *ibid.*, L/6.

115 *Cf.*, Bothe, 'Conflits armés', *RGDIP*, 1978, 92.

116 Bretton, Ph., 'La Convention du 10 avril 1981 sur l'interdiction ou la limitation d'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination', *AFDI*, 1981, 92; *cf.*, Lattmann, E., *Schutz Kulturgüter bei bewaffneten Konflikten* (Zurich, 1974), 96 for similar construction of the 1954 Hague Convention on Cultural Property; *cf.*, above, Chapter 8, section A iii b (9).

117 Dinstein, 'The New Geneva Protocols', *op. cit.*, 268.

118 Zorgbibe, C., 'De la théorie', *op. cit.*, 91–92.

119 *Cf.*, Draper, *The Red Cross Conventions*, *op. cit.*, 12.

120 Above, Chapter 1, section D i a.

Law Commission.[121] But there has, in some quarters, been unrest for some time about this classification and especially about the fact that non-State entities conclude agreements of very similar substance, and with very similar effects, to traditional treaties.[122] It has already been shown that ample provisions exist in the field of the Law of War today by which also non-States can adhere to treaties.[123] This is true not only for rules on warfare methods or humanitarian rules under which individuals derive certain specific benefits. But there are also a number of treaties, as there are many general uncodified rules, under which individuals assume considerable duties of behaviour.

Are non-State parties bound as well although they have not been able to accede to treaties as State parties?

Not so long ago dissident forces were denied the status of belligerents in the Spanish Civil War and therefore deprived on the application of the Law of War.[124] On the other hand, in other situations, resistance movements have been recognised to enjoy rights under the Law of War even though they did not even fulfil the requirements for combatant status at the time. For example, in the *Rauter Case* before a Special Criminal Court in the Hague in 1948 it was held that the Dutch resistance movement would be recognised as a legitimate combatant, even though it had operated clandestinely, as the occupying power was in flagrant violation of international law.[125] In other words, the violation of law by an adverse party improved the standing of a group as combatants.

Now guerrillas and liberation movements are capable of adhering as Contracting Parties to several international treaties. But the actual application of rules of the Law of War by guerrillas in both international and internal conflicts has become a real problem. Protocols I and II enhance the possibility of such application.

The ICRC proposed already at the Stockholm Conference in 1948 that resistance movements should 'act in obedience to the laws and customs of warfare; and in particular that they should treat nationals of the occupying Power who may have fallen into their hands according to the provisions of the [Geneva] Convention'.[126] But the formula was abandoned at the 1949 Conference for the Geneva Conventions as the conference decided to adopt a common formula for resistance movements and independent militia and volunteer corps and to restate in this formula the four traditional conditions[127] of the Brussels Declarations and the Hague Regulations.[128]

121 See especially, Reuter, P., 'Report', *ILC Yearbook*, 1985.

122 See my *Law Making*, *op. cit.*, 319 *et seq.*

123 Above, Chapter 6, section B c and d.

124 See, Padelford, R.J., *International Law and Diplomacy in the Spanish Civil Strife* (New York: Macmillan, 1939), 18; Rousseau, C., *La non-intervention en Espagne* (Paris: Pédone, 1939), 511.

125 *AD*, 1949, 530; *cf.*, *Sansolini v Bentivegna*, *RivDI*, 1958, 129; *ILR*, 1959, 986.

126 IRCR, *Projects on the Revised or New Conventions* (Geneva, 1948), 54; ICRC, *Report of the 1947 Conference of Government Experts* (Geneva: ICRC, 1947), 108.

127 Above, Chapter 4, section C ii.

128 Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference*, vol. 2 A, 414, 465, 477.

Normally only States can take full part in Diplomatic Conferences and only States can sign the official text of treaties.[129] At the same time, it is claimed that non-State parties to conflict have no rights or standing under treaties and no corresponding duties. But how can the notion of reciprocity explain the lopsided situation when different rights accrue on both sides? If, on the one hand, guerrilla groups are considered to be belligerents, they too should be bound by the Law of War. But this cannot be achieved on the basis of reciprocity as such reciprocity cannot be entrenched in treaties where only States are parties.

The General Assembly has repeatedly argued that taken combatants on both sides should be given prisoner of war status.[130] It is obviously a crucial question whether rebels will obey similar rules to those binding the State.[131] Both anti-governmental and governmental forces need protection; it must not always be assumed that government forces are superior in war.[132]

It is this lack of reciprocity in standing that is the reason for a sharp distinction that many writers make between the law of the Hague and the law of Geneva insofar as they state that the former set of rules is really for the international law subjects who have a *jus bellandi*.[133] But one might also suggest that it is precisely the circle of the subjects entitled to *jus bellandi* that has changed[134] and that, therefore, the hazy limit between the two 'laws' remain and, with that, also the distinction in the requirement of reciprocity of standing. It was quite understandable that delegations at the Conference for negotiation of the 1977 Protocols were anxious to ensure that if the government forces were prepared to abide by certain rules vis-à-vis guerrillas, so should the dissident forces.[135]

It would appear reasonable to argue that also rebels are bound by the provisions in, for example, the Additional Protocols of 1977 since they also derive benefits from them. Many delegates at the Diplomatic Conference emphasised that rebels are bound as well as State parties.[136]

The Weaponry Convention, too, will be applied to all parties, even to non-State parties, by the novel technique of indirect application.[137] Article 96 of Protocol I indicates that this is only applicable between those parties which accept and apply the instrument. In relation to a third party a State only has to apply general international law. Some have deduced a far-reaching principle of reciprocity and claim that a party would no longer be legally obliged to apply such general international law if the other party does not respect such rules.[138] But this also leads

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129 CDDH.SR.57, vol. 7, 278 (Spain).

130 GAOR, 13th sess., Ist Committee, 1022 mtg, 374.

131 Dinstein, 'The New Geneva Protocols', *op. cit.*, 278.

132 *Cf.*, CDDH/II/SR.33, vol. 11, 341 (USSR).

133 Bindschedler-Robert, *Reconsidérations*, *op. cit.*; *cf.*, Bindschedler-Robert, *Cours introductif* (Geneva: IHEI, 1975–6), 15.

134 Above, Chapter 5, section C i and ii.

135 *E.g.*, USSR, CDDH/II/SR. 33, vol. 11, 341: both sides need protection; Federal Republic of Germany, CDDH/I/SR.23, vol. 8, 220.

136 CDDH/1/SR.23, vol. 8, 220 (West Germany); *cf.*, CDDG/SR.36, vol. 6, 63 (New Zealand).

137 Above, Chapter 7, section A ii e.

138 SOU 1984:56, 68; *cf.*, 20 and 54.

to the conclusion that the non-State party, which most international lawyers insist is no 'subject' of international law, is not bound to apply any specific rules vis-à-vis a third party. This attitude certainly undermines the very concept of humanitarian law and it is of little consequence that such statements are coupled with comments to the effect that such suspension of general rules will not be 'recommended'.[139]

One cannot on the one hand maintain a criterion of reciprocity in internal war, and on the other hand deny that groups may be subjects, in limited respects, to the same rules. But if one abandons the condition of reciprocity there is little remedy for a State party to a conflict if the insurgent group resorts to practices which violate the Law of War.[140]

It is not reciprocity on which the obligation relies. It is equality. It may be true to question whether it is just to place an aggressor on the same footing as his victim[141] but this need affect what could be called 'forensic equality', *i.e.* the capacity to assume rights and obligations.[142] In this sense all belligerents are equal.[143] And, therefore, the obligations under both the Weapons Conventions, the Geneva Conventions and the Protocols of 1977, are in their essence binding upon two parties to a conflict. Either the non-State party has to be recognised and then under similar duty as the State party, or, if it is not given that right it cannot be bound by any duties under these instruments.

d A General or a Contractual Basis of Obligation?

The 1899 Conventions were only binding between the Contracting States in wars between two or more of these parties.[144] The Hague Conventions of 1899 contained[145] provision that the obligations of the Conventions would only be binding between Contracting Parties in wars between two or more of them.

The 1907 Hague Conventions contained an even more limiting formula, stipulating that the conventions would only apply to the Contracting Parties in a war between them, and then only if all the belligerents were parties to the Conventions.[146] This amount to a *clausula si omnes* – a condition to be bound only if everyone else undertakes similar obligations – stipulating that the provisions of the Conventions would only be activated if all the parties to the conflict were bound by the Convention in question.

139 SOU 1984:56, 20; *cf.*, 70. The Swedish Committee on the International Law of War suggested even that vis-à-vis a State which has ratified the Protocol application would depend on 'actual' implementation by the other side: for a while therefore a State would be entitled to delay or suspend application until it has been verified whether the adversary complies with the rules.

140 See above, Chapter 1, section D iv on guerrilla warfare.

141 Bindschedler-Robert, *Réconsiderations*, *op. cit.*, Ch. V.

142 See Detter, I., 'The problem of unequal treaties', *op. cit.*, 1090.

143 Rousseau, Ch., *Conflits armés*, *op. cit.*, 24–26.

144 For reference, above, Chapter 5, section A.

145 Article 2(5).

146 Hague IV, article 2; Hague V, article 20; Hague VI, article 6; Hague VII, article 7; Hague VIII, article 8; Hague IX, article 8; Hague X, article 18; Hague XI, article 9; Hague XIII, article 28.

Some suggest that the original element of reciprocity in the Hague Conventions has been gradually displaced as more and more rules from these instruments became absorbed in general international law.[147]

The Geneva Conventions, for example, contain no clause on reciprocity and this development, some claim, breaks new ground as the Geneva Conventions are are regarded as applicable, imposing, as it were, unilateral obligations without any requirement of reciprocity.

Common article 1 of the Geneva Conventions stipulates that the Contracting Parties 'undertake to respect and to ensure respect for the present Convention in all circumstances'. This provision makes, say many,[148] the whole Convention mandatory without any condition of reciprocity. At the Diplomatic Conference of the Additional Protocols it was also emphasised that article 1 of the Geneva Conventions had 'broken new ground' in 1949 by introducing the idea of a unilateral obligation not subject to reciprocity.[149] The Geneva Gas Protocol 1925 also referred to prohibitions being universally accepted as a part of international law, binding all alike 'the conscience and the practice of nations'.

The *Institut de droit international* decided in a Resolution of 1971 that the Geneva Conventions have become part of general international law, binding even in their details on all, even on non-contracting parties.[150] Some members had argued in their replies to a questionnaire from the Institute that only the principles, but not the details, of the Conventions had become part of general law.[151] But the Institute found that the Conventions *in toto* had become incorporated in the system of international law. It would therefore bind even non-parties.[152]

But it is not only the most basic rights and duties that have been incorporated into general international law. There is evidence that also detailed matters are now part of the system that bind States and individuals alike, and individuals bound by these rules include terrorists who are now the most prominent belligerents in modern warfare. That basic rights and duties form the core of this system is shown also by the recurrent entrenchment of these very basic rights in other specific international agreements on human rights.[153] Among the basic rights referred to in this context may be the 'alleviation of massive suffering' which, according to some writers is an implied goal of the Charter of the United Nations.[154]

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147 SOU 1984:56, *Folkrätten i Krig*, *op. cit.*, 55.

148 *E.g.*, Hinz, J., *Das Kriegsgefangenenrecht*, *op. cit.*, 15; Pictet, J., *Humanitarian Law and the Protection of War Victims*, *op. cit.*, 21; Pictet, *Développements et principes du droit international humanitaire* (Geneva: ICRC, 1983); Pictet, *International Humanitarian Law*, *op. cit.*, 1985; *cf.*, Coursier, H., *Lessons on the Geneva Conventions* (Geneva: ICRC, 1963), 25.

149 CDDH/1/SR.4, para. 35 (Nigeria).

150 Resolution, 54 *Annuaire* 1971 ii 465.

151 54 *Annuaire* 1971 i, 113.

152 Such non-parties may include United Nations forces, see *ibid.*, ii 240 (Seyersted).

153 Above, Chapter 5, section C v.

154 Schachter, O., 'The United Nations and internal conflict', *op. cit.*, 408 *et seq.*

This goal forms part of protection of basic human rights[155] and of the right to protection against genocide,[156] but it has also its own, separate justification as an objective of the United Nations.[157] The Courts often stated that, since law is not to be interpreted literally, the defendants should have known that they were bound by law as understood under the Martens clause. The Martens clause was relied on in the trials of war criminals[158] to rebut any defence plea on *nullum crimen sine lege*.

The Geneva Conventions contain special provisions to the effect that denunciation of the Conventions will not have effect only for the denouncing Power. The Conventions then go on to stipulate that the denunciation 'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of nations, as they result from the usages established among civilised people, from the laws of humanity and the dictates of public conscience'.[159] It is unclear whether there is a disjunction between the first statement about the limited effect of a denunciation for the denouncing party alone, and the second statement which appears to apply to all parties to a conflict, even to the denouncing party. The 1977 Protocols have been interpreted both to provide general rules[160] and to include a degree of reciprocity.[161] Special problems arise in connection with the 1977 Protocols although they really only concern the application of 'a few basic humanitarian rules', respected by all in non-international conflicts.[162]

The standards imposed by the relevant Conventions, as supplemented by the Martens clause, also involve rights given to individuals which they are not even able to validly renounce.[163] Views on the basis of obligation will vary according to the views on international ethics as a separate set of rules which can be assessed and determined.

Could one argue that such very rules of international law must be suspended or adapted to the case when an adversary violates rules of international law and, for example, resorts to unlawful weapons[164] or unlawful use of weapons?[165]

The issue centres on two problems: one concerns the right to resort to countermeasures, like reprisals,[166] when rules are violated; the other question concerns the very standing of non-State belligerents in the problem of reciprocity.

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155 *Cf.*, above, Chapter 5, section C iii c and v.

156 *Cf.*, above, Chapter 7, section B ii c.

157 *Ibid.*, 408.

158 *E.g. Von Leeb Case* (1948), *AD*, 1948, 377 (before IMT); *Rauter Case* (1949), *AD*, 1949, 542 (before a Dutch Special Court).

159 Geneva I, article 63; Geneva II, article 62; Geneva III, article 142(4); and Geneva IV, article 158.

160 Above, Chapter 6, section B i and ii g.

161 Above, in this Chapter section B ii a.

162 ICRC, CDDH/I/SR.59, vol. 9, 240 and above, Chapter 9, section B.

163 *E.g.* Geneva III, articles 7, 78, 54(2), 68 and 109(3).

164 Above, Chapter 7.

165 Above, Chapter 8.

166 Above, Chapter 2, section B iv and Chapter 8, section A iv c.

To comment on the first question, it is clear that Geneva Convention III expressly forbids reprisals[167] as did the earlier 1929 Geneva Convention.[168] Does this mean that whatever measure a belligerent may decide to take they must not include reprisals? Or is a belligerent free from all obligations under the Geneva Convention so that even reprisals against innocent civilians can be used? But the victims of the retaliation will not even have the same identity[169] as the perpetrators of the violations. Therefore, it would seem reasonable to refuse this proposition.[170]

Some have claimed that international ethics will be violated in case of any serious infringement of the Universal Declaration of Human Rights.[171] Ethics, or similar concepts, may well be a useful bridge between theological and secular spheres and between divergent cultural traditions provided it is understood as sufficiently broad to cover and sufficiently specific to identify, common values across boundaries.[172] It may be that some rules in international society are of such essential importance that they must be upheld.[173]

But there are still considerable problems. Some still argue that a State can prevent, by the mechanism of article 2(3), the Geneva Convention from 'becoming applicable'.[174] However, to the extent that rules form part of 'general ethics' and to the extent they are identified by 'conscience' they cannot be subject to denunciation[175] either unilaterally or after anterior breach. But suspension of various rules of the Law of War is envisaged by certain specific provisions in relevant treaties that lay down rules for this law. Thus, civilians in general and medical units will forfeit their privileges if they resort to perfidy by shielding military targets.[176] This means that the effect of certain rules can be suspended by previous breach. But there seem to be other rules which must never be violated. These concern the most fundamental rights to evade indiscriminate attack, torture or other inhuman treatment.

There thus appears to be several layers of rules pertaining to the rules of war, some of which are subjected to ordinary requirement of reciprocity and others, or a rather more fundamental type, are exempt from denunciation and which do not seem to be subject to reciprocity.

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167 Article 13(3).

168 Article 2(3).

169 *Cf.*, the situation in terrorism when threat or force is applied against a third party, above, Chapter 1, section B iii c.

170 But Egypt considered a similar provision in Protocol I of 1977, article 20, to be binding only on the basis of reciprocity: CDDH.SR.37, vol. 6, 77.

171 Castaneda, 'La valeur juridique des resolutions des Nations Unies', 129 *RCADI*, 1970, 205.

172 *Cf.*, Turner-Johnson, J., *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, 1981), 117–118.

173 On the nature of I have called 'prophylactic rules' see Detter, I., *Concept*, *op. cit.*, 2nd edn, Part II and Detter, I., *International Legal Order*, *op. cit.*, Chapter V. See, also, *ibid.*, on *jus cogens* and on fundamental rules of international law, see, ICJ, *Barcelona Traction Case, Second Phase* (1970), ICJ, *Reports*, 1970, 3 at 32; *Hostages in Teheran Case* (1980), ICJ, *Reports*, 1980, 26; *Advisory Opinion on Namibia* (1971), ICJ *Reports*, 1971, 52.

174 Rosas, *The Legal Status*, *op. cit.*, 242; *cf.*, 101.

175 Above, in this Chapter, section A.

176 Above, Chapter 8, section A iv d on perfidy.

C SANCTIONS AND RESPONSIBILITY FOR BREACHES

i State Responsibility and Sanctions

Violations of the Law of War engage, with immediate effect, the international responsibility of a State.[177] Yet, war crimes perpetrated, at a higher level, by the high command of politicians may only lead to trials by a victor State at the end of a war.[178] There is certainly a clear application of the *vae victis* principle in the field of war crimes. Some have questioned the lack of symmetry when no officers of the Allies were prosecuted for acts amounting to war crimes.[179] Furthermore, the imbalance has been further criticised in view of the fact that the War Crimes Court was flawed by procedural inadequacies.[180] But rudimentary sanctions by a victor State are probably better than a situation where war criminals feel themselves exempt from any future prosecution.[181]

There may have been a time when there was no clear demarcation between the responsibility of States, military leaders and soldiers. However, no statesman or soldier can nowadays claim to be ignorant as to the consequences, for a State, or for a person individually, of violations of the Law of War.

The responsibility of a State may be engaged although it did not necessarily commit a crime against international law, but failed in taking sufficient measures to prevent such a violation. This was held by the International Court of Justice to have happened with regard to the genocidal massacre of 7,000 men and boys in Srbrenica by Bosnian Serbs in 1995.[182]

The reaction of international society to a breach of international law is often that of imposing *sanctions* on an offending State.[183]

177 Hague Regulations, article 3; Protocol I of 1977, article 9. See, Verdross, A., *Die völkerrechtwidrige Kriegshandlung und der Strafanspruch der Staaten* (Berlin: Engelmann, 1920), and Garner, J.W., 'Punishment of offenders against the laws and customs of war', *AJIL*, 1920, 70. On responsibility in general see the ILC *Yearbook*, 1963 onwards. On the importance of the notion of imputation see my *Concept*, *op. cit.*, 2nd edn, 54; *contra*, Brownlie, I., *Responsibility*, 35.

178 *Cf.*, Zemanek, K., 'Das Kriegs und Humanitärrecht', in *Handbuch des Völkerrechts* (Vienna: Manz, 1983), No. 2129 at 394.

179 Falk, R.A., Kolko, G. and Lifton, R.J., *Crimes of War: A Legal, Political, Documentary and Psychological Inquiry Into the Responsibility of Leaders, Citizens and Soldiers for Criminal Acts in War* (New York: Random House, 1971), 141; de Zayas, A.M., *Die Wehrmachtuntersuchungsstelle, Deutsche Ermittlungen* über *Alliirte Völkerrechtverletzungen im Zweiten Weltkrieg* (Munich, 1980) and 7th edn (Munich: Universitas/Langen Müller, 2001), *passim*.

180 *Cf.*, Minear, R.H., *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), 141. On the right to a 'fair' trial see the *High Command Case*, 12 *Nuremberg* 63.

181 Zemanek, 'Das Kriegs und Humanitärrecht', *op. cit.*, 394.

182 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ *Reports*, 2007.

183 On the definition of sanctions and the varied use of such measures, as *pre-emptive* or *punitive*, see Detter, I., *The International Legal Order*, *op. cit.*, Chapter IX iii.

a Reaction against Violations of the Law of War: Condemnation

World opinion may occasionally condemn a State in breach of the Law of War to make that State cease unlawful behaviour. Condemnation may precede formal resolutions of the United Nations or decisions specifying concrete sanctions Sometimes such condemnation by, for example, the Security Council may be coupled with a specific mandate of verification that certain weapons systems are effectively dismantled.

The United Nations Special Commission (UNSCOM), for the verification of the destruction of numerous weapons in Iraq, represents what may be a new method in international society. Iraq formally 'accepted' Resolution 687, but later often denied access to UNSCOM. Sanctions were introduced to remind Iraq of its accepted obligations.[184] The Commission's work came to an abrupt end in 1998 when it was no longer allowed to inspect Iraqi facilities. Nevertheless, the Commission achieved important results with regard to the inspection of nuclear, chemical and biological weapons plants. It is also symptomatic of how seriously other States reacted to Iraq's unwillingness to accommodate UNSCOM's mission in its final stages, that the United States and the United Kingdom immediately 'retaliated' with a bombing raid against Iraq in December 1998.[185]

If lack of condemnation can be a factor that encourages war,[186] positive condemnation can bring about attitudes that certain war crimes must be punished.[187] An example of this is the condemnation, albeit late, of the Vukovar massacre, an attack by the Yugoslav army in November 1992 on 297 patients in a hospital in Croatia, an action which was doubly illegal as both hospitals and *hors de combat* personnel are illegitimate targets.[188] It may be that condemnation was late in coming because it had to be tied to the undisputed evidence revealed by exhumation of the bodies.[189]

b Embargo and Economic Sanctions

One of the most common forms of sanctions during armed conflict has been a declaration on trade or, more pertinently, on the purchase of weapons. Embargo is one of the most forceful types of economic sanctions.[190] Such measures were taken

184 For example, SC Res. 1134/97.

185 SC Res 687/91, laying down conditions for ceasefire in the Gulf War, establishing UNSCOM. A further agreement by Exchange of Letters between the UN and Iraq stipulated that free access to inspect and verify was to be given to UNSCOM and IAEA as well as to certain officials of the specialised agencies.

186 See above, Chapter 3 B I on dangers of lack of condemnation by other States.

187 Note the action against Libya in 2011 largely brought about by condemning world opinion of a dictator who bombed his own citizens and other examples under Chapter 2 viii b in humanitarian intervention and under the R2P doctrine.

188 See above, Chapter 8 A iii (6).

189 All the patients had been shot in the back of the head. The United Nations supervised the exhumation at Ovčara, not far from Vukovar, see *Vjesnik*, 19 November 1998.

190 See further Detter, I., *The International Legal Order*, *op. cit.*, Chapter IX.

against Iraq during the Gulf War,[191] and against Yugoslavia in conjunction with the NATO operations in 1999 in order to bring the regime of President Milosović from violating humanitarian rules, especially in Kosovo.[192] More questionably, an embargo was imposed on Slovenia and Croatia by the UN and by the European Union in 1991 which effectively prevented these countries from defending themselves against the Yugoslav army, the fourth strongest in Europe, in conjunction with the independence of Slovenia and Croatia and in the aftermath.[193]

Embargoes have been imposed in other numerous other situations and with considerable effect.[194]

c Compensation

There have been cases when a State has been obliged to pay compensation, after having started a war or after illegally annexing another country. The Versailles Treaty, for example, imposed a heavy duty of compensation on Germany.[195] The *duty* of compensation is, as a rule, imposed on a State but the right of compensation may be enjoyed by individual beneficiaries. Civilian war victims thus have a right of compensation.[196]

Funds raised by the duty of compensation are normally paid into a central commission and then distributed to individual claimants. Such commissions may also be given the power to fix the amount payable.[197] Terms may vary from cash payments to taking over physical assets such as military equipment or various external assets.[198]

In recent times this technique of administering claims of compensation is illustrated by the founding of a commission and a fund for compensation after the Gulf War. Pecuniary penalties were imposed by the Security Council[199] on Iraq to

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191 SC Res. 660/90; 661/90; 665/90; 667/90; 678/90; 687/90; *cf.*, 1115.97; 1134.97.

192 SC Res. 1160/98, 1199/98 and 1244/99.

193 *E.g.*, SC Res 713/91.

194 For example against Libya, SC Res, 748/92; 88393; against Liberia, SC Res/788/92; 823/93; 985/95.

195 Articles 231–263.

196 Lee, I.T., 'The right of a victims of war to compensation', in St. John Macdonald, R. (ed.), *Essays in Honour of Wang Tiena* (Dordrecht: Nijhoff, 1994), 489; Parker, K., 'Compensation for Japan's Second World War rape victims', *Hastings International and Comparative Review*, 1994, 497; Kodera, S., 'Compensation to civilian war victims on Okinawa', *Japanese Annual of International Law*, 1988, 58.

197 A Reparation Commission was thus established by the Versailles Treaty for Germany to determine the amount of liability. The initial sum was set at 132 million German Marks, later revised and lowered on account of the unrealistically high claim, 14 *Allied Powers Reparation Payments*, 1927.

198 As was the case after the Second World War see 14 *Dept of State Bulletin*, 1946, 'The Paris Agreement on Reparations from Germany', 1023ff.

199 Some scholars have questioned the legal right of the UN to impose a duty of compensation 'merely' on the basis of Iraq's aggression against Kuwait and questioned whether the Security Council did not exceed its powers under the Charter, see, Zadalis, R.J., 'Gulf War compensation standard: concern about the Charter', *RBDI*, 1993, 333ff. It is clear that earlier liability claims had been imposed by groups of States, for example the Allies after

compensate for 'any direct loss, damage, including environmental damage and depletion of natural resources, or injury to foreign Governments, nationals or corporations, as a result of Iraq's unlawful and illegal occupation of Kuwait.'[200] A UN Fund and a Compensation Commission were set up[201] to process claims.[202] The first payments of nearly three million dollars to over 600 recipients in 16 countries were made in 1994.[203] In the case of Iraq, the duty of compensation was coupled with far-reaching obligations to respect boundaries, not to acquire or retain certain weapons, and to return certain property.[204]

In a landmark judgment in 2012 a US federal judge awarded 813 million USD against Iran, payable to victims of the 1983 bombing of the Marine barracks in Beirut. The cause of action is based on the US statute, the Foreign Sovereign Immunities Act, which was apparently amended in 2008 to allow for civil legal claims (including punitive damages) against nations for sponsoring terrorism.[205]

d Military Action

Military action can be perceived as a form of sanction in certain cases when war crimes are perpetrated by a State. Thus this may be a useful way to classify NATO's action against Yugoslavia in 1999 as this action was partly taken to force the government in Belgrade to discontinue ethnic cleansing and genocide in the province of Kosovo.[206] Another example may be the intervention by Allies in Libya in 2011 to force Colonel Gaddafi to cease bombing his own citizens.[207]

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the First and Second World Wars. However, such a right is inferior, but complementary, to that of taking a binding decision to ensure international peace and security and must therefore be implicit or inherent: see Detter, I., *Law Making*, *op. cit.*, Chapter 1.

200 SC Res. 687 (1991).

201 *Ibid.*

202 *Cf.*, Bodaert-Souminen, S., 'Iraq war reparations', 231ff.; d'Argent, P., 'Le Fonds et la Commission de Compensation des Nations Unies', *RBDI*, 482; Bettauer, R.J., 'The UN Compensation Commission: developments since 1992', *AJIL*, 1995, 416; Bederman, D.J., 'The UN Compensation Commission and the tradition of international claims settlements', *NYUJIL*, 1994, 1ff.; Crook, J.R., 'The UN Compensation Commission: a new structure to enforce state responsibility', *AJIL*, 1993, 144ff.; Ulmer, N.C., 'The Gulf claims institution', *JIA*, 1993, 85ff.; GArmise, E.J., 'The Iraqi claims process and the ghost of Versailles', *NYULR*, 1992, 840ff.; Cotterau, G., 'De la responsabilité de l'Iraq selon la résolution 687 du Conseil de Sécurité', *AFDI*, 1991, 99ff.

203 UN, *Press Release*, 8 June 1994.

204 There were also obligations to provide statements of gold and foreign currency reserves and specific undertaking not to commit terrorist acts, *ibid.* The latter obligation is, of course, not dependent on the exhortation in the Security Council Resolution but is an obligation under general international law, reinforced by international conventions to which Iraq was already a party. In this part, therefore, the Resolution is pleonastic. *Cf.*, Detter, I., *International Legal Order*, *op. cit.*, Chapter IX.

205 *Brown v Islamic Republic of Iran*, Case No. 08-cv-531 (D.D.C. July 3, 2012).

206 See above in this Chapter under C ii.

207 See above, Chapter 2 B viii.

e Legal Action

Action may be taken against a State guilty of war crimes in an international court such as the International Court of Justice (ICJ). This happened in the *Genocide Case* brought by Bosnia-Herzegovina against Yugoslavia (Serbia and Montenegro) before the ICJ in 1993. The Genocide Convention applies naturally to situations both in war and in peace. However, as the acts complained of in the case concerned mainly acts carried out in war, it would seem appropriate to regard this case as one about war crimes.[208] This case concerned mainly atrocities committed in the war in 1991–5, in particular the massacre at Srbrenica.

Itself accused by Bosnia-Herzegovina of genocide, Yugoslavia took a surprising action against 10 NATO States and accused them of a number of crimes, including genocide in the Allied bombing *Operation Allied Force* in 1999. Kosovo had earlier enjoyed some autonomy but Yugoslavia ignored the needs of the ethnic Albanians who form more than 90 per cent of the population of Kosovo. When the treatment of the Kosovars exceeded what the Allies considered acceptable or tolerable, NATO intervened by a bombing raid.

The law suits against NATO members were probably taken with little justification,[209] but may well indicate that legal action, both for Applicants and for Respondents, or in a cross action like the *Genocide Case* and the *NATO Cases*, may well be a way to clarify the meaning of war crimes: in this case the numerous law suits by Yugoslavia were probably used as an attempt to raise a defence against accusations of its own policies.

As a procedural note, it may be interesting to note that article 34 of the Statute of the ICJ reserves *locus standi* only for States. Only States can thus be parties to a case before the Court. An inter-governmental organisation may ask for an Advisory Opinion, as for example, the World Health Organisation has done,[210] or even the United Nations itself: inter-governmental organisations do have international personality, as confirmed by the ICJ in 1949.[211] International personality means that an organisation can assume rights and duties and act in its own name.[212]

Above all, it ought to be possible to take action against an organisation if that entity is guilty of actions which are not compatible with international law or with the Law of War. Both NATO and the UN forces have national contingents but these are all subjected to unified command, entailing allegiance to this command

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208 This was confirmed in the judgment 26 February 2007 but the majority of the Court held that it was not certain that Serbia had committed the genocide in Srbrenica but was guilty of not having prevented the genocide.

209 Note the eight actions, called 'reckless' by some commentators, against NATO States *inter alia* for genocide, *Yugoslavia v Belgium; v Canada; v France; v Germany v Italy; v Netherlands; v Portugal* and *v United Kingdom*, all in 1999. A further two actions, against Spain and against the United States, were discontinued because of valid reservations to the Court's jurisdiction.

210 Requested in 1993 and delivered by the ICJ in 1996, ICJ *Reports*, 1996.

211 *Reparations for Injuries Case*, ICJ *Reports*, 1949.

212 For a theory setting out a series of international actors as having international personality depending on the need to act in situations of 'international relevance', see Detter, I., *The Concept, op. cit.*, Chapter One; Detter, I., *International Legal Order, op. cit.*, Chapter II, iii.

structure.[213] In the massacre of Srbrenica, there were serious failings of the UN forces on the location who did not react when the crowd was separated into women and children on one side and men and young boys on the other, from where the latter group was taken and all shot. These failings of the UN contingent raise the question which should be addressed in the future of the passive personality of international organisations and the liability for war crimes. It is not sufficient to insist that the UN soldiers enjoy immunity as there are also limits to such privileges in the face of genocide.

ii Individual Responsibility

States have collective responsibility but Al-Qaeda, and other terrorists, will, so far, be subjected to rules of individual responsibility. One may note the transitory problem of liberation movements: here the answer to the question of collective or individual responsibility would be that, should they not win their fight, they will, as a group, be dissolved by the State and in this sense there will remain no bearer of collective responsibility; then, in all likelihood, the individuals concerned will be prosecuted for their part in any crimes.[214] And if liberation movements do win their fight they will emerge as States: although they would then be able to assume collective responsibility under international law, they are, as victors, likely to escape such responsibility.

As mentioned above, the question of liberation movements belongs largely to the past: the colonial empires have been dismantled and, following a certain subsequent fragmentation, the situation now appears fairly stable.

But liberation movements have played a part not matched by guerrillas and terrorists. The leaders of the liberation movements may have resorted to guerrilla practices, cruel treatment and other violations of the Law of War. But they were fighting to acquire independence for their own State and if they achieved this goal they normally enjoy immunity from prosecution.

In that sense they are to be distinguished from the following terrorist movements which solely seek to harm Christian and other values of the 'West'. The *jihad* terrorists also appear to belong to a cohesive group, mainly associated to the mother organisation Al-Qaeda. Yet, their responsibility will always be individual as there cannot be any collective responsibility for an entity that cannot even be sufficiently identified and delimited. Thus, the terrorists have engaged their individual responsibility for their crimes.

a Identification of War Crimes

Above the collective responsibility of States, a normal consequence of any violation of international rules, there is also, in some cases, individual responsibility for certain 'war crimes'. That such responsibility exists in certain circumstances was already shown in the provisions of the Versailles Treaty stipulating that war criminals had

213 See Detter, I., *Law Making, op cit.*, Chapter 1.

214 See below, in the next section.

to be surrendered by Germany to the Allies.[215] New efforts in the field of individual responsibility were made by the Declarations of London in 1942, of Moscow in 1943 and of Berlin in 1945.[216] But the substantial development of detailed rules in the field of individual responsibility probably came with the Nuremberg Trials[217] and in the Far East Trials.[218]

But war crimes still occur.[219] The development of individual responsibility has been codified in the Geneva Conventions of 1949 and in the Protocols of 1977.

The Nuremberg Tribunals and the Tribunal for the Far East enumerated 'war crimes' in their Charters[220] but this classification has not been entirely adopted in the doctrine.[221] Many consider that the notion 'crimes against peace' is too vague to imply a war crime in the technical sense[222] and that the Charters thus employed a notion of war crime that is too wide.[223]

Some have suggested that the list of war crimes should be enlarged by including the use of nuclear weapons[224] as a new war crime.[225] Others have assumed that misuse of conventional weapons, or the use of forbidden such weapons, will qualify

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215 Articles 228–230.

216 See, Rousseau, Ch., Conflits armés, *op. cit.; cf.*, UN, *History of the United Nations War Crimes Commission and the Development of the Law of War* (London: H.M. Stationery Office, 1948).

217 Woetzel, R., *The Nuremberg Trials with a Postlude on the Eichmann Trial*, 2nd rev. edn (London: Stevens, 1962).

218 See Dull, P.S. and Unemura, M.T., *The Tokyo Trials* (Michigan: University of Michigan, 1962); Röling, B.V.A., 'The Tokyo trials and the development of international law', *Indian LR*, 1953, 4.

219 *E.g.* on My Lai see, Committee on Armed Services, House of Representatives, 91st Congress, 2nd sess., Hearings of the Armed Services Investigating Subcommittee, *Investigation of the My Lai Incident*, 1976; Peers, W., *The My Lai Inquiry, The 'Peers Report', First Report of the Department of the Army Review of the Preliminary Investigation into the My Lai Incident* (Washington, DC: Brassey's and New York: W.W. Norton, 1979); *US v Calley* (1973), 46 CMR 1131; *cf.*, *Koster v US* (1982) 685 F 2d 407; *cf.*, Warnke, P.C., 'Individual responsibility in warfare', in Trooboff, P.D. (ed.), *Law and Responsibility in Warfare: The Vietnam Experience* (Chapel Hill, 1975), 187 *et seq.*; on Shatila and Sabra, see Burnett, W.D., 'Command responsibility and a case study of the criminal responsibility of Israeli military commanders for the pogrom at Shatila and Sabra', 107 *MilLR*, 1985, 71; on the massacre at Kafr Kassem in 1947, see *RGDIP*, 1959, 513; International Organisation for the Elimination of All Forms of Racial Discrimination (ed.), *Witness of War Crimes in Lebanon, Testimony Given to the Nordic Commission in Oslo, October 1982* (London, 1983), 20 *et seq.*, also on the Red Cross not being respected. On the numerous war crimes in Croatia and Bosnia, Rwanda, Sierra Leone, the Lebanon and elsewhere, see below on the War Crimes Tribunals, section ii b (1).

220 UN Doc. A/1316 1950; The relevant provisions are reproduced in my 'Foreign warships', *op. cit.*, at 68.

221 See discussion in the International Law Commission for the 1954 Draft on Code of Offences Against the Peace and Security of Mankind, *Yearbook* ii, 1954, 149.

222 Zemanek, *Kriegs und Humanitärrecht*, *op. cit.*, No. 2129 at 394.

223 *Cf.*, Piccagalo, P.R., *The Japanese on Trial, Allied War Crimes Operations in the East 1945–1951* (Texas: University of Texas Press, 1979), 212.

224 See above, Chapter 7; section B ii c on legality of use.

225 van den Wijngaert, C., 'Les euromissiles et le droit pénal international', in *Actes du Colloque, Les conséquences juridiques de l'installation* éventuelle *de missiles cruises et pershing en Europe* (Brussels, 1984), 111; Andries, A., 'L'emploie de l'arme nucléaire est un crime de

as war crimes even though the Conventional Weapons Convention itself is silent on this point.[226]

The traditional war crime included from the earliest inception of rules on the Law of War probably concerns illegitimate violence of the rights of prisoners of war.[227] The rules on treatment of prisoners of war[228] may have fallen into some disrespect after the First World War.[229] However, after the Second World War inhuman treatment of prisoners of war was clearly condemned as a war crime.[230] Other typical offences would be murder and devastation not justified by military necessity.[231] Numerous convictions in the Nuremberg Trials thus concerned atrocities against civilians. For example von Leeb was held personally responsible for partaking in the 'Barbarossa Order' to shoot civilians on mere suspicion for certain acts.[232] Also in the Far East Trials war crimes often concerned violations of rules protecting civilians, in the *Case of Yamashita*, for example, involving atrocities against the civilian population in the Philippines.[233] Other war crimes include the killing of enemy soldiers who have surrendered. This is a practice condemned in the early textbooks although it is there often coupled with exceptions for military necessity,[234] reprisals[235] or even for the case where the surrendered soldier is himself guilty of a crime.[236] The last case is still catered for in the Geneva Convention on Prisoners of War.[237] Under this article persons will still be exempt from the privileges of being treated as a prisoner of war.[238] The effect of this provision, however, may be mitigated by the extended provision granted by Protocol I of 1977.[239] However, the reservations to the relevant article of Protocol I will bring back much to the level of the Third Geneva Convention.[240]

War crimes, especially certain practices of the Second World War, have been thought to be so abhorrent that they belong to a different class than other violations of international law. They are for example so serious that many suggest

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guerre', *La revue nouvelle*, 1983, 315. On the importance of moral-legal condemnation of the use of nuclear weapons, see Bindschedler-Robert, *Réconsiderations*, *op. cit.*, 11–12.

226 Rauch, J.A., 'Certain Conventional Weapons Convention: arms control or humanitarian law?', 105 *MilLR*, 1984, 58.

227 *E.g.* Special Commission Established by the Peace Conference in 1919, *AJIL*, 1920, 95.

228 Above, Chapter 9, section B iii f.

229 Mullins, C., *The Leipzig Trials* (London, 1921); Rousseau, Ch., *Conflits armés*, *op. cit.*, 99.

230 *The Great War Criminals Case*, *AD*, 1946, 216; *The Hirota Case*, Tribunal for the Far East (1949), *AD*, 1948, 366.

231 Above, in this Chapter, section B i a.

232 *The von Leeb Case*, 11 Nuremberg 554, 560.

233 *The Yamashita Case*, UN War Crimes Commission, 4 *Law Reports of the Trials of War Criminals*, 1948, 3.

234 Above, in this Chapter, section B i a.

235 Above, Chapter 2, section B iv and Chapter 8, section A iv c.

236 Martens, G.F., *Précis du droit des gens moderne de l'Europe*, 2nd edn (Paris: Guillaumin & Cie, 1864), Bk VIII, Ch.iv para. 272 at 232.

237 Geneva III, article 85.

238 Above, Chapter 9, section B iii f.

239 See above, Chapter 6, section B i.

240 See above, Chapter 9, section B iii f.

there should be no limitation period,[241] almost forgetting that rules on limitation normally apply to secure accuracy of evidence rather than necessarily reflecting the severity of crimes. But there are still proceedings for war crimes 40 years after the end of the Second World War. Many States have introduced special regulations to prolong the possibility to bring prosecutions for war crimes[242] but a time of 40 years exceeds most provisions in national legislation[243] on prosecution for murder or other serious crimes. Some such extending provisions in national legislation were adopted as measures to implement a special Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity concluded in 1968.[244] Some demands, like the one for Klaus Barbie from Bolivia,[245] resulted in a State finally being able to claim jurisdiction. Even for those who are no longer likely to be alive, there are still outstanding demands[246] for extradition, for example of the suspected war criminals Mengele from Paraguay[247] and G.F. Wagner from Brazil.[248]

Among the most spectacular cases of evasion of justice for war crimes are the Serb leader Karažič and the Serb general Mladić, indicted by the Hague Tribunal for former Yugoslavia for serious war crimes committed 1990–6, long sought after and finally apprehended after several years. Karažič served as President of the Republika Srpska[249] from 1992 to 1996; he was arrested in 2008 and extradited to the ICTY. General Mladić was finally apprehended in 2011 and extradited to the same Tribunal in the Hague.

b War Crimes and Universal Jurisdiction

Some have suggested that flagrant disrespect for human rights gives rise to universal jurisdiction and that, therefore, war criminals can be tried anywhere.[250] Such acts

241 Mertens P., 'L'imprescriptibilité des crimes des guerre et contre l'humanite', Université de Bruxelles (ed.), *Etude de droit international et de droit pénal comparé* (Brussels, 1974), at 226: to allow limitation would be to normalise genocide.

242 *Ibid.*, 25 *et seq.*

243 Note that not all countries have such statutory provisions.

244 8 *ILM* 68.

245 *RGDIP, Chronique*, 1972, 135.

246 See, further, Rousseau, Ch., *Conflits armés, op. cit.*, 182–183.

247 *RGDIP*, 1980, 411.

248 *Ibid.*, 355.

249 Under the Dayton Agreement of 1995 the Republika Srpska and the Federation of Bosnia-Herzegovina form one single State. See, the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement), US State Dept., official site: http://www.state.gov/www/regions/eur/bosnia/bosagree.html. But many services of the joint State are decentralised and Republika Srpska claims certain surprising powers more associated with the status of an independent State. In 2009 a representative office was thus opened in Brussels for negotiations with the European Union.

250 Robespierre, quoted by Basdevant, J., *La révolution française et le droit de la guerre continentale* (Paris: L. Larose, 1901), 165: '*Ceux qui font la guerre à un peuple pour arrêter les progrès de la liberté et anéantir les droits de l'homme doivent être poursuivis par tous, non comme des ennemies ordinaires mais comme des assassins et des brigands rebelles.*'

would also give rise to universal jurisdiction and allow any State, or as Robespierre said by 'all'[251] to take action against the party at fault.

The system of universal jurisdiction has been adopted by the Geneva Conventions, based on the maxim *aut dedere aut punire, i.e.* either a State must extradite a war criminal or make sure that he is punished in its own criminal proceedings.[252] A system for universal jurisdiction has also been adopted in later treaties on hijacking and other forms of terrorism.[253] With regard to chronology, it may be added that the right to prosecute subsists for a considerable time period.

Such universal jurisdiction has always existed with regard to pirates,[254] who are by tradition *hostes gentium* or the enemies of all.

The right of universal jurisdiction exists also under general international law for terrorists who can be compared to pirates.[255]

States thus also enjoy such powers and for terrorist crimes.[256] In the modern world, which, as Lord Millet stated, is but a 'global village' where 'national borders are no impediment to international terrorists and other criminals', the situation of terrorists can best be compared to that of pirates, subject to be caught or tried wherever they find themselves, Even for other crimes than piracy there is now a trend in international society towards universal jurisdiction. As Lord Griffiths said in *Liangsiriprasert v United States*:

> 'Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality.'[257]

Similar powers are held by States for serious war crimes. For such crimes there is also universal jurisdiction. States have often exercised such jurisdictional powers even in cases when war criminals have been apprehended long after the Second

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251 See quotation in the previous note.

252 See Geneva I, article 49; Geneva II, article 50; Geneva III, article 129; and Geneva IV, article 146.

253 Above, Chapter 1, section B iii c.

254 See Detter, I., 'Illegal combatants', *op. cit.*, on the *jihad* terrorists being compared to pirates, also with regard to the right to universal jurisdiction. On jurisdiction over pirates see, *S.S. Lotus (France v Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7): a pirate 'is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish', *per* Judge John Basset Moore. In *re Piracy Jure Gentium* [1934] A.C. 586 (P.C.); In *re Tivnan* (1864) 122 Eng. Rep. 971 (Q.B.); *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69 [2002] 1 A.C. 556, 580–81. *Cf.*, Law of the Sea Convention, art. 105, art. 101(a); High Seas Convention, art. 15(1). Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 5, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; see also Detter, I., *International Legal Order, op. cit.*, 402–454.

255 See, Detter, I., 'Illegal combatants', *op. cit.*, at 1098.

256 For example, for France, Fédération *des Déportés & Al. v Klaus Barbie*, Cour de cassation, 1985, 78 *ILR* 124; 1988, 100 *ILR*, 330; *Paul Touvier*, 100 *ILR* 338; for Canada*R v Finta*, High Court, 10 July 1989, 93 *ILR* 424.

257 *Liangsiriprasert v Gov't of the U.S.* [1991] 1 A.C. 225 (P.C.) (appeal taken from H.K.). *Cf.*, *R (Abbasi) v Sec'y of State for Foreign & Commonwealth Affairs* [2002] EWCA (Civ) 1598.

World War.[258] The leading case is clearly the *Eichmann Case*[259] but this case was complicated by the fact that Eichmann had been illegally captured in Argentina, infringing the sovereignty of that country. But according to the principle *male captus bene detentus*,[260] Israel claimed the right to convict Eichmann. There were further complications in this case in that the apprehending State did not exist when the alleged crimes were committed. Israel claimed, however, to be the 'guardian of international law and agent for its enforcement to try the Appellant' under what has been called the 'protective principle' concerning paramount State interests.[261]

A number of countries have introduced legislation enabling exercise of universal jurisdiction for violations of the Law of War. State practice shows that many States have indicted and convicted persons for war crimes.[262] States have even extradited their own citizens to be tried by another country, held to have a greater interest in the proceedings.[263] On the other hand, if a State indicts and convicts one of its own citizens, there is no exercise of 'universal jurisdiction' but of mere national competence.[264]

Now, however, there is a further system put in place for special war crimes tribunals to try suspected war criminals and the tendency is for States to extradite suspects to these tribunals.[265]

It must not be overlooked, however, that some States prefer to exercise their own jurisdiction, either by courts or by military tribunals or commissions. This is particularly the case with the United States which has not ratified the ICC Statute. As for the prisoners in Guantanamo, the trial of Kahlid Sheikh Mohammed, one of the instigators of the 9/11 attack, began before a military court on 4 May 2012, with a trial date set for May 2013, with 2,976 counts of murder in the indictment.

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258 Most States have introduced legislation that such crimes will not be barred by any Statute of Limitation.

259 Supreme Court of Israel, 29 May 1962, 36 *ILR* 5.

260 This doctrine has been used to enable States to indict suspected war criminals. In the ICTY case of *Gotovina*, IT-06-90, the Croatian General who was abducted after having been apprehended in Spain, the doctrine does not seem to have been discussed. For the doctrine, see Schreit, T., *Male captus bene detentus* (Leiden, 2012).

261 *Ibid.*, at 54–57, 304.

262 For example, for Germany, the *Jorgić* Case, Bundegerichtshof, 20 April 1999 and Bundesverfassungsgericht, 12 December 2000; *Djajić* Case, 20/96, Oberster Gerichtshof, Bayern, 23 May 1997, 92; *Sokolović* Case, Bundegerichtshof, 21 February 2001; for Switzerland, *Niyonteze Case*, Trib.mil. de cassation, 27 April 2001; for the Netherlands, *Knesević Case*, Supreme Court of the Netherlands, 11 November 1997; for Belgium, the *Case Mukankango, Mukabutera, Higaniro* and *Ntezimana*, four citizens of Rwanda, resident in Belgium, convicted for war crimes in the Hutus-Tutsis conflict in 1994, Cour d'Assises de Bruxelles, 8 June 2001.

263 See the *Demjanjuk Case*, 612 suppl. 544, DC Ohio, 1985.

264 See the *Ntuyahaga Case*, Cour d'Assises de Bruxelles, 4 July 2007. Here, the accused was a citizen of Belgium, first indicted in 1998 by the ICTR accused of genocide and crimes against humanity but the ICTR dropped all charges the following year after political pressure by the Rwandan Patriotic Front. Tanzania arrested him for entering the country illegally and Rwanda asked for his extradition to be tried for murder of the Prime Minister. However, Tanzania chose to extradite him to Belgium although there is some indication in the judgment that he surrendered himself voluntarily.

265 See below in the next section.

c Prosecution for War Crimes and Immunity

There is an important conceptual distinction between immunity of proceedings and immunity of enforcement.[266] There is also a distinction between immunity in proceedings concerning indictment and proceedings on substantive law. With regard to immunity of proceedings, which, in this context, is the most important aspect, it must be noted that Heads of State do enjoy immunity in such proceedings as long as they are in office.[267] But a Minister of Defence may not be afforded such immunity,[268] nor – for example – a Deputy Chief of National Security.[269]

The question of immunity is clearly also relevant as States usually claim immunity for *acta de jure imperii*, that is to say official acts. Normally such acts also include acts of the armed forces of a State. A forceful Dissenting Opinion by Judge Cançado-Trindade in the *Case of Jurisdictional Immunities of the State (Germany v Italy)* underlines that such immunity for war crimes is based on a misinterpretation of the rules of immunity which never include *delicti imperii*, that is to say State crimes.[270] It is indeed surprising that the majority of the Court held that crimes against peremptory rules would not suspend rights of immunity. The Court made a strict distinction between 'procedural' immunity, bearing on jurisdiction which, even if rules of *jus cogens* have been violated, does not infringe 'customary' rules on State immunity. The Court held that rules forbidding slave labour and deportation are certainly rules with the force of *jus cogens* but the rule of immunity, in its procedural form, only addresses whether courts of one State may exercise jurisdiction in respect of another State. The rules, said the Court, address different questions and that the immunity of States in proceedings prevails.

Another question of immunity arises when a State infringes the territory of another by military incursions. In the event, a Soviet submarine had grounded in shallow waters in 1986 within the military area of Karlskrona; the captain declared that his compass was faulty but he had already navigated some 30 miles in highly treacherous waters within a highly classified military area. For some time the Prime Minister of Sweden, Mr Olof Palme, supported by an adviser in his Foreign Ministry, insisted that the attacks of Soviet submarines in the Swedish archipelago could

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266 See, in detail, Fox, H., *The Law of State Immunity*, 2nd edn (Oxford: OUP, 2008).

267 La Cour de cassation, *Kadhafi*, Cass. 1ère civ., 9 March 2011. *Al-Adsani v United Kingdom*, 21 November 2001, 35763/97, where the European Court of Human Rights held that granting of immunity in a civil action is not in conflict with article 6 § 1 of the Convention. Also, the Executive decides who is 'Head of State', *US v Noriega*, 177 F 3d 1206 Ct of App. 11 Cir (1997). On that score, Ayatollah Khomeini 'Supreme Leader of the Islamic Republic of Iran' was denied immunity, 99 F Supp. DC Columbia (1998). *Cf., Republic of the Philippines v Marcos*, 862 F 2d 13 55, 9 Cir. (1988), cert. denied, 109 S.Ct. 1933 (1989). *Trajano v Marcos*, 978 F 2nd 493 9 cir (1987).

268 For example, in the United States, *Xuncax v Gramajo*, 886 F Supp. 162 (1995): a Guatemalan Minister of Defence was held to have acted beyond the scope of authority and was held not to be entitled to immunity.

269 *Cabiri v Assasia Gyima*, 921 F Supp.1189 (1996).

270 See, also, Dissenting Opinion of Judge Cançado Trindade in the *Case of Jurisdictional Immunities of the State (Germany v Italy)*, judgment 3 February 2012, ICJ *Reports*, 2012, Part V of the Opinion.

not be resisted with armed force of the Swedish Navy as the foreign warships, the submarines, enjoyed 'immunity'. This is a misunderstanding of what an 'attack' means under international law and what 'immunity' signifies in the Law of War.[271]

The right of self-defence entitles a State to immediate action if an attack is at hand. Clearly, a State cannot ignore what amounts to an 'armed attack', assuming that the submarines in question enjoy 'immunity': this is to confuse two important questions. An attack entitles a State to self-defence and immunity in that context is irrelevant. But Mr Palme ordered the Swedish Navy not to take defensive action and even paid for the salvage of the Soviet submarine U 132 to be lifted off the island in the military area, insisting that the submarine was 'immune'.[272]

An important question in this context has been the question of immunity with regard to war crimes: it now seems clear that Heads of State and ministers of a government cannot expect to be immune to indictments for war crimes, when they are no longer in office. Former Heads of States have thus been indicted, like, for example, President Milosović,[273] General Pinochet[274] and President Charles Taylor.[275] On the other hand, numerous cases confirm that Heads of State (and Foreign Ministers) who are still in office cannot be indicted as they enjoy immunity: see the case of a foreign minister of the Congo, in the *Arrest Warrant Case*[276] in the International Court of Justice. National courts have also granted immunity to a still serving Head of State: see the case against President Mugabe in a United States court.[277] Even those who could be suspected of violations of rules of *jus cogens*, like rules on genocide, are not indictable in national courts, as shown by the decision in 2011 by the French Court of Cassation in the Case of colonel Gaddafi, when he was still in office.[278]

271 See Detter, I., 'Foreign warships and immunity for espionage', *AJIL*, 1984; *eadem*, 'Ubåtsspionaget och folkrätten' (Submarine espionage and international law), *Svensk juristtidning*, 1985 and *eadem*, 'Ubåtsspionaget: missförstånd på missförstånd' ('Submarine espionage: misunderstanding upon misunderstanding'), *Svensk juristtidning*, 1985.

272 The Captain asserted his compass was out of order. It was still remarkable to navigate as far as he had, miles within the military zone, without hitting a shoal as that area is highly treacherous. The Foreign Ministry insisted the Captain could not be apprehended and not even questioned as he was 'immune', see *ibid., loc. cit.*

273 See ICTY, *Milosović* Case, IT-02-54; the accused was indicted in 1999, transferred to the ICTY in 2001, but died during the trial in 2006. Milosović was President of Yugoslavia/ Serbia from 1990 to 1997.

274 *Ex parte Pinochet*, AC 1999 147. There are three judgments, 2 *All ER*.

275 See *Charles Taylor Case*, SCSL-03-1-T, judgment 26 April 2012.

276 *Arrest Warrant Case* (*Democratic Republic of the Congo v Belgium*), ICJ *Reports*, 2002. See also Separate Opinion of Judge Guillaume as to the importance of the person being present within the territory.

277 *Tachiona v Mugabe*, Western District, NY, 2001, 160 Fed. Supp. 2nd Series 259.

278 Cour de cassation, France, conc. *Kadhafi*, Cass. 1ère civ., 9 March 2011. But see above, Chapter 2 B viii d on 'punitive' intervention, in Libya, during which Colonel Gaddafi was murdered by the insurgents.

d Prevention of Terrorism: Freezing of Assets

One effective way of responding to terrorists is to freeze their assets. The action of freezing has also been used against States, but that is rare: freezing measures have only been used against a government that has violated certain fundamental principles of international law, such as the immunity of diplomats, concerning the attack on the US Embassy in Tehran, preventing staff to leave, which led to one case in the International Court of Justice, the *Hostage Case*,[279] and one High Court action in London to freeze Iranian assets in seven American banks – a measure which finally secured the release of the hostages.[280]

Freezing the assets of terrorists is now the most effective way to sanction terrorists and far more effective than legal action. As 'genocidal' *jihad* terrorists are also 'suicidal' there is little chance of ever convicting many perpetrators. But to cut off their funds would not only be an appropriate sanction but could conceivably also prevent attacks and save many lives. The main problem here is however that it is riddled with difficulties to locate assets of terrorists.

The Financial Action Task Force (FATF) is an inter-governmental body developing and promoting policies to combat money laundering and terrorist financing. FATF lays down International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF issued valuable recommendations in 2012 suggesting concrete measures to combat terrorism by controlling their funding.[281]

The revised FATF Recommendations now fully integrate counter-terrorist financing measures with anti-money laundering controls.[282] The FATF Recommendations are used by more than 180 governments, and by banks, to combat terrorism and other crimes. At the global level, the FATF will also monitor and take action to promote implementation of the standards.

e Prosecution for War Crimes by War Crimes Tribunals

(1) The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The International Criminal Tribunal for the former Yugoslavia (ICTY) is an *ad hoc* Tribunal for war crimes committed in the former Federation of Yugoslavia in the 1990s. On 25 May 1993, the UN Security Council passed Resolution 827 to establish the International Criminal Tribunal for the former Yugoslavia, known as the ICTY. This resolution contained the Statute of ICTY with rules on jurisdiction

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279 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, *Reports*, 1980.

280 *The Frozen Assets Case*, High Court of London (settled), 1981. Many sought to take the credit but it was said the release of the hostages was delayed to allow President Carter to come into power after President Reagan in January 1981.

281 FATF, *The FATF Recommendations, Paris, 16 February 2012.*

282 The recommendations concern, *inter alia*, 1. Improved transparency to make it harder for criminals and terrorists to conceal their identities or hide their assets behind legal persons and arrangements; 2. better operational tools and a wider range of techniques and powers, both for the financial intelligence units, and for law enforcement to investigate and prosecute money laundering and terrorist financing.

and organisational structure. This was the first war crimes court established by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. The ICTY has jurisdiction over the territory of the former Yugoslavia from 1991 onwards, over individual persons (but not over legal entities) for grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and for crimes against humanity.

The ICTY may take over national investigations and proceedings at any stage if this proves to be in the interest of international justice. It can also refer its cases to competent national authorities in the former Yugoslavia.

Although the ICTY should have been a model for subsequent war crimes tribunals and even for the general International Criminal Court (ICC),[283] it has been somewhat of a disappointment.[284] Far from providing clear guidance on the law of war crimes and crimes against humanity, it has caused confusion and disarray by inventing doctrines unknown previously in international criminal law, such as the doctrine of 'joint criminal enterprise', not even mentioned in the Nuremberg and Tokyo Trials.[285]

There have been other deviations from what was considered a fairly stable set of rules. In one case, designed to cause spectacular outrage among international lawyers, the *Tadić Case*,[286] the Court simply decided to enlarge its own competence and deal with matters under some sort of 'implied' authority and without any grounds for assuming this under its own Statute. The Chamber decided that to avoid 'lengthy, emotional and costly' trials, it could resort to the dangerous doctrine of '*compétence de la compétence*' and enlarge its own competence. But the theory, as understood in French law, from where ICTY recruited it, is normally limited to minor procedural matters.[287]

The other very serious development is that ICTY presumes that a case it has decided may provide 'new law': the Court cites one of its own decisions as 'an authority' in a subsequent case, or, as it turns out, in a series of cases. The Court thus perpetuates what might have been an understandable mistake in one case to provide a 'precedent' for future cases. This doctrine of precedence has been adopted although it is an alien idea in civil law countries (the countries involved in the 1990–5 war in Croatia and Bosnia). As is well known by continental and other international lawyers, the doctrine or precedents is only applied in Commonwealth countries. And yet there have been few, if any, protests against the practice of the Court.

The ICTY Tribunal has been severely criticised by one of its own Judges who had also sat on the *Tadić Case*: Judge Li stated in a Dissenting Opinion in the *Prosecutor v Dražen Erdemović*[288] that some of his colleagues in this and in other cases showed considerable ignorance of certain rules of the Law of War, especially

283 See, below, in this Chapter.

284 *For detailed criticism of the questionable attitudes of ICTY, see Lombardi, G.P., 'Legitimacy and the expanding power of ICTY', 37 New England Law Review, 2003, 887 et seq.*

285 See further below in this Chapter on widespread criticism.

286 Case No. IT-94-94-A1.

287 See, Detter, I., *Law Making, op. cit.*, Chapter One.

288 Case No. IT-96-22-T, T. Ch. I, 29 November 1996.

concerning the relationship between war crimes and crimes against humanity.[289] In this Case there was also a strong Dissenting Opinion by Judge Cassese, warning against the adoption of certain national rules, pretending that they form part of international law affecting, for example, the scope of jurisdiction of ICTY, enlarging the competence of the Tribunal without any support in its Statute.[290] Other Judges have reacted to the increased use of the controversial doctine of a 'Joint Criminal Enterprise (JCE)' which has been used to convict persons who had neither a *mens rea* nor had taken any part in the *actus reus*, thus adopting doctrines never known or used in the Law of War. A further former Judge Schomberg resigned from the Tribunal and published biting criticism of the law administered by the ICTY.[291]

What is tragic is that the States whose citizens were being prosecuted lacked the political power and perhaps the will to protest against these failings. Croatia and Serbia/Montenegro had little authority but to submit to indictments of the Court and the Great Powers showed no or little interest in assisting in the task to see that cases were fairly decided. The United Kingdom, which had assisted in the creation of Yugoslavia, was particularly loathe to be involved with the Court which, with a few brilliant exceptions, was to be run by quite a mediocre squad of Judges.

Although well funded, the ICTY administration is still below what is acceptable: judgments and other documents in the court registry can only now be read page by page and there is a defective search engine unable to trace documents. Numerous documents are inadequately scanned and virtually illegible. It all adds up to some scheme, by design or incompetence, to deprive scholars of the chance to examine files of the Court.

There appears to have been a decisive tendency to make sure that as many Croats as Serbs were indicted although it was fairly clear that the JNA, the Yugoslav national army, dominated by Serbs, had attacked Croatia when the Croats sought to leave the communist Federation in 1990, under the authority of one of the provisions in the Federal Constitution. Besides, Croats, but not Serbs, were deprived of accessing arms under the EU arms embargo rules, so Croats would appear to have been the majority of victims rather than perpetrators of war crimes. Curiously, the ICTY decided not to indicate the nationality of the accused (sometimes with similar names) as they were to be treated 'equally'.

The Court appeared to some as a vindictive mechanism to punish some soldiers who, on the face of it, had faithfully abided by the rules of traditional Law of War. Punishments have also been excessive and handed without much evidence from the Prosecution of any wrongdoing under the traditional and accepted rules of the Law of War. For example, General Gotovina, who had retaken an area from the Serbs with remarkably few losses on any side, was convicted to 24 years in prison. Yet, it was more or less clear that Croatia had willingly extradited several generals in order to obtain favourable treatment in the run to join the European Union, something which may turn out to be a Pyrrhic victory. In November 2012 General Gotovina

289 *Ibid.*, Dissenting Opinion by Judge Haopei Li, 7 October 1997.
290 *Ibid.*, Dissenting Opinion by Judge Antonio Cassese.
291 See further below under Joint Criminal Enterprise, in this Chapter.

was acquitted on appeal and immediately released.[292] The previous Prosecutor in the case, Mme Carla del Ponte, made an unprecedented declaration that, in her opinion, there had been ample 'evidence' against General Gotovina and made a statement that at least, *prima facie*, gave the impression that she considered the Appeal Chamber had been 'wrong', a statement which perhaps was not expected from a Prosecutor after the verdict of the higher court had been given.[293]

(2) International Criminal Tribunal for Rwanda (ICTR)

Recognising that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of 8 November 1994.[294]

The ICTR, another *ad hoc* Tribunal,[295] was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. The time span for crimes to be prosecuted is thus limited to one single year. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period.

The Tribunal is competent to decide in cases concerning genocide, crimes against humanity, violations of Common article 3 of the Geneva Conventions and of Additional Protocol II and with crimes committed between 1 January and 31 December 1994, by Rwandans in the territory of Rwanda and in the territory of neighbouring States, as well as non-Rwandan citizens for crimes committed in Rwanda. The Tribunal has delivered 50 first-instance judgments involving 70 accused, nine of whom pleaded guilty. In an interesting development of the reduction of immunity of statesmen who commit atrocities, the Tribunal has indicted numerous ministers and even the former Prime Minister, Jean Kambanda.[296]

(3) The Special Tribunal for Lebanon (STL)

Some war crimes tribunals are so-called 'hybrid' tribunals in the sense that they have both international and national judges. The mechanism of hybrid courts to use national machinery for the implementation of rules of international law is an application of the doctrine of '*dédoublement fonctionnel*'[297] and indicates that national organs in this way can provide the institutional machinery when the international legal system lacks adequate structural bodies.[298] The Special

292 ICTY 16 November 2012, Judgment IT-06-90.

293 Večernji List 17 November 2012.

294 By Resolution 977 of 22 February 1995, the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania.

295 Regarding activities in Chambers, the ICTR President predicted that all trial work was expected to finish by the first half of 2012. The work of the Appeals Chamber would be finished by 2014.

296 ICTR-97-23. Kambanda was sentenced to life imprisonment.

297 Scelle, G., *Traité de droit international* (Paris: Dalloz, 1929).

298 For the application, see my *Law Making*, *op. cit.*, 117.

Tribunal for Lebanon (STL) is one such *ad hoc* hybrid Tribunal for the prosecution under Lebanese law of those responsible for the assassination of Rafic Hariri on 14 February 2005.[299] The STL was established by a Resolution of the Security Council taken under Chapter VII to find and punish those responsible for this 'terrorist crime'.[300] The Tribunal also has jurisdiction over a series of other attacks in Lebanon, between 1 October 2004 and 12 December 2005, if they are connected with the Hariri assassination.

This is an exceptional situation when the United Nations has taken the initiative to establish a tribunal for a terrorist crime. It is different from the other war crimes tribunals as there is a highly volatile situation in the country which could be described as a 'post-war and a pre-war' situation. It may indicate the importance that terrorists have attained as actors in international scenarios and underline the proposition that they can no longer be dismissed as non-subjects of international law: they, like other individuals, have direct duties under the international legal system.

Like the ICTR, the STL has only jurisdiction for a short time span of a little over one year. The tribunal officially opened on 1 March 2009. There was an initial three-year mandate for the court and there is no fixed timeline for the prosecutions but work is anticipated to be completed by 2015.

The Prosecutor submitted an indictment and the Tribunal issued four confidential arrest warrants in 2011. Some members of Hezbollah have denounced the legitimacy of the Tribunal.[301]

(4) The Extraordinary Chambers in the Courts of Cambodia (ECCC)

The Khmer Rouge Tribunal, formally called the Extraordinary Chambers in the Courts of Cambodia (ECCC) is another *ad hoc* hybrid[302] court, established to try the most senior and most responsible members of the Khmer Rouge for atrocities in Cambodia. It is a hybrid court in the sense that is both a national and an international court: it was established as part of an agreement by the government of Cambodia and the UN. Its members include both local and foreign judges. The Extraordinary Chambers are competent to judge on crimes against humanity, war crimes and genocide committed during the period between 17 April 1975 and 6 January 1979, thus during some three and a half years. The Tribunal aims in particular for the prosecution of those involved with the crimes of Pol Pot.

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299 The court is based near The Hague with a field office in Beirut.

300 Security Council Resolution 1757 taken under Chapter VII of the Charter 2007, and Annex UNSC 1757 R on Agreement between the United Nations and the Lebanese Republic to establish a Special Tribunal for the Lebanon, *cf.*, SC Res 1664 of 2006. The Security Council condemned the terrorist bombings on 14 February 2005 as well as other attacks in Lebanon since October 2004 and referred to the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting 'the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime'.

301 *Handbook on The Special Tribunal for Lebanon*, 2008-04-01, International Center for Transitional Justice, 2008.

302 For the meaning of 'hybrid' in this context, see above under the Lebanese Court.

The Chambers may consider serious violations of Cambodian penal law, international humanitarian law and custom, and violation of international conventions recognised by Cambodia. This Court has also suffered criticism and controversies: the prosecutor suggested that the judges in one case had failed in examining evidence and allowed the investigation to be closed prematurely.[303]

(5) The Special Court for Sierra Leone (SCSL)

In Resolution 1315 (2000) of 14 August 2000, the Security Council expressed deep concern at serious crimes committed in Sierra Leone. The Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special hybrid[304] court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law. This agreement between the United Nations and the government of Sierra Leone was concluded in 2002. The Special Court for Sierra Leone is to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. It is thus a Court to deal with war crimes committed during the 10-year civil war in this country.

In June 2007, the SCSL found three of out 11 indicted persons, namely Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, guilty of acts of terrorism, including collective punishment, extermination, murder, rape, outrages upon personal dignity, conscripting or enlisting children under the age of 15 years into armed forces, enslavement and pillage. It was notably the first ever international court to bring a guilty verdict for the military conscription of children.[305]

It is interesting to note that Sierra Leone delegates the enforcement of sentences to another country which has also had war crimes problem and even its own war crimes tribunal.[306] In 2009, persons convicted by the Court were transferred from the Court's detention facility in Freetown to Mpanga Prison in Rwanda for the enforcement of their sentences. The prison is administered by the Rwandan Prison services (RPs) and the SCSL works with the RPs commissioner-general's office to ensure that international standards in the prison are maintained until the Court's closure.

It is difficult to assess what cases the SCSL has decided as the available statistics indicate the number of official documents but not dockets, indictments and other relevant information.

The most prominent case before the SCSL has been the case involving the former Liberian President Charles Taylor, who was charged in an 11-count indictment alleging responsibility for war crimes, crimes against humanity, and other serious violations of international humanitarian law committed by rebel forces in Sierra

303 *Deutsche-Presse Agentur*, 13 May 2011.

304 For the meaning of 'hybrid' in this context, see above under the Lebanese Court.

305 *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, 22 February 2008.

306 ICTR, see above, in this section.

Leone during the country's decade-long civil war. He pleaded not guilty to all charges.

The Taylor trial opened on 4 June 2007 in The Hague. It was adjourned immediately after the Prosecution's opening statement when Mr Taylor dismissed his Defence team and requested new representation. Witness testimonies took nearly three years, between January 2008 and November 2010. Closing arguments took place in February and March 2011 but then there were further delays. The Court Registrar announced that these delays were due largely to the complexity of the case. The Judges had to read through more than 50,000 pages of statements of over 100 witnesses and to examine the 1,520 exhibits tendered in evidence. Some of the trial was held in The Hague and not at the Court's premises in Freetown, Sierra Leone. One witness, Issa Hassan Sesay, a person previously convicted by the Special Court, was transferred from detention in Rwanda to the Hague in order to give his testimony. A contingent of Mongolian UN soldiers have been guarding the premises of the Court in Freetown since 2006.

After the Defence closed its case on 12 November 2010, the trial chamber scheduled final arguments for 8 February 2011 and final trial briefs were to be submitted on 14 January 2011. However, the Defence failed to file its final trial brief on the scheduled date. Counsel for the accused argued that he had received written instructions from the accused, not to file a final trial brief until decisions were reached on all outstanding motions and appeals and the brief was filed three weeks later. Then the trial chamber, by a majority, refused to accept the untimely filed brief. The Appeals Chamber reversed the decision of the trial chamber and accepted the brief. The Prosecution had already made its oral closing arguments on 8 and 9 February 2011 and the Defence presented closing arguments on 9 and 10 March 2011. Oral responses by both parties were heard on 11 March 2011. The President of the Court announced that a verdict could be expected 'during the second half of 2011'.[307]

But the Court delivered its judgment on 26 April 2012.[308] Thus, the *Charles Taylor Case* has taken five years which must be seen against the far more complex cases before the Nuremberg Military Tribunal which were finished in under a year.[309] The judgment did not mention any operation of a JCE which may signal a new development to abandon the use of this dangerous doctrine.[310]

The *Charles Taylor Case* is the last trial stemming from Sierra Leone's decade-long civil war, and that it will be the last major trial to be held at the Court.

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307 *Eighth Report of the Special Court for Sierra Leone*, 2011, 11.

308 Judgment, *Charles Taylor Case*, SCSL-03-01, 26 April 2012.

309 The Trial of the Major War Criminals before the International Military Tribunal (IMT), which tried 25 of the most important captured leaders of Nazi Germany. The trials were held from 20 November 1945 to 1 October 1946. The 'Doctors' Trial', *United States of America v Karl Brandt, et al.*, was held subsequently to the IMT hearings. The trial lasted from 9 December that year until 20 August 1947 against 23 defendants. The 'Judges' Trial', *The United States of America vs. Josef Altstötter, et al.*, was also held in US Military Court, sitting in Nuremberg, against 16 defendants. The trial lasted from 5 March to 4 December 1947.

310 See below, in the following section.

(6) The East Timor Special Panels for Serious Crimes (SPSC)

Numerous crimes were committed in East Timor, now renamed Timor Leste, in the aftermath of a referendum in 1999 as to whether the county should seek independence from Indonesia. In the referendum the East Timorese had voted overwhelmingly for independence from Indonesia but from certain factions there was opposition and as a consequence there was turmoil in the country and a wave of crimes. The United Nations Transitional Administration in East Timor (UNTAET) was established in 1999. This is the first UN mission with 'sovereign authority'.[311] It was charged with establishing and organising the whole justice system but the efforts of UNTAET fell far short of expectations: 10 years later the justice system was still not yet working.[312]

To deal with crimes, two UN-appointed bodies of experts were formed, charged with the task of investigating what had taken place at this time and determining responsibility for those crimes. To that end an International Commission of Inquiry on Timor Leste (ICIET) and a group of three Special Rapporteurs visited the region in 1999 and 2000 respectively.

On the basis of their investigations both groups recommended the creation of an international tribunal.[313] The creation of an international tribunal, however, was deferred on the basis of an undertaking given by the Indonesian government to try suspects in its own domestic courts. A national *ad hoc* Tribunal, a Human Rights Criminal Court, was instead created pursuant to Law No 26/2000 as a tribunal of specialised jurisdiction to try persons for human rights violations, within the existing legal system. This Tribunal had thus the status of a national court. Violations were defined as being the crimes of genocide and crimes against humanity; and the Tribunal was given jurisdiction over Timor Leste for a time-frame of violations that took place between April and September 1999. The *ad hoc* Tribunal commenced its work on 14 March 2002 to deal with 18 persons indicted before the Tribunal; only six were convicted and of those five had their sentences quashed on appeal.[314] There is overwhelming evidence indicating that the *ad hoc* Tribunal either failed in or was prevented from discharging its responsibilities in accordance with international human rights standards.[315]

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311 Chopra, T., Ranheim, C. and Nixon, R., 'Local-level justice under transitional administration, lessons from East Timor', in Isser, D. (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (Washington: US Institute of Peace Press, 2011), 119ff.

312 *Ibid.*, 119, 135. *Cf.*, Asia Foundation (ed.), *Law and Justice in East Timor, Report*, 2004.

313 Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc.A/54/726, S/2000/59(2000); The Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture and Special Rapporteur of the Commission on Violence Against Women, its Causes and Consequences.

314 Report of the International Commission of Inquiry on East Timor to the Secretary General, UN Doc.A/54/726, S/2000/59(2000); The Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture and Special Rapporteur of the Commission on Violence Against Women, its Causes and Consequences.

315 Cohen, D., *Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta* (New York: International Centre for Transitional Justice, August 2003). See also

As the Tribunal did not appear to be working properly, it was replaced by the Special Panels for Serious Crimes (SPSC).[316] The Regulation establishing the SPSC provided that the Panels would have exclusive jurisdiction over war crimes, crimes against humanity, genocide and torture. The Panels were given extensive jurisdiction with universal ambit over these crimes and thus competent to hear cases about crimes regardless of where and when they were committed. The SPSC were therefore conferred with broad jurisdiction, in accordance with principles of international criminal law, to enable the Panels to prosecute perpetrators of crimes committed in relation to the Indonesian occupation of Timor Leste. Nevertheless, the Serious Crimes Unit, charged with prosecuting crimes before the SPSC, adopted an interpretation of its mandate to limit its jurisdiction to offences committed in 1999.[317] Another interpretation could have led to a wider mandate as the tasks had been defined in ambiguous terms.[318]

From 2001 to 2005 the East Timor Special Panel for Serious Crimes (SPSC) conducted 55 trials arising from crimes committed during the 1999 violence in the country. Most trials involved relatively low level defendants. However, some accused were militia leaders of some importance.[319]

On 21 December 2004 the governments of Timor Leste and Indonesia announced that they had agreed to form a Commission for Truth and Friendship (CTF) in order to finally 'close this chapter'. It was decided that no more crimes would be prosecuted and the work of the SPSC came to an end.

After 2005 the U.C. Berkeley War Crimes Studies Center agreed to provide continuing public access to copies of official records of the Panels.[320] This arrangement was achieved by agreement with the SPSC and its coordinating Judge, Phillip Rapoza, and provides valuable documentation for scholars and others with interests in the region.

(7) The International Criminal Court (ICC)

The International Criminal Court (ICC) is the first permanent international criminal court. The *ad hoc* War Crimes Tribunals – ICTY, ICTR, STL and ECCC, were all established to try crimes committed only within a specific time-frame and during a specific conflict. Therefore it was considered that it would be preferable to establish an independent, permanent criminal court. 120 States adopted the Rome Statute establishing the ICC in 1998 and the Statute entered into force on 1 July 2002 after ratification by 60 countries, by 2011 the Statute had been ratified

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Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor, Coalition for International Justice-Open society Justice Initiative Joint Report, 24 November 2004.

316 SPSC were established under UNTAET Regulation 2000/15.

317 Hirst, M. and Varney, H., *Justice Abandoned: An Assessment of the Serious Crimes Process in East Timor*, New York, (International Centre for Transitional Justice), Occasional Papers Series, June 2005.

318 The definition by Regulation 2000/15 could have been read to include all crimes during the entire occupation of East Timor and not only crimes committed in 1999.

319 One such case was, for example, *Deputy General Prosecutor for Serious Crimes v Anton Lelan Sufa et. Al*, Case No: OE-1-99-SC 4/2003-SPSC.

320 Available at http://socrates.berkeley.edu/~warcrime/ET.htm.

by 116 countries.[321] However, future work of the ICC is seriously undermined by the fact that neither the United States, nor Russia and Japan, have adhered to the Rome Statute.

The ICC is an independent international organisation, and is not, like the International Court of Justice, the ICJ, part of the United Nations system. Its seat is at The Hague in the Netherlands. It is only competent to deal with crimes committed after its creation, that is to say after 2002. Although the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities. It is possible that voluntary contributions may render the tribunal's independence controversial, especially if such contributions are given by individuals or corporations. It would have been preferable to establish the ICC to form part of the UN system, like the ICJ.

In 2012 the ICC is seized of seven 'situations', of which the situation in Côte d'Ivoire is pending the Pre-Trial Chamber's authorisation for the opening of an investigation. The situations in Uganda, the Democratic Republic of the Congo and the Central African Republic were referred by the States in question, and the situations in Darfur, Sudan and the Libyan Arab Jamahiriya were referred by the United Nations Security Council. There is thus, in 2012, one case in Uganda, four cases in the Democratic Republic of the Congo, one case in the Central African Republic, three cases in Darfur and two cases in Kenya. The Report by ICC to the UN for 2010–2011 goes on to state that

> 'In respect of the situation in the Libyan Arab Jamahiriya, there is one ongoing case, *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. On 27 June 2011, Pre-Trial Chamber I issued warrants of arrest against the three suspects for crimes against humanity allegedly committed since 15 February 2011.'[322]

In late 2005 the International Criminal Court (ICC) issued arrest warrants for the rebel leaders accused of being responsible for Uganda's 20-year civil war and accompanying atrocities. A ceasefire was signed in Uganda on 29 August 2006, but Joseph Kony, the leader of the rebel group the Lord's Resistance Army, said he would not agree to a full peace agreement unless he was granted amnesty from prosecution by the ICC or any other tribunal. The Ugandan government said it would ensure that amnesty was granted if the rebels surrendered, but Kony and his commanders wanted the amnesty to be granted first.

The UN promised not to arrest the rebel leaders if they came to the peace negotiations; however, the ICC had not agreed to grant amnesty to the rebel

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321 UN doc. A/66/309.

322 The Report was not amended to take into account the death of Colonel Gaddafi on 20 November 2011 as it covers the time period from 31 July 2010 to 1 August 2011. *Seventh Report by the ICC to the Security Council*, UN doc. A/66/309. On 17 March 2012 there were reports that Senussi had been arrested in Nouakchott in Mauritania and that Libya had requested his extradition. *Daily Telegraph*, 17 March 2012. Saif Al-Islam Gaddafi was arrested in southern Libya on 19 November 2012: *BBC News*.

leaders. In the end, Kony was not arrested. Several years later, Kony was still at large. On 2 March 2012 the African Union announced that they would send 5,000 soldiers to hunt down Kony. Investigations by the ICC continue into allegations of human rights abuses in the Darfur region in Sudan's west, although conditions there made it impossible for the ICC to conduct investigations on-site in the absence of cooperation from the government. The ICC also continues looking into allegations of human rights abuses in the Democratic Republic of the Congo (DRC). In what became the first case to reach trial at the ICC, Union of Congolese Patriots leader Thomas Lubanga Dyilo was surrendered to the court by Congolese authorities. Lubanga was accused of war crimes for his use of child soldiers under the age of 15 in the eastern DRC between 2002 and 2004 and enlisting and conscripting them into *La Force patriotique pour la libération du Congo* (the Patriotic Force for the Liberation of the Congo). He was thus accused of using these children to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003, a crime punishable under article 8(2)(e)(vii) of the Rome Statute. He was convicted on 14 March 2012.[323] The sentence, after appeal by the Prosecutor, was set as prison for 14 years.

But the ICC has been accused of having embarrassingly close cooperation with both the Congolese President Kabila and with President Museveni in Uganda, who, in turn, appear to have encouraged the ICC to focus on atrocities committed by rebels while 'insulating themselves from prosecution'.[324] In both countries political opposition was stifled in 2011 while the ICC, together with the United States, turned a blind eye; the ICC was then accused of passively watching State crimes being committed and not only ignoring but actively encouraging such crimes.[325]

In 2013 the ambitious Prosecutor from ICTY, Mme Carla del Ponte, made a forceful statement that the ICC should proceed to prosecute 'war criminals' in Syria.[326]Such a call is, however, legally questionable. The UN is still classifying the Syrian war as 'internal' and China and Russia have both opposed any form of intervention.

However outrageous some attacks have been against civilians and citizens of this country, it must be remembered that consequences of an invasion just might make the situation worse: the over-arming of Libyan rebels had later consequences in Mali. The surplus of weapons furnished to the rebels in Libya ended up in Mali to stir up another revolt, this time by Islamist fundamentalists. No doubt an intervention in Syria would have similar consequences in the region.

It might be wiser to respect more the sovereignty of a State and to resort to diplomatic pressure than to military intervention to persuade a regime to cease attacks on its own population. Resorting to threats of war crimes prosecution is also likely to stifle such diplomatic efforts. It must also be remembered that Christians were safer during the regimes of Saddam Hussein in Iraq, under Colonel Gaddafi in Libya or under President Mubarak in Egypt. Therefore Christians are

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323 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06.

324 Clark, P., 'State impunity in Central Africa', *IHT*, 3 April 2012.

325 *Ibid.*

326 *IHT*, 19 February 2013.

possibly safer under president Assad in Syria than under any future Islamist fundamentalist regime.

f Concepts Used by War Crimes Tribunals

(1) The Doctrine of *Respondeat Superior*

The plea of *respondeat superior*[327] as a defence in proceedings concerning responsibility is derived from the very organisation of the armed forces. They are highly stratified, depending at every level on order, discipline and the accurate and speedy execution of orders. All military codes contain detailed regulation of the effects of disobeying orders, providing in many cases for proceedings by a court martial. They are often supplemented with emergency measures, entitling even summary executions of members of the armed forces if orders are disobeyed in the face of the enemy.

If, then, a member of the armed forces is under such strict discipline in most armed forces, it is natural that only the responsibility of those giving the orders should be engaged. Therefore, the application of the doctrine *respondeat superior* can only be suspended in extreme situations.

But for the trial of war crimes the doctrine was not fully accepted and it was thought suitable to allow its operation to mitigate a sentence but not to exclude responsibility. The Treaty of London of 8 August 1945[328] contained a clause that 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.'[329]

Yet, as a rule, and in view of the importance of military discipline and of the unquestioned execution of orders, the principle must probably operate to exclude responsibility except in exceptional circumstances. Such situations are those where the execution of an order would involve a grave breach of the Law of War, including all humanitarian rules. The Geneva Conventions exemplify such grave breaches by a list of examples.[330] Protocol I of 1977 makes this category of 'grave' breaches even clearer.[331] On the other hand, the Protocol does not contain the article which had existed in the Draft, and which had provided that no one would be punished for obeying orders, even if an act committed in the execution of such orders constituted a grave breach,[332] unless the person executing the order knew his act would constitute a grave breach.[333] Some had felt that combatants will face a dilemma if

327 See, *e.g.*, Muller Rappard, E., *L'ordre supérieur militarire et la responsabilité pénale du subordonné* (Paris, 1965); Eustathiades, C., 'Quelques aspects de la jurisprudence concernant les criminels de guerre, l'exception des ordres reçus et autres moyens de defense similaire', in 2 *Festschrift Laun*, 1953, 395; Green, L.C., *Superior Orders in National and International Law* (Leiden: Sijthoff, 1976); see also Detter, I., 'Foreign warships', *op. cit.*, 70.

328 59 Stat 1544.

329 Article 8.

330 *E.g.*, above, in this Chapter, section B i c.

331 Article 85(3)(5).

332 Article 77(1) of the Draft, CDDH/SR/45, vol. 6, 334.

333 Article 77(2) of the Draft, *ibid.*, *loc. cit.*

they have to decide whether they should obey or question an order as contrary to international law[334] But the final text of the Protocol expressly excludes any defence under the doctrine.[335] In practice it has also often been held that superior orders constitute no effective defence for certain grave violations of the Law of War, for example by the sinking of a hospital ship: this was aptly illustrated in the *Llandovery Castle Case*.[336] But the doctrine will still, in all likelihood, be applied by courts in mitigation of a sentence if it does not altogether exclude liability; on the other hand, the doctrine may operate as a defence for all but the gravest of acts.

A member of the armed forces may, if prosecuted for a war crime, resort to usual defences, like for example self-defence or necessity, to exclude liability. A sentence may be mitigated if the defendant thought he was in greater danger than he actually was. However, other subjective defenses, like being ignorant of the contents of international law,[337] are no longer allowed,[338] bringing the traditional principle *ignorantia juris nocet*[339] into full operation in international law.

That means that the defence *nullum crimen sine lege*[340] will be defeated since the *lex* does contain rules of which no one must be ignorant. But the argument that there had been no legal prohibition was certainly at the centre of pleadings on the part of the defence both in the International War Trials and in national courts.[341]

A superior officer is, as described, normally liable for war crimes committed by persons under his command, on the condition that he gave the relevant order, or that he knew of a planned act and refrained from preventing it being committed. The Genocide Convention[342] failed to regulate these matters but Protocol I of 1977 clarifies the position.[343] Similar rules were applied in the Nuremberg Trials where personal responsibility was incurred for subordinates,[344] including neglect of their inaction.[345] These rules were accepted in the doctrine as being an expression for

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334 *Ibid., loc cit.* But the United States considered that the draft article did not go far enough, *ibid.*, 339. *Cf.*, Matthei, D., 'Befehlserweigerung aus humanitären Grunden', *RDPMDG*, 1980, 257.

335 Article 86(2).

336 *Germany v Dithmar & Boldt*, in 1 Friedman, L. (ed.), *The Law of War: A Documentary History* (New York: Random House, 1972), 868.

337 *Cf.*, above, Chapter 11, section A ii e *in fine*, on dissipation of knowledge and education of the armed forces.

338 *Cf.*, Zemanek, 'Kriegs- und Humanitärrecht', *op. cit.*, no. 2134 at 395.

339 Ignorance of the law is harmful.

340 There is no crime if there is no law, i.e. no one can be punished for an act which was not a crime under a legal rule in existence when the act was committed.

341 For Belgium, where the defence of *nullum crimen sine lege* was partly accepted in municipal cases, see Beirlaen, *De vervolging van oorlogsmisdadigers in Belgie na de tweede Werldoorlog in de bestraffing van inbreuken tegen het oorlogs en het humanitair recht* (Antwerp and Brussels: Bruylant, 1980), 67.

342 78 *UNTS* 278.

343 Protocol I, articles 86 and 87.

344 *The List Case*, 11 Nuremberg 1259; *cf., The Roques Case, ibid.*, 632; *The Reinecke Case, ibid.*, 651; and *The Woeler Case, ibid.*, 683.

345 *The Kuechler Case*, 11 Nuremberg 565; *The Salmuth Case, ibid.*, 617.

general international law[346] and were also applied in the My Lai Investigation[347] where it was held that General Westmoreland had taken adequate precautions and should therefore be acquitted.[348]

A commanding officer may also be personally responsible after the event if he knew of a committed act and did not institute proceedings against the perpetrator.[349] In practice superior officers have been held responsible for war crimes committed by persons they commanded although the officers had not authorised the acts.[350]

(2) Doctrine of Joint Criminal Enterprise (JCE)

The special Tribunals for war crimes were set up in the 1990s and later, first, for crimes committed in the former Yugoslavia (ICTY), then for Rwanda (ICTR), and later for the Lebanon and for Cambodia. Initially these Tribunals copied and adopted the relevant legal rules for war crimes, rules inherited from the Nuremberg and Tokyo Tribunals and other case law on rules in warfare. However, after some time the ICTY developed a new doctrine, hitherto unknown in international courts and tribunals, the theory of a *joint criminal enterprise* (JCE). This doctrine was launched in the ICTY, and quickly adopted by the other tribunals, without asking the question whether this doctrine was in the interest of justice, given the special conditions in military warfare.[351]

A complicated formula emerged quickly and many of the eminent lawyers involved in these trials still seemed to hesitate to inquire whether this imposed vague and novel doctrine was conducive to secure the justice was made in the cases before the tribunals. There emerged three steps of forms of JCE:

1. The first and most basic variant of JCE is applicable where all participants in a common criminal plan share the same intent. This form of JCE is often pursued when it is prohibitively difficult to prove who actually committed the *actus reus* of the crime.
2. The second form of JCE, often called the concentration camp mode, is a variant of the first form that additionally requires a system of abuse and ill-treatment. This requires that the accused actively participated in enforcing the system of ill-treatment. Both the first and second forms of JCE are widely accepted modes of liability.

346 Parks, W.H., 'Command responsibility for war crimes', 62 *MilLR*, 1963; Campbell, R., *Military Command Liability for Grave Breaches of War and International Law: Absolute or Limited?* (London, 1974).

347 On sources, *supra*, section C ii a in notes to the text on identification of war crimes.

348 *The Peers Report*, 7.

349 Protocol I, articles 86–87.

350 *In Re Yamashita*, US 1945 672.

351 See, for example, Danner, A.M. and Martinez, J.S., 'Guilty associations: joint criminal enterprise, command responsibility and the development of international criminal law', *California Law Review*, January 2005.

3. The third and most controversial variant of JCE provides liability for crimes committed outside the scope of the common criminal plan or purpose, where the crimes are a natural and foreseeable consequence of the plan. Through this form of liability an accused could be found guilty of a crime without possessing the intent to commit that crime. This variant of JCE is particularly problematic for crimes that require a specific intent (e.g. for genocide one must act with the intent to destroy, in whole or in part, a racial, ethnic or religious group).

The doctrine, especially in its secondary and ancillary forms as developed by the Tribunals, in the first league, ICTY, leads to result that virtually anyone can be convicted of a war crime: it is sufficient to have, at some point, considered siding with persons who later took a course of action towards a strategic target. Even a person who joined a political party then had some aggressive ambition, could, on this ground, be convicted for war crimes.

A reaction against the absurd or at least unnecessary concept of JCE came from the war tribunals themselves insofar as a former Judge decided to stand up and declare that this is a concept which is highly dangerous to justice and a concept that, furthermore, is totally unnecessary. The eminent Judge Schomburg, who had sat as a Judge in the ICTY and who previously had been a Judge in the German Federal Court, stated boldly that we could have achieved necessary results without this 'invented doctrine'. He says 'the doctrine of JCE in its entirety is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today's international tribunals, in particular not in the Statutes of ICTY and ICTR, however invented and applied by the Appeal Chamber of both Tribunals'.[352] As it was a former ICTY Judge who said this it is important to take note. It was also said by a Judge with considerable experience and therefore of perhaps more weight than if it had been said by any other ICTY Judge. Even the former President Antonio Cassese, with his renommé among international lawyers, was an excellent academic but before he was appointed to the war crimes tribunals he had never been a Judge. On the contrary, Judge Schomburg had acted in the highest Court in Germany and he, like some others, wondered why suddenly everyone accepted this new concept which did not cover more than what other precepts have regulated, except that it contributed to a serious threat to what in France is called '*sécurité de droit*' or in German '*Rechtssicherheit*', vaguely translated into English as securing the 'Rule of Law'.

Some felt the situation of accused and of others had become so precarious because of the new notion than they ridiculed the concept altogether. JCE was labelled as an abbreviation for '*Just convict everyone!*' by Professor Bill Schabas, Chairman of the Irish Centre for Human Rights at the National University of Ireland.

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352 Schomburg, W., 'Jurisprudence on JCE – revisiting a never ending story', *Cambodia Tribunal Monitor, 3 June 2010, 2.*

This mockery of the notion of JCE was further taken up by lawyers who could see the dangers of accepting this concept.[353]

With regard to the *Tadić Case*[354] – which was the first one to apply the JCE doctrine – Judge Schomburg says that it is

> 'abundantly clear that the general part of the applicable domestic law was even better placed than JCE to accomplish the necessary:
> a) in general: to bring to justice without legal gaps and effectively the most serious actors in campaigns of genocide and/or ethnical cleansing;
> b) to hold responsible the perpetrators behind the perpetrators, the allegedly untouchables;
> c) not to run the risk that those perpetrators with clean hands escape as mere aiders and abettors (a trivialization realized in later judgments of ICTY/ICTR);
> d) not to confuse the membership in a JCE with a membership in a criminal group, the latter forming a separate broader (and thus least grave) mode of participation, not foreseen in the Statutes of the UN ad hoc-tribunals; however in the Rome Statute for the permanent ICC (Art. 25(3)(d): an additional *argumentum e contrario*);
> e) not to run the risk that, exactly opposed to the noble primary goal of International Criminal Law (cf. supra a), members of groups, or ethnicities would be punished solely based on a common purpose or intent, i.e. nearly every like-minded person.'[355]

It is clear from the reasoning in the Nuremberg and Tokyo Trials that the law as it stood was quite adequate to convict those who had perpetrated war crimes and punish possible co-perpetrators. One Judge in the a case before ICTY had to write a forceful dissenting opinion to underline that his fellow Judges had blindly accepted what was essentially an invented notion in international law. Thus in *Prosecutor v Simić* Judge Per-Johan Lindholm stated in his Separate and Partly Dissenting Opinion[356] that

> '2. I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration. What the basic form of a joint criminal enterprise comprises is very clearly exemplified by Judge David Hunt in his Separate Opinion in *Milutinović, Sainović and Ojdanić*. The reasoning in the *Kupreškić* Trial Judgment is also illustrative. The acts of – and the furtherance of the crime by – the co-perpetrators may of course

353 *Cf., e.g.*, Badar, M.E., "Just convict everyone!" Joint perpetration: from *Tadić* to *Stakić* and back again', 6 *International Criminal Law Review*, 2006, 293 *et seq.*

354 *Prosecutor v Tadić* (Appeal Judgment) IT-94-1 (15 July 1999). But in *Tadić* the expression JCE was only used once, and that in the survey of other States with reference to Australia. Throughout the judgment the court speaks of 'the common purpose doctrine'. This case is also riddled with legal defects and it is indeed surprising it has not been criticised further; but see above, Chapter 5 vii, fallacies of customary law.

355 Schomburg, W., 'Jurisprudence', *op. cit.*, 3

356 Trial Judgment, IT-95-9-T, 17 October 2003, at paras 2 and 5.

> differ in various ways. If something else than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word 'committed' in Article 7(1) of the Statute. Finally, also the *Stakić Trial Judgment* limited itself to the clear wording of the Statute when interpreting 'committing' in the form of co-perpetration. *Stakić* requires that co-perpetrators 'can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.' The *Stakić Trial Judgment* can, based on the doctrine of 'power over the act' ('*Tatherrschaft*'), be read as distancing itself from the concept of joint criminal enterprise. ...
> 5. The concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law.'[357]

In an amazing decision, avoiding any in-depth of what the learned Judge had said, and indeed, what the Trial Chamber had decided, the Appeal Judgment insisted that international law 'does not know of any co-perpetratorship'. The Appeal Chamber said that:

> 'This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is 'firmly established in customary international law' and is routinely applied in the Tribunal's jurisprudence.'[358]

In other words, the criticized Trial Chamber had relied on *its own previous judgment to enlarge its competence*. This mechanism, which international organisations sometimes have sought to use to claim more power, is clearly highly irregular. It has been applied within strictly limited latitudes in French administrative law as as *compétence de la compétence*. But in other areas such expansion of competence has been severely critised in both case law and doctrine. It is irregular and illegal for a body or entity, especially for a Court, to increase its competence by own measures.[359]

ICTY also turned the truth around: it is co-perpetratorship which is an accepted rule of liability in international law[360] whereas JCE is certainly not accepted as such, except by the Tribunal itself.

Yet, the other war crimes tribunals swiftly adopted the JCE model invented by ICTY without questioning its justification. It has been used by the ICTR and SCSL, although the SCSL refrained from using the doctrine in the *Charles Taylor Case* in 2012 and cited precisely the article by Judge Schomberg.[361] Only the ECCC, the Chambers for Cambodia, analysed earlier case law and doctrine and decided, as

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357 *Ibid., loc. cit.*
358 IT- 97-24-A (22 March 2006), para. 62.
359 On this concept, see Detter, I., *Law Making by International Organisations, op. cit.*, 25.
360 See Schomburg, 'Jurisprudence', *op. cit.*, especially at note 76.
361 SCSL, Judgment 26 April 2012.

a result, that JCE III (the extended version of JCE) would certainly not apply in its Court.[362]

It is important to emphasise that 'conspiracy' does not appear in the major treaties on the Law of War: thus there is no mention of this in the Geneva Conventions or the Hague Conventions. One authority on military law states that, under the common law governing military commissions, it is not enough to intend to violate the Law of War and commit overt acts in furtherance of that intention unless the overt acts either are themselves offences against the Law of War or constitute steps sufficiently substantial to qualify as an attempt. [363]

Thus,

> '[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in overt acts, i.e., in unlawful commissions or actual attempts to commit, and not in intentions merely.'[364]

Furthermore, none of the major treaties governing the Law of War provides that conspiracy would be a crime. The only 'conspiracy' crimes recognised by international war crimes tribunals have been conspiracy to commit genocide and common plan to wage aggressive war, which for its commission requires actual participation in a 'concrete plan to wage war'.[365]

> [T]he Charter [of the Nuremberg Tribunal] does not define as a separate crime any conspiracy except the one to commit acts of aggressive war.[366]

The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognise as a violation of the Law of War conspiracy to commit war crimes.[367] Accordingly, the Tribunal determined to 'disregard the charges ... that the defendants conspired to commit War Crimes and Crimes against Humanity'.[368]

As one prominent figure from the Nuremberg Trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the Law of War on the ground that '[t]he Anglo-American concept of conspiracy was not part

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362 ECCC/Pre-Trial Chamber, *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, Case File No: 002/19-09-2007-ECCC/OCIJ (20 May 2010). *Cf.*, discussion by Judge Schomberg, 'Jurisprudence', *op. cit.*, 1ff.

363 Winthrop, W., *Military Law and Precedents*, 2nd edn (Washington: GPO, 1920), 831.

364 *Ibid.*, 841.

365 1 *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947).

366 Only Hitler's most senior associates were convicted of conspiracy to wage aggressive war, see Pomorski, S., 'Conspiracy and criminal organization', in Ginsburg G. and Kudriavtsev, V. (eds), *The Nuremberg Trial and International Law*, (The Hague: Kluwer, 1990), 213, 233–235.

367 See, *idem*,, at 469.

368 22 *Trial of the Major War Criminals Before the International Military Tribunal* 469 (1947); see also *ibid.*

of European legal systems and arguably not an element of the internationally recognized Law of War'.[369]

> The plurality contends that international practice—including the practice of the IMT at Nuremberg—supports its conclusion that conspiracy is not an offense triable by military commission because '[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war'.[370]

Although a few individuals were charged with conspiracy under European domestic criminal codes following the Second World War, 'the United States Military Tribunals' established at that time did not recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity'.[371]

It has been suggested[372] that the reasoning of the Court following the ICTY's jurisprudence, is a step 'in the direction of consistency in the application of JCE in international and internationalized tribunals'. The addition of the ECCC's jurisprudence to the jurisprudence of the ICTR and Sierra Leone tribunals, regarding the application of the first two variants of JCE, suggest that these modes of liability 'may eventually become customary international law'.[373]

The former Chief Prosecutor Carla del Ponte also hailed the advent of the JCE as a great 'achievement'.[374] But others who attended the same Symposium on JCE took a very different view. One academic stated that, for example, the requirement of an 'express agreement' for Joint Criminal Enterprise liability leads to unsatisfactory results.[375] Thus, when the Court held in that, where a defendant is not alleged to have participated in the physical perpetration of the crimes charged but to have contributed in some other way to the commission of the crimes by a group, the prosecution must demonstrate that the defendant entered into an express agreement with the physical perpetrators to commit the crimes charged. The author argues that this 'express agreement requirement' is both conceptually unsound and practically unhelpful.[376] Another academic took a similar view and found several things wrong with the JCE concept. He criticised the

369 Taylor, T., *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), 36; see also *ibid.*, at 550, observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a 'persuasive argument that conspiracy in the truest is not known to international law'.

370 *Ibid., loc. cit.*

371 See also *15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 1949*, 90–91.

372 Shore, J., 'Joint criminal enterprise in the extraordinary chambers in the courts of Cambodia', *Human Rights Brief*, 27 August 2010.

373 *Ibid.*

374 'Investigation and prosecution of large-scale crimes at the international level, the experience of the ICTY', 4:3 *Journal of International Criminal Justice*, 2011, 539.

375 Gustafsson, K., 'Requirement of an "express agreement" for joint criminal enterprise liability, critique of Bđranin', 4 *Journal of International Criminal Justice*, 2007.

376 *Ibid., loc. cit.*

> 'over-reliance on international case law and the insufficient attention to the language of *criminal* statutes when interpreting conspiracy doctrines. The result of these mistakes is a doctrine of *joint criminal enterprise* that fails to offer a sufficiently nuanced treatment of intentionality, foreseeability and culpability. Specifically, the doctrine in its current form suffers from three conceptual deficiencies: (1) the mistaken attribution of *criminal* liability for contributors who do not intend to further the *criminal* purpose of the *enterprise*, (2) the imposition of *criminal* liability for the foreseeable acts of one's co-conspirators and (3) the mistaken claim that all members of a joint *enterprise* are equally culpable for the actions of its members.'[377]

Even Judge Cassese found that JCE is not an ideal concept in its present form. He found two criticisms pertinent, and said that

> '(i) that the International *Criminal* Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Tadić* (1999) was wrong in indiscriminately using terminology typical of both the civil law and common law tradition, and
> (ii) that the foreseeability standard, being somewhat loose as a penal law category of culpability and causation, needs some qualification or precision. Generally speaking, the notion of JCE needs some tightening up.'

The judgments of the ICTY, and to some extent the other war crimes tribunals, have been marked by questions regarding impartiality and signs of political influence.

The JCE doctrine is not ideal. It is, in fact, a dangerous doctrine which seriously undermines the Rule of Law. As it has been suggested the abbreviation might as well stand for 'just convict everyone'. The largely invented doctrine has been applied by judges, some of whom have had little experience of international courts and without much experience in the Law of War. This situation has caused some hesitation and misunderstandings on the part of the bench in cases bearing upon JCE. This combined with the modest level of advocacy of some advisory counsel, has led to lack of criticism of the doctrine of the JCE, a doctrine which has never been properly questioned as to its merits. It is certainly a device which appears to have been diverted for political purposes to convict 'to order'. Mme Carla del Ponte was for a long time the Chief Prosecutor with the difficult ambition to show an approximate balance of convicted Croat and Serb defendants in the ICTY (although Croatia had been attacked by the Serbs and there was a clear discrepancy as to who were the attackers and who were the victims). On behalf of Croatia there was an urge to prove to del Ponte that all was being done to 'cooperate' with the Tribunal and the Croats saw as the prize at the end of the road the questionable value of membership in the European Union.

Those who consider the concept of JCE as an unfortunate degradation of the international justice system, opening up the doors as it does, for conviction of virtually anyone for anything, may consider themselves slightly vindicated by the judgment of Charles Taylor, widely thought to have been part of a genocide scheme in Sierra Leone, including actions of mutilations, torture and rape. The judgment by

377 Ohlin, J.D., 'Three conceptual problems with the doctrine of joint criminal enterprise', 4 *Journal of International Criminal Justice*, 2007.

the Special Panels for Sierra Leone on 26 April 2012 did not use any form of a JCE and the Court specifically referred to the highly critical study of the JCE concept by Judge Schomberg; thus Taylor had not been a member of any JCE. The Court was careful not to dismiss outright the existence of such a concept but, in any event, it did not apply in the present case. This may indicate a small light at the end of the tunnel of the unfortunate labyrinths of the JCE doctrine which has so undermined justice in the war crimes tribunals.

A serious blow to the application of the JCE doctrine had come on 16 December 2011 when the International Criminal Court dealt with a case where some argued the doctrine of JCE should apply.[378] After all, the other war crimes Tribunals never had the slightest reference to JCE in their Statutes – something rarely mentioned by defence counsel! But the Statute of the ICC does have provision for a form of JCE in Art. 25(3)(d), an article which has been called 'enigmatic': so it was with great expectation that the interpretation of the Court was awaited. But in December 2011 the Court refrained from applying the doctrine. Commentators immediately suggested that this might mean that the ICC – after all of far greater reputation than the other war crimes Tribunals – will never resort to any JCE arguments.[379]

It appears that the JCE doctrine was used to engineer a number of convictions which, in a jurisdiction like, for example, England, would never have succeeded. It may be surprising that most counsel, judges and academics have accepted JCE, in all its forms, with little questioning as to the value of this novel doctrine.

g The Contribution of Courts and War Crimes Tribunals to the Body of Law of War

The war crimes tribunals have now decided in a great number of judgments and there is an important body of case law. However, there are hopes that the quality and the fairness of trial will improve with the International Criminal Court which will act on a permanent basis, as opposed to the special war crimes tribunals which have had the standing of *ad hoc* courts with the problems that such provisional standing entails. There has been much criticism of some of the war crimes tribunals for lack of competence, lack of knowledge of the Law of War and, more importantly, for not being sufficiently independent of governments and political influence. There has also been certain concern about frequent sentences of excessive length, of 30 and 40 years, lengths unheard of in the Nuremberg Trials. Some sentences have been drastically reduced on appeal: in one case before the ICTY a sentence of 45 years was reduced to nine years.[380] On 17 May 2012, the important ICTY trial of General Mladić, indicted for the slaughter of over 8,000 captives in Srbenica, collapsed: the trial was abandoned and postponed *sine die* as the Prosecution, even after several reminders, had failed to transmit numerous evidentiary document to

378 Pre-Trial Chamber I declined to confirm the charges against Callixte Mbarushimana and ordered his release, ICC-CPI-20111216-PR757.

379 See Dahlin, J.D., http://www.liebercode.org/2011/12/icc-decision-on-complicity-for.html.

380 See the *Blaškić Case*, Case No. IT-95-14-T before ICTY.

the defence.[381] Such procedural errors do not enhance the reputation of the war crimes tribunals.

The cost of the war crimes tribunals is not irrelevant and when a judgment takes over five years to deliver – like in the *Charles Taylor case* – it must be questioned whether there could not be more efficient ways of dealing with war criminals. The fact that the Nuremberg Trials were completed within a year may also shed some light on the absurd length of time devoted to cases less complicated than those heard in Nuremberg. The *Charles Taylor Case* may, in this respect, have been complicated but there are others which surely could have been dealt with with more competence and with greater speed, saving considerable sums on costs.

The importance of jurisdiction of war crimes tribunals will be limited as long as the United States does not adhere to the ICC: this fact alone may illustrate that not every State has full confidence in the system of war criminal tribunals as it now stands. In any event, the war crimes tribunals have a temporary existence, apart from the ICC, and, as long as the United States does not adhere to the Statute of this tribunal, much is left to jurisdictional powers of States. It could be suggested that States even have a duty to try and convict a captured *jihad* terrorist, if the war crime tribunals do not act. The guilt of the *jihad* terrorist is enhanced by targeting civilians and seeking to harm as many victims as possible.[382]

It may well be that a system of universal jurisdiction will develop further with regard to terrorists, in particular to those that have been called genocidal terrorists or *jihad* terrorists in this work and oblige States to take action. Universal jurisdiction does not merely imply powers but possibly even obligations: the *jihad* terrorist, who is now the main belligerent in international society, is an enemy of mankind, a *hostes humani generis*, and in such capacity, a threat to all. Therefore, just as much as States have a duty to uphold other fundamental rules of international law, like the immunity of diplomats,[383] or the freedom of the seas,[384] so do States have the duty to capture *jihad* terrorists and indict them in national courts if the war crimes tribunals do not have competence or if they do not act. This is a paramount duty for States to take pre-emptive action to eliminate the scourge of genocidal terrorists and re-introduce a peaceful *modus vivendi* between all religions and between all nations.

381 *Telegraph*, 18 May 2012.

382 See above, Chapter 1, B iv, on the War on Terror.

383 See the *Hostage Case*, ICJ, *Reports*, 1981.

384 See Detter, I., *International Law and the Independent State*, 2nd edn (London, 1994), Ch. VI, C ii.

Conclusions

War may be technically outlawed; but wars still occur. The world has changed: the first edition of this work was written during the bipolar time when there was then, in 1987, a feared conflict, or war, possibly a nuclear war, between the United States and the Soviet Union. Then, communism fell and the second edition of this book in 2000 faced new challenges, in a different political scenario. Yet, that edition was published a year before 9/11 and now the world is different, again.

The pattern of war has changed once more. We have passed the time when States fought wars for their own expansion. We have also left the era when liberation movements in colonies fought for their independence. We have also largely passed the phase when nations forming part of an unwanted federation fought wars for their independence. In all these cases, we knew who was the 'enemy' and where he could be found.

Nowadays, the 'enemy' is elusive and could be hiding anywhere for some surreptitious attack, not against any military targets of a State, but increasingly against innocent civilians who are unable to defend themselves in action. Most wars now seem to be fought by a State, or an alliance of States on one side, and terrorists on the other, as main belligerents.

Another type of war fought by States nowadays concern intervention to curtail dictators who maltreat their own citizens – another remarkable change in the traditional interpretation of the reserved domain and the territorial sovereignty of States. Here outside forces, perhaps allies of major powers, fight against armies of 'rebels' or, indeed, of government forces, inside a State. This trend of intervening, and interfering, in the domestic affairs of a State may be warranted to safeguard fundamental human rights but also shows a worrying trend of the reduction of sovereign rights. It must also be retained that sovereignty is, and is likely to remain, one of the pillars that secures the stability of the international legal order.

Changes in international society have thus shown the inclination of some States to intervene in the internal affairs of another, under the label 'responsibility to protect', essentially a new term for 'humanitarian' intervention. The new device

of 'Right to Protect' (R2P) has been used – and sometimes perhaps not – to alert governments to much of what is essentially only an new form of 'intervention'.

The use of intervention lends itself to much abuse and self-interest of intervening powers. The new pattern of intervention has certainly changed, posing a major threat to the sovereignty of States. At times States have intervened in the internal affairs of another where, one may observe, that the end result was perhaps to secure the supply of oil rather than rescue the suffering civilians. On the other hand, there are limits to what degree a State may maltreat its own citizens and if they start bombing their own population, they may expect that other States will intervene.

Of course, the situation is indeed extreme if there is major suffering of the civilian population – or where they are being bombed by their own government, like in Libya in 2011 – but caution must also be exercised not to contribute to any further domino effect. In the event, the over-armed rebels in Libya rapidly disposed of the excess of arms that were then used by Al-Qaeda terrorists in Mali to take over half the country. This, in turn, led to another intervention with military force, this time by France, the ex-colonial power. A series of revenge attacks followed, some of which directed to innocent civilians who had been working in the region. New threats have followed by hostile powers like North Korea exporting missiles and nuclear technology to a number of instable countries, and possibly even to terrorists.

A close scrutiny of international practice seems to suggest that it is not true that States (and intergovernmental organisations) are the only subjects of international law; it is not true that only States (and organisations) conclude treaties; it is not true that only States wage wars.

The advent of genocidal or *jihad* terrorists changed the political landscape. Suggestions in the first edition of this book that non-State actors are also bound by the Law of War have been vindicated in that governments, courts and academics begin to agree that it is in the interest of all to submit non-State actors to the international regulatory framework. The *jihad* terrorists are subjected to the Law of War and, as they are now some of the *main belligerents*, they have *obligations* under the Law of War. But, of course, recognising them as 'subjects of international law' by giving them obligations does not imply that they are in any way similar to 'States'. The obligations, on the other hand, of these new belligerents, include the duty to use uniform or distinguishing insignia to show they are not members of the civilian population; if they do not, they will be considered as *illegal combatants*, and will not qualify for prisoner of war status but, as such, will be detainees. As such, contrary to prisoners of war, they can be interrogated. On the other hand, there are some minimum standards that have to be followed in the interrogation techniques.

In this maze of new developments the time has come to recognise that 'customary law' does not appear to furnish any valid legal foundation of all relevant rules in war. Naturally, there are areas where customary law is important. But even there we find a striking asymmetry between what is accepted as proof of State practice: as the English language has become predominant *and* precedents are

important in that legal culture, the majority of 'evidence' comes from the Anglo-Saxon world. But what about Russian, Japanese, Venezuelan or Bulgarian (etc.) cases? When does the International Court of Justice or the War Crimes Tribunals cite cases from these legal systems?

Above all, in the field of Law of War, customary law is particularly evasive; here it is of prevailing negative nature, relying as it does on non-action rather than action of belligerents. Furthermore, here we are not speaking of 'State practice' but rather of the practice of the member of the armed forces in the battlefield.

The better view would appear to be to recognise that there is a *jus naturalis*, based on the actual needs of international society;[1] such international natural law is not immutable but will adapt to what the 'common conscience' demands. This view is also compatible with the recurring expression in conventions and judgment of principles 'declaratory' of the 'customs' of war. But it is the recognition, the *opinio juris*, which is vital – not any pretended actual practice or non-practice.

Gas, as a weapon and method in war, was not held 'illegal' in the First World War, the Great War, and was practised by the belligerents. But it was widely condemned *before* the Geneva Gas Protocol of 1925. It is as if States and statesmen realised – having seen the horrendous effect of gas on combatants – that this was too much: this must be condemned. It is as if the conscience of men has suddenly been awakened, not dissimilar from when slavery – or apartheid – was condemned in international society.

A similar phenomenon of condemnation by such *opinio* can be found – *without State practice* – when annexation of planets in Outer Space is outlawed or when first strike by nuclear weapons is prohibited.

It is, indeed, becoming more and more fictitious to speak of 'customary law' in the realm of the Law of War. Far more rules appear to be derived from general ethics and views on civilised behaviour. There is thus a clear *international natural law*, often applied by courts – albeit in the guise of calling it 'customary law' with very little evidence. There is also a clear process on behalf of States of their *opinio juris naturalis* as the behaviour of dictators is condemned and cruel practices in war are held to be unacceptable.

Naturally, it is helpful to be able to refer to a written document. Codifying treaties and conventions are thus useful to put on paper what States, in their *opinio juris naturalis*, consider appropriate. However, it is essential to retain the simple truth that, if a document lays down rules on basic rights, as does Common article 3 of the Geneva Conventions on rules in 'non-international' wars, the obligatory force is not derived from the Conventions but from the *underlying international natural law*. If one takes that view, it is clearly easier to accommodate obvious needs for judging behaviour in *all* wars and not be constrained to extraordinary semantic excursions, like the US Supreme Court in *Hamdan*,[2] to explain that the rules apply *in all wars*. With this view, it is also clear why a *substratum* of such *international natural*

1 See Detter, I., *The Concept of International Law*, 2nd edn (Stockholm, 1994), Chapter 4.

2 Supreme Court of the United States, *Hamdam v Rumsfeld, Secretary of Defense*, 28 June 2004; 30th Judicial Circuit Court of Ky., 410 US 484.

law, approved by the *opinio juris* of States, applies, without transformation, in the internal sphere of States.

At least by 2012, 11 years after 9/11, genocidal or *jihad* terrorists have, alongside States, become important actors in international society, highlighting the vulnerability of States. The earlier liberation movements demonstrated the utter fragile structure of States that did not have the full support of their colonial citizens; later the fight for independence of members of federated States showed the brittle nature of federations that did not have the full support of their member nations.

Genocidal or *jihad* terrorists are now the main belligerents in international society. Now focus might be on the impossibility to protect States and citizens once suicidal terrorists come on the scene. No Head of State and no ordinary civilian can be safe as no one knows when and where the next attack will take place. Earlier in history a perpetrator would at least try to save himself but the abnormal views of the *jihad* terrorists lead the attackers to believe that they will even be rewarded, in Paradise, for their atrocities.

So the new suicidal terrorists demonstrate one major change in international society. An important debate has taken place as to how States then are allowed to treat the surviving terrorists: are they, as suggested, at least at times, by the Red Cross, also to have the privileges like real soldiers and be treated as prisoners of war? Or is it not reasonable to deprive them of such status but still afford them some minimum rights, such as due process in some form and, above all, exempt them from torture?

An increasing fragmentation of States has taken place after the Second World War, first by decolonisation under the rule of self-determination during the 1960s and 1970s, but then much further splitting off by subsequent claims to autonomy in the 1990s in the wake of the fall of communism. At the same time, the number of non-State actors multiply in international society, with multinationals and NGOs. And now the main belligerents are not States but the *jihad* terrorists and some war duties have been delegated by States to private military or 'security' companies.

It could be questioned whether the world is on a path back towards the conditions in the sixteenth to seventeenth centuries before the strong nation State arose to quell the constant civil wars. But situations are different today: now, wars are fought within fairly consolidated States, which often merely provide a venue for a confrontation of two outside supporting States who feed either side with financial or material support. Yet, the anarchical trends that can be discerned today with a constant undermining of State power might lead to a reaction that an even stronger bloc building or super-structural network will result.

For a long time States, courts and academics claimed that the Law of War only applied in 'international war'. It was highly fictitious to justify the application of the Law of War in certain internal conflict by claiming that conflicts are 'internationalised'; liberation movements are thus held to be belligerents in 'international wars', under Protocol I of 1977 regardless of outside support or objective circumstances justifying such qualification. It appears more reasonable to claim that the same Law of War is applicable in all wars. Today this is even clearer: all are subjected to the Law of War, soldiers, civilians and terrorists. Far from being withdrawn from the

rules of the Law of War, intra-State or internal conflicts, just as much as inter-State wars, are also subjected to the Law of War.

The Law of War is remarkably consolidated. The bulk of this legal system does not consist of elusive 'customary' rules but rather more of universally evident rules, binding by common recognition, and constituting a *jus internationalis naturalis*. The Law of War is well accepted to be binding on all belligerents and combatants and in great part rules are not subject to unilateral abrogation as was shown in the War Crimes Trials. There are certain standards from which no one must deviate and in this respect also the Law of War presents different characteristics than international law in general. The Law of War has the individual as its exclusive focus and the *rationale* of all rules can be derived from a common agreement to keep compulsory standards of behaviour.

There is no doubt that the use of any indiscriminate weapon is illegal as no weapon must be used that is not adequately aimed at military targets. There is no doubt that weapons that cause unnecessary suffering are forbidden. There is no doubt that the civilian population and all who are *hors de combat* must at all times be exempt from attack and given necessary medical assistance.

After having accepted such rules, and after claiming that the rules of war bind all, even third parties, it is hypocritical to find that States, at the same time, have sought to safeguard their national interests by clauses on denunciation of certain general conventions on the Law of War. Such clauses, allowing for denunciation, are incompatible with any claim that rules are 'generally binding'. And how can the supplementary rules, which are found in everyone's 'conscience', be denounced? But such clauses on denunciation are normally made by States which still erroneously insist that no rules of international law have effect in the municipal sphere.

There is a constant contradiction and conflict between the interests of the States and the interests of the individual. But for the most part, there is an overwhelming presumption, well supported in case law, that States, groups, individuals and terrorists are bound by the core of the Law of War in its totality and they cannot denounce this law nor escape the obligations of the general rules.

When we say 'in its totality' no doubt many will argue that there will always be refinements and details by which not all States can be bound in the absence of specific consent. Yet, the core of the Law of War consists of less than that and it is only the totality of the 'core' by which parties are bound. The basic rules are very simple and have been stated above as rules concerning exemption from attack of civilians and those *hors de combat*; prohibition of indiscriminate weapons, a rule which really only follows from the first; and a rule on assistance to those who are wounded or in need of help, based on the rudimentary principle of reciprocity.

It is thus not only States that are bound. By the reason of equality of belligerence also terrorists are bound. States have feared that any such admission would give such groups an undeserved 'standing' which could lead to dangers to the security of the State. But this is misconceived. It is the Law of War that would impose far-reaching duties on such belligerents as liberation movements and guerrillas and it is in the interest of States to allow for formalisation of accession to treaties on the Law of War. This has already been achieved in the field of the Conventional

Weapons Convention and Protocol I of 1977. That individuals are bound is clearly shown in the War Trials and in this field, too, there is a sharp contrast between the Law of War and other parts of international law.

The process of disarmament is clearly having an important impact on the Law of War. In practice, disarmament on a partial or limited basis operates to regulate wars: certain weapons are prohibited; others may not be used except in a specific way; others may only be used provided their effects are not of a prohibited nature. The trend to prohibit weapons at, or even before, the research stage, is important as it is more difficult to eliminate weapons which are manufactured and deployed. Further detailed rules on weapons and methods of warfare, coupled with humanitarian rules, form the important body of the Law of War.

In spite of some disagreement, particularly on the part of the United States with regard to incendiary weapons, the Weapons Conventions have already been treated, in large parts, as binding international law. The provisions they contain concern weapons the legality of which is already questionable under international law. In the field of protection of individuals from certain warfare methods and in the field of humanitarian law there is even greater agreement that international law now incorporates numerous provisions in unratified treaties. For example, a book devised for military commanders of various levels in Sweden to ascertain applicable rules of the Law in War, includes references to rules on personal protection under the Additional Protocols of 1977 as if they were already part of general international law.[3]

This is probably the correct position, although there will be an area of doubt of the rules on certain indiscriminate weapons. The position in law was obviously strengthened by the accession of further parties to the Protocols, especially the adherence by States like the United Kingdom.

The Biological Weapons Convention of 1972, the En-Mod Convention of 1979 and the Weaponry Conventions of 1981, together with the Protocols of 1977 to the Geneva Conventions of 1949, and later Conventions on Conventional Weapons, together with the Conventions on Nuclear Weapons, etc., present a formidable network of rules which are clearly acceptable to States and individuals alike. They clarify several hazy areas and define many concepts which gives new focus of application of similar terms in older Conventions. The new instruments furthermore advance on previous protection by extending to some hitherto unprotected groups. For these reasons, further conventions and agreements will contribute to a clearer identification of rules applicable in armed conflicts both on the international and internal scale, even to parties which do not adhere to these treaties.

Rules of belligerence provide further detailed rules as to what targets may be attacked and what objectives enjoy immunity. It is important to underline that these rules also bind terrorists whose guilt is aggravated by choosing immune targets, like civilians, for their attacks.

Concerning the law by which accused persons are convicted in the war crimes tribunals it may be noted that the Law of War is quite clear as to what is a war crime.

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3 Wulf, *Handbok, op. cit., passim.*

There are two main questions: one concerns the basis of obligation of such rules and the second one concerns methods of assessing imputation and liability for an act.

In the first instance, it must be suggested that there is a tendency to consider conventions on the Law of War as gradually being absorbed in 'general' international law. This process appears to lead to further absorption even into the international natural law, the 'obvious law', binding even on non-parties to the treaties is also reflected in the adoption of certain Resolutions of the General Assembly. Certainly such Resolutions have, technically speaking, no binding force but crystallise in many cases an ongoing development of the law.[4]

A main development concerns the gradual acceptance of ethics in warfare and the importance of 'sociologically necessary rules', or 'international natural law', or the '*jus naturale internationalis*', binding as reflecting human conscience, rather than the nebulous rules of 'customary law' which in the case of the Law of War are almost exclusively based on the absurd notion of 'negative custom'. It is indeed far-fetched to claim that States and combatants should be bound by rules based on facts that that something has *not* happened in the past, such as 'women have not been attacked' or 'young children have not been shot', rather than on the simple fact that such brutalities conflict with the human conscience of normal people. To refer to 'customary law' in such contexts shows that that concept has become something of a 'dustbin' in international law, into which rules are thrown when lawyers find no other ground to explain the obligatory force of such precepts.

Secondly, the process of punishing those responsible for war crimes has developed in the last decade to include mechanisms for also punishing terrorists. It is tragic to see this new system of war crimes tribunals being undermined by a doctrine, introduced and often applied by the ICTY: the concept of Joint Criminal Enterprise (JCE), a doctrine setting aside normal rules of liability and imputation. This doctrine continues to pose serious threat to the Rule of Law, introducing an arbitrary element in the assessment of guilt only paralleled by the Peoples' Tribunals under communism. This vague concept must be better defined and delimited to serve any purpose unless the Courts realise that the same results could actually be obtained, and secured with better accuracy, with the rules that existed before the introduction of this perilous concept in the war crimes tribunals. It is also remarkable that there has not been more discussion as to to why new rules, enabling virtually anyone to be convicted, were introduced but that States, defence counsel and academics sheepishly accepted this 'reform'.[5] It took another court, the Sierra Leone Tribunal, to prefer the traditional concept of 'aiding and abetting' to the JCE formula, which was avoided, in the important case against former Liberian President Charles Taylor in 2012.

It must also be mentioned that there is a risk of 'politicising' the tribunals if pressure is put on States to hand over suspected war criminals, against rewards

4 Detter, I., *The International Legal Order*, 2nd edn (London, 1994), Chapter IV iii c (7) on numerous reasons why Resolutions 'appear' binding, *inter alia.*, as they often reflect precisely the *jus naturale internationalis*.

5 But see the brilliant summary of criticism by Judge Wolfgang Schomberg, former Judge at ICTY and former Judge of the German Federal Court, 'Jurisprudence', *op. cit.*

of, for example, membership in the European Union in return for 'co-operating with the Tribunals'. Such methods would seem to endanger the impartiality of the tribunals and introduce serious elements of pressure, in turn, on the tribunals to convict such suspected war criminals.

The main concern about the war crimes tribunals is the immense cost incurred for running proceedings for years. The tribunals do not even coordinate their findings with each other so that now one tribunal now seems to use a law of its own. The quality and the competence of the war crimes tribunals must be reviewed and improved.

The more rules on weapons and methods are laid down and codified, the more they will crystallise a pattern of behaviour for States and groups. At the time of their adoption the Hague Regulations of 1907 may have represented a major advance on existing international law. But by 1939, *i.e.* within 32 years, they were held to have become binding upon all members of international society, even of those which had not adhered to them, as they were 'declaratory of the laws and customs of war'.[6] And it is precisely those rules which are an expression of the *jus naturalis ad bellum et in bello*. Such rules on ethics in war are obviously often supplemented by further contractual agreements and treaties between States. But the ethical rules remain at the centre of the international legal system in war and armed conflict.

The most important core element of the Law of War remains as the distinction between a civilian and a soldier and between those two protected groups and a 'terrorist'. As long as the problem of 'civilian by day – terrorist by night' subsists, it is imperative to insist on the rules of distinction: unless a person wears a uniform, or other clear and open signs of being engaged in the hostilities, he will be considered an '*illegal combatant*', and not entitled to be treated as a prisoner of war if captured. The terrorist who surreptitiously attacks while in civilian clothes will not enjoy such protection under the Law of War: he will be considered to be an 'illegal combatant', exempt from any protection except of that afforded to a detainee. This means that he will still have some minimum rights. But he can, as opposed to a prisoner of war, be interrogated; but according to the minimum right he enjoys such interrogation must not involve torture. Although he has some rights, it would be inappropriate to allow him – as some still suggest – prisoner of war status. The reason for demoting him to another level (still ensured of some minimum rights) is that, unless we insist on that precious rule of distinction in the Law of War, we will dilute the protection of which the true soldier and the true civilian are worthy. They are the individuals at the centre of the Law of War.

6 See the Judgments of the Military Tribunal at Nuremberg where the Court stated that: 'The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of war" which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.'

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The Law of War

Third Edition

Ingrid Detter

The third edition of Ingrid Detter's authoritative work explores the changing legal context of modern warfare in light of events over the last decade. Ingrid Detter reviews the status of non-State actors, as individuals and groups become more prominent in international society. Covering post 9/11 events and the resulting changes in the ethos of war, the author analyses the role of military companies and examines what their legitimacy means for international society. The edition also discusses certain 'intrinsic' rules in the Law of War, such as rules giving individuals the right to be spared genocide, torture, slavery and apartheid and assure them basic democratic rights. The author questions the right of 'illegal' combatants to be treated as prisoners of war and suggests that a minimum standard must be afforded to all, whether captured dictators or detainees suspected of terrorism. In the modern world, the individual (the soldier, the civilian, the dictator, the terrorist or the pirate) can no longer behave as they wish. Further new topics include 'target killings', the 'right to protect' ('R2P' – claimed to be a new form of intervention), the use of unregulated weapons such as drones and robots, the war scenario in Outer Space and cyber crimes. There is also a discussion of new developments in the field of war crimes including severe criticism of the novel concept 'joint criminal enterprise' (JCE), which, in the opinion of the author, undermines the Rule of Law. This updated and expanded edition will be of use to statesmen, scholars and students of international relations and international law.

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