JUIN
JUNE
2003
VOLUME 85
N° 850

Revue fondée en 1869
et publiée par le
Comité international
de la Croix-Rouge
Genève

Review founded in 1869
and published by the
International Committee
of the Red Cross
Geneva

REVUE INTERNATIONALE DE LA CROIX-ROUGE

Débat humanitaire : droit, politiques, action

INTERNATIONAL REVIEW OF THE RED CROSS

Humanitarian Debate: Law, Policy, Action

Contents Table des matières

Juin
June
2003
Volume 85
N° 850

L'interprétation du droit international humanitaire par les tribunaux internationaux

Interpretation of international humanitarian law by the international tribunals

233 *Éditorial/Editorial*

235 **The contribution of the International Court of Justice to international humanitarian law**
Vincent Chetail

271 **Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie : évaluation de l'apport de sa jurisprudence au droit international humanitaire**
Jean-François Quéguiner

313 **Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict**
James G. Stewart

351 **The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia**
Natalie Wagner

Affaires courantes et commentaires
Current issues and comments

385 **The implementation of international humanitarian law in the Russian Federation**
BAKHTIYAR TUZMUKHAMEDOV

397 **The review of weapons in accordance with Article 36 of Additional Protocol I**
JUSTIN MCCLELLAND

Faits et documents — Reports and documents

421 **War in Iraq:** the ICRC President calls for respect for international humanitarian law
Declaration by the ICRC President Jakob Kellenberger to the media on 20 March 2003

423 **Conflict in Iraq:** Memorandum to the belligerents

429 **United Nations Security Council 4762nd meeting**
Response to the humanitarian situation in Iraq
Speaking notes for an address by Mr. Jakob Kellenberger, President International Committee of the Red Cross (ICRC), Geneva
New York, 22 May 2003

433 **Première session spéciale de la Conférence des États parties chargée d'examiner le fonctionnement de la Convention sur les armes chimiques**
La Haye 28 avril - 9 mai 2003
Déclaration du Comité international de la Croix-Rouge, Genève

437 **First Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention**
The Hague 28 April - 9 May 2003
Statement of the International Committee of the Red Cross, Geneva

441 **Cérémonie de remise du Prix Paul Reuter 2003**
444 **Presentation ceremony, Paul Reuter Prize 2003**

Livres et articles — Books and articles

447 **Récentes acquisitions faites par le Centre d'Information et de Documentation / Recent acquisitions of the Library & Research Service**

Un texte paraissant dans la *Revue* n'engage que son auteur. En publiant un article dans la *Revue*, ni la rédaction ni le CICR ne prennent position au sujet des opinions exprimées par son auteur. Seuls les textes signés par le CICR peuvent lui être attribués.

Texts published by the *Review* reflect the views of the author alone and not necessarily those of the ICRC or of the *Review*. Only texts bearing an ICRC signature may be ascribed to the institution.

Éditorial

Le droit international humanitaire, comme tous les corps de droit, n'est pas statique et doit toujours être interprété et appliqué de façon à confirmer ses objectifs principaux et sa pertinence. Les dernières deux décennies, en particulier ces dix dernières années, les tribunaux internationaux ont de plus en plus dû traiter des questions concernant le droit international humanitaire. Ils ont identifié les objectifs fondamentaux, les règles et les principes appropriés des traités et du droit coutumier et ils se sont prononcés sur la façon dont ceux-ci s'inscrivent au droit international général aussi bien qu'au droit pénal international, au droit de la responsabilité étatique et au droit des droits de l'homme. Le résultat de cette délibération juridique sur le droit international humanitaire est une richesse de précédents persuasifs et revêtus d'autorité concernant l'application des règles du conflit armé.

Cette édition de la Revue examine cette contribution des tribunaux internationaux au droit international humanitaire. Les jugements et les avis de la Cour Internationale de Justice sont focalisés en un article, proposant une vue d'ensemble de la façon dont la Cour a aidé à clarifier le rapport entre le droit international humanitaire et le droit international général et à identifier la teneur des principes fondamentaux de la loi humanitaire. La manière dont la Cour de Justice internationale a traité la complexité des liens entre les traités humanitaires, le droit coutumier et le ius cogens *est également évaluée.*

La jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie est ensuite analysée sous plusieurs angles. Dans une perspective globale, son impact sur le droit international humanitaire est évalué, en particulier par rapport à sa fonction interprétative qui permet d'appliquer des dispositions conventionnelles anciennes aux conflits inter-ethniques modernes. Cet aspect controversé du rôle du tribunal dans l'application du droit international humanitaire est analysé dans une autre contribution avec un regard plus détaillé sur l'extension du régime d'infractions graves et de la doctrine de but commun. La question de la jurisprudence du tribunal est examinée dans un dernier article pour savoir si une définition unique de conflit armé devrait être adoptée pour remplacer la dichotomie entre conflit armé international ou non-international.

En plus des articles thématiques, une contribution plus spécifique traite de la mise en œuvre du droit international humanitaire dans la Fédération russe. Dans une autre contribution, l'examen des armes en vertu de l'article 36 du protocole additionnel I aux Conventions de Genève est revisité d'un point de vue pratique.

Enfin, la Revue publie quelques documents principaux du CICR concernant la guerre récente en Irak, y compris le mémorandum aux belligérants rappelant aux États leurs engagements en vertu du droit international humanitaire pendant ces hostilités.

La Revue

Editorial

International humanitarian law, like any body of law, is not static, and it must always be interpreted and applied in such a way as to uphold its basic objectives and relevance. Over the past two decades, particularly the latter half, international tribunals have increasingly had to decide on questions relating to humanitarian law. They have had to identify relevant rules and principles, customary laws and fundamental objectives, and rule on how these relate to general international law and other distinct bodies of international law such as international criminal law, the law of State responsibility and human rights law. The result of this judicial deliberation in the area of international humanitarian law provides a wealth of persuasive and authoritative precedence in relation to the enforcement of the rules of armed conflict.

This issue of the Review takes stock of the contribution of the international tribunals to international humanitarian law. The judgements and opinions of the International Court of Justice are the focus of one article, which provides an overview of how the Court has helped to clarify the relationship between international humanitarian law and general international law and to identify the content of the fundamental principles of humanitarian law. The way the International Court of Justice has dealt with the complexity of the links between humanitarian treaties, customary norms and jus cogens *is also assessed.*

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia is analysed from several angles. From an overall perspective, its impact upon international humanitarian law is evaluated, particularly as regards its interpretative function and how this has allowed long-standing provisions of humanitarian treaties to be applied to modern inter-ethnic conflicts. This controversial aspect of the Tribunal's role in the application of international humanitarian law is analysed in a further contribution with deeper insight into the extension of the grave breaches regime and the common purpose doctrine. The jurisprudence of the tribunal is used in a final article to bolster the argument as to whether a single definition of armed conflict should be adopted to replace the problematic international /non-international armed conflict dichotomy.

In addition to the thematic articles, one contribution deals with the specific subject of the implementation of international humanitarian law in the Russian Federation, whereas another looks at the review of weapons under Article 36 of the Additional Protocol I to the Geneva Conventions, from a practical point of view.

Finally, this issue also contains some key ICRC documents relating to the recent war in Iraq, including a memorandum to the belligerents reminding them of their obligations under international humanitarian law during military hostilities.

The Review

The contribution of the International Court of Justice to international humanitarian law

VINCENT CHETAIL*

International humanitarian law is a major part of public international law and constitutes one of the oldest bodies of international norms. As the principal judicial organ of public international law, the International Court of Justice contributes to the understanding of the fundamental values of the international community expressed in international humanitarian law.[1] Judicial decisions as such are not a source of law, but the *dicta* by the International Court of Justice are unanimously considered as the best formulation of the content of international law in force.[2] From a general international law perspective, international case law is therefore of the utmost importance in determining the legal framework of humanitarian law.[3] Since the remarkably brief and elusive reference to the "elementary considerations of humanity" in its first Judgment delivered on 9 April 1949 in the *Corfu Channel Case*,[4] the International Court of Justice has had occasion to deal with questions of humanitarian law in two highly debated cases: the Judgment of 27 June 1986 concerning *Military and Paramilitary Activities in and against Nicaragua*[5] and the Advisory Opinion delivered ten years later on 8 July 1996 concerning the *Legality of the Threat or Use of Nuclear Weapons*.[6] These two cases have been commented on at length, and it is not our intention to study here the specific circumstances of each case[7] or the particular position of the Court concerning nuclear weapons with regard to international humanitarian law.[8] We deliberately choose to place the case law of the International Court of Justice in a more general perspective within the framework of humanitarian law and to

* The author is a teaching and research assistant at the Graduate Institute of International Studies (Geneva) and at the Centre of European and Comparative Law (Lausanne). He was also a consultant for the United Nations High Commissioner for Refugees. The author is grateful to Professors Vera Gowlland-Debbas and Andrew Clapham for their helpful comments. He also wishes to thank his colleagues Mariano Garcia Rubio and Jeremy Allouche for their revision of the final draft of this article.

consider it in the light of the other relevant cases, mainly the Advisory Opinion on *Reservations to the Genocide Convention*[9] and the contentious case on *Application of the Convention on the Prevention and Punishment of the*

1 For a more general perspective, see P.-M. Dupuy, "Le juge et la règle de droit", *RGDIP*, Vol. 93, 1989, pp. 570-597; *ibid.*, "Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", in: R.-J. Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos. Droit et justice*, Pedone, Paris, 1999, pp. 117-130; G. Abi-Saab, "The International Court as a world court", in V. Lowe. & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Grotius Publications, Cambridge University Press, 1996, pp. 3-16; V. Gowlland-Debbas, "Judicial insights into fundamental values and interests of the international community", in A.S. Muller, D. Raic & J.M. Thuranszky (eds), *The International Court of Justice: Its Future Role after Fifty Years*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, pp. 327-366.

2 H. Lauterpacht, *The Development of International Law by the International Court*, Stevens & Sons, London, 1958, in particular pp. 6-22, and pp. 61-71; E. McWhinney, "The legislative role of the World Court in an era of transition", in R. Bernhardt, W.K. Geck, G. Jaenicke. & H. Steinberger (eds), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler*, Springer-Verlag, Berlin-Heidelberg-New York, 1983, pp. 567-579; O. Schachter, "Creativity and objectivity in international tribunals", *ibid.*, pp. 813-821; L. Condorelli, "L'autorité de la décision des juridictions internationales permanentes", in Société Française pour le Droit International, *La juridiction internationale permanente*, Colloque de Lyon, Pédone, Paris, 1986, pp. 277-313; R.Y. Jennings, "The judicial function and the rule of law in international relations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Vol. III, Milano — Dott. A. Giuffrè Editore, 1987, pp. 139-151; M. Mendelson, "The International Court of Justice and the sources of international law", in V. Lowe V. & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, *op. cit.* (note 1), pp. 63-89; F. Francioni, "International 'soft law': A contemporary assessment", *ibid.*, pp. 167-178; J.J. Quintanan, "The International Court of Justice and the formulation of general international law: The law of maritime delimitation as an example", in: A.S. Muller *et al.* (eds), *The International Court of Justice. Its Future Role after Fifty Years*, *op. cit.* (note 1), pp. 367-381; S. Rosenne., *The Law and Practice of the International Court, 1920-1996*, Vol. III, The Hague/Boston/London, Martinus Nijhoff, 1997, in particular pp. 1606-1615 and 1628-1643; M. Shahabuddeen, *Precedent in the World Court*, Grotius Publications, Cambridge University Press, 1996, in particular pp. 1-31 and pp. 67-96.

3 On the importance of international case law in the field of humanitarian law or human rights, see I.P. Blishchenko, "Judicial decisions as a source of international humanitarian law", in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica S.r.l., Naples, 1979, pp. 41-51; R. Abi-Saab, "The 'general principles' of humanitarian law according to the International Court of Justice", *International Review of the Red Cross*, No. 766, 1987, pp. 381-389; N.S. Rodley, "Human rights and humanitarian intervention: The case law of the World Court", *International and Comparative Law Quarterly*, Vol. 38, 1989, pp. 321-333; S.M. Schwebel, "The treatment of human rights and of aliens in the International Court of Justice", in V. Lowe & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, *op. cit.* (note 1), pp. 327-350.

4 *Corfu Channel Case (Merits)*, ICJ Reports 1949, p. 22.

5 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, ICJ Reports 1986, p. 14.

6 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226.

Crime of Genocide.[10] It will thus be shown how the case law of the International Court of Justice represents a major contribution from the twofold perspective of clarifying the relationship between international

7 These cases have been the object of the most abundant literature written on the cases of the Court. For the *Case concerning Military Activities in Nicaragua*, see in particular the special issue of the *American Journal of International Law*, Vol. 81, 1987; P.W. Kahn, "From Nuremberg to The Hague: The United States position in *Nicaragua* v. *United States*", *Yale Journal of International Law*, Vol. 12, 1987, pp. 1-62; P.-M. Eisemann, "L'arrêt de la CIJ dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci", *AFDI*, Vol. XXXII, 1986, pp. 153-189; J. Verhoeven, "Le droit, le juge et la violence: Les arrêts Nicaragua c. Etats-Unis", *RGDIP*, Vol. 91, 1987, pp. 1159-1239; T.D. Gill, *Litigation Strategy at the International Court: A Case Study of the* Nicaragua *v.* United States *Dispute*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989; W. Czaplinski, "Sources of international law in the Nicaragua case", *International and Comparative Law Quarterly*, Vol. 38, 1989, pp. 85-99; C. Lang, *L'affaire Nicaragua/Etats-Unis devant la Cour internationale de Justice*, LGDJ, Bibliothèque de droit international, Vol. 100, Paris, 1990; J. Crawford, "Military activities against Nicaragua case (*Nicaragua* v. *United States*)", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, Max Planck Institute for Comparative Public Law and International Law, Elsevier, Amsterdam/Lausanne/New York/Oxford/Shannon/Singapore/Tokyo, 1997, pp. 371-378. For the case on the *Legality of the Threat or Use of Nuclear Weapons*, see the numerous and extensive contributions published in the special issue of the *International Review of the Red Cross*, No. 823, 1997; L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999. See also: M. Perrin de Brichambaut, "Les avis consultatifs rendus par la CIJ le 8 juillet 1996 sur la licéité de l'utilisation des armes nucléaires dans un conflit armé (OMS) et sur la licéité de la menace et de l'emploi d'armes nucléaires (AGNU)", *AFDI*, Vol. XLII, 1996, pp. 315-336; V. Coussirat-Coustère, "Armes nucléaires et droit international: A propos des avis consultatifs du 8 juillet 1996 de la Cour internationale de Justice", *ibid.*, pp. 337-356; R.A. Falk, "Nuclear weapons, international law and the World Court: A historic encounter", *American Journal of International Law*, Vol. 91, 1997, pp. 64-75; M.J. Matheson, "The Opinions of the International Court of Justice on the threat or use of nuclear weapons", *ibid.*, pp. 417-435.

8 See notes 6 and 7. For a general appraisal of the legality of nuclear weapons, see also: G. Schwarzenberger, *The Legality of Nuclear Weapons*, Stevens & Sons, London, 1958; M.N. Singh, *Nuclear Weapons and International Law*, Stevens & Sons, London, 1959; I. Brownlie, "Some legal aspects of the use of nuclear weapons", *International and Comparative Law Quarterly*, Vol. 14, 1965, pp. 437-451; A. Rosas, "International law and the use of nuclear weapons", in: *Essays in Honour of Erik Casrén*, Finnish Branch of the International Law Association, Helsinki, 1979, pp. 73-95; R.A. Falk, L. Meyrowitz. & J. Sanderson, *Nuclear Weapons and International Law*, Center of International Studies, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, 1981; E. David, "A propos de certaines justifications théoriques à l'emploi de l'arme nucléaire", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 325-342; S. McBride, "The legality of weapons of social destruction", *ibid.*, pp. 401-409; L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Juris Publishing, Manchester University Press, 2000, pp. 128-132.

9 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 15.

10 *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia) (Preliminary objections)*, ICJ Reports 1996, p. 595.

humanitarian law and general international law on the one hand (Part 1), and identifying the content of the fundamental principles of international humanitarian law on the other (Part 2).

International humanitarian law and general international law

Contemporary international humanitarian law is composed of: (A) a complex set of conventional rules, (B) customary norms and (C) *jus cogens*, which the case law of the International Court of Justice helps to clarify and interpret.

Unity and complexity of treaties of international humanitarian law

The systematic codification and progressive development of humanitarian law in general multilateral treaties started relatively early when compared to other branches of international law.[11] Contemporary humanitarian law is the outcome of a long normative process, whose more immediate origins date back to the late nineteenth century with the movement towards codification of the laws and customs of war. As a result, international humanitarian law is one of the most codified branches of international law. This very substantial body of law is characterized by two sets of rules: the "Hague Law", whose provisions relate to limitations or prohibitions of specific means and methods of warfare, and the "Geneva Law", which is mainly concerned with the protection of victims of armed conflicts, i.e. non-combatants and those who do not or no longer take part in the hostilities.[12] With the adoption of the Additional Protocols of 1977, which combine both branches of international humanitarian law, that distinction is now mainly historical and didactic.

11 On the historical development of international humanitarian law, see: G. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, Weidenfeld and Nicholson, London, 1980; P. Haggenmacher, *Grotius et la doctrine de la guerre juste*, Presses Universitaires de France, Paris, Graduate Institute of International Studies, Geneva, 1983; J. Pictet, "The formation of international humanitarian law", *International Review of the Red Cross*, No. 244, 1985, pp. 3-24; G.I.A.D. Draper, "The development of international humanitarian law", in *International Dimensions of Humanitarian Law*, Henry Dunant Institute/UNESCO, Geneva/Paris, 1988, pp. 67-90; G. Best, "The restraint of war in historical and philosophical perspective", in A.J.M. Delissen. & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 3-26; M. Howard, G.J. Andreopoulos & M.R. Shulman, *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven/London, 1994; L.C. Green, *The Contemporary Law of Armed Conflict, op. cit.* (note 8), pp. 20-53.

12 See on this distinction: S.E. Nahlik, "Droit dit 'de Genève' et droit dit 'de La Haye': Unicité ou dualité?", *AFDI*, Vol. XXIV, 1978, pp. 1-27; F. Bugnion, "Law of Geneva and Law of The Hague", *International Review of the Red Cross*, No. 844, 2001, pp. 901-922.

In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice acknowledges in unequivocal terms the basic unity of international humanitarian law. It makes definitively clear that this branch of international law contains both the rules relating to the conduct of hostilities and those protecting persons in the power of the adverse party. By so doing, the Court retraces the historical evolution of humanitarian law:

> "The 'laws and customs of war' — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This 'Hague Law' (...) fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities".[13]

The Court concludes that:

> "These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law".[14]

The underlying unity of international humanitarian law is grounded on the basic values of humanity shared by every civilization. As Judge Weeramantry points out:

> "Humanitarian law and custom have a very ancient lineage. They reach back thousands of years. They were worked out in many civilizations — Chinese, Indian, Greek, Roman, Japanese, Islamic, modern European, among others. Through the ages many religious and philosophical ideas have been poured into the mould in which modern humanitarian law has been formed. They represented the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war. In

13 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 6), p. 256, para. 75.
14 *Ibid.*

the language of a notable declaration in this regard (the St. Petersburg Declaration of 1868), international humanitarian law is designed to 'conciliate the necessities of war with the laws of humanity'."[15]

The numerous treaties of humanitarian law express the continuing concern of the international community to maintain and preserve fundamental rules in the specific context of armed conflicts, where the rule of law is particularly threatened. According to the International Court of Justice's own words, the set of conventional rules applicable in time of armed conflict is:

"fundamental to the respect of the human person and 'elementary considerations of humanity'."[16]

The Court thereby underlines that the same fundamental ethical values are shared both by humanitarian law and human rights law. Despite their different historical backgrounds and their own normative specificities, the central concern of both branches of international law is human dignity. They originate from the same source: the laws of humanity. In addition to acknowledging this common conceptual framework, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* also contributes to a better understanding of the interplay between treaties of humanitarian law and human rights law.[17] Indeed, the Court confirms the convergence and complementarity of human rights and humanitarian law and recognizes the continuing applicability of human rights law in time of armed conflict:

15 *Ibid.*, Dissenting Opinion of Judge Weeramantry, pp. 443-444.

16 *Ibid.*, p. 257, para. 79.

17 On the relationships between human rights and humanitarian law, see: A.S. Calogeropoulos-Stratis, *Droit humanitaire et droits de l'homme: La protection de la personne en période de conflit armé*, Graduate Institute of International Studies, A.W. Sijthoff, Geneva/Leiden, 1980, p. 119; Y. Dinstein, "Human rights in armed conflict: International humanitarian law", in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1984, pp. 345-368; A. Eide, "The laws of war and human rights: Differences and convergences", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, *op. cit.* (note 8), pp. 675-698; A.H. Robertson, "Humanitarian law and human rights", *ibid.*, pp. 793-802; M. El Kouhene, *Les garanties fondamentales de la personne en droit humanitaire et en droit de l'homme*, Nijhoff, Dordrecht, 1986; L. Doswald-Beck. & S. Vité, "International humanitarian law and human rights law", *International Review of the Red Cross*, No. 800, 1993, pp. 94-119; T. Meron, "The convergence between human rights and humanitarian law", in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, Martinus Nijoff, The Hague, 1997, pp. 97-105; R.E. Vinuesa., "Interface, correspondence and convergence of human rights and international law", *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 69-110; R. Kolb, "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", *International Review of the Red Cross*, No. 324, 1998, pp. 409-419.

"The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life [guaranteed under Article 6 of the International Covenant] is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[18]

Humanitarian law can therefore be regarded as a species of the broader genus of human rights law. This is not a distinction in terms of their intrinsic nature, but a distinction based on the context of application of rules designed to protect human beings in different circumstances. Although in the present case the right to life, as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, adds no substance to the existing humanitarian law, the Court's recognition of the continuing applicability of human rights treaties in time of armed conflict is of considerable importance for two main reasons. At the substantive level, provisions of human rights treaties go beyond conventional humanitarian law and fill some normative gaps, particularly in the context of non-international armed conflict and internal strife.[19] At the procedural level, human rights treaties contain sophisticated enforcement mechanisms that may supplement the

18 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 6), p. 240, para. 25. For a commentary on this passage of the Advisory Opinion, see V. Gowlland-Debbas, "The right to life and genocide: The Court and international public policy", in L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons, op. cit.* (note 7), pp. 315-337.

19 See on this question: Y. Dinstein, "The international law of civil wars and human rights", *Israel Yearbook on Human Rights*, Vol. 6, 1976, pp. 62-80; S. Junod, "Human rights and Protocol II", *IRRC*, No. 236, 1983, pp. 246-254; Th. Meron, *Human Rights in Internal Strife: Their International Protection*, Hersh Lauterpacht Memorial Lectures, Grotius Publications, Cambridge, 1987; H.S. Burnos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes", in F. Kalshoven. & Y. Sandoz (eds), *Implementation of International Humanitarian Law,*

more rudimentary mechanisms for the implementation of humanitarian law, mainly based on a preventive and State-oriented approach.[20]

Customary nature of humanitarian law treaties

Already in its first Judgment, delivered on 9 April 1949 in the *Corfu Channel Case*, the International Court of Justice referred indirectly to the customary nature of humanitarian law treaties. The point was that a specific obligation to notify the presence of a minefield is contained in the Hague Convention VIII of 1907. However, Albania — the defendant — was not a party to it. Moreover, this convention applies in time of war, which was not the case. The Court considered nevertheless that:

Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 1-30; P.H. Kooijmans, "In the shadowland between civil war and civil strife: Some reflections on the standard-setting process", in: A.J.M. Delissen. & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven, op. cit.* (note 11), pp. 225-247; F. Hampson, "Human rights and humanitarian law in internal conflicts", in: M.A. Meyer (ed.), *Armed Conflict and the New Law*, The British Institute of International and Comparative Law, London, Vol. II, 1993, pp. 53-82; H.P. Gasser, "A measure of humanity in internal disturbances and tensions: Proposals for a code of conduct", *International Review of the Red Cross*, No. 262, 1988, pp. 38-58; T. Meron, "Draft model declaration in internal strife", *International Review of the Red Cross*, No. 262, 1988, pp. 59-104; A. Eide, A. Rosas & T. Meron, "Combating lawlessness in gray zone conflicts through minimum humanitarian standards", *American Journal of International Law*, Vol. 89, 1995, pp. 215-223; R. Abi-Saab, "Human rights and humanitarian law in internal conflicts", in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality, op. cit.* (note 17), pp. 107-123; C. Sommaruga, "Humanitarian law and human rights in the legal arsenal of the ICRC", *ibid.*, pp. 125-133; D. Momtaz, "The minimum humanitarian rules applicable in periods of internal tension and strife", *International Review of the Red Cross*, No. 324, 1998, pp. 455-462; A. Eide, "Internal disturbances and tensions", in: *International Dimensions of Humanitarian Law, op. cit.* (note 12), pp. 241-256; T. Hadden. & C. Harvey, "The law of internal crisis and conflict", *International Review of the Red Cross*, No. 833, 1999, pp. 119-134

20 See: B.G. Ramcharan, "The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflict", *American University Law Review*, Vol. 33, 1983, pp. 99-115; M. Sassoli, "Mise en oeuvre du droit international humanitaire et du droit international des droits de l'homme: Une comparaison", *ASDI*, Vol. XLIII, 1987, pp. 24-61; C. Cerna, "Human rights in armed conflict: Implementation of international humanitarian law norms by regional intergovernmental human rights bodies", in F. Kalshoven & Y. Sandoz (eds), *Implementation of International Humanitarian Law, op. cit.* (note 19), pp. 31-67; R. Wieruszewski, "Application of international humanitarian law and human rights law: Individual complaints", *ibid.*, pp. 441-458; D. Weissbrodt & P.L. Hicks, "Implementation of human rights and humanitarian law in situations of armed conflicts", *International Review of the Red Cross*, No. 800, 1993, pp. 94-119; D. O'Donnell, "Trends in the application of international humanitarian law by United Nations human rights mechanisms", *International Review of the Red Cross*, No. 324, 1998, pp. 481-503; L. Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* Case", *ibid.*, pp. 505-511; A. Reidy, "The approach of the European Commission and Court of Human Rights to international humanitarian law", *ibid.*, pp. 513-529.

"The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." [21]

The Court acknowledges that the specific provisions of the Hague Convention of 1907 were declaratory of a general principle of international law, and therefore admits — at least implicitly — the customary nature of the conventional rule expressed in the Convention.[22] This conclusion was reiterated by the Court in its Judgment of 27 July 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*:

"[I]f a State lays mines in any waters whatever (...) and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907".[23]

The latter case was likewise an occasion for the Court to examine the customary nature of the four Geneva Conventions of 12 August 1949.[24] Indeed, the multilateral treaty reservation of the United States appeared to preclude the Court from applying the Geneva Conventions as treaty law. The Court, however, did not find it necessary to take a stance with regard to the relevance of the U.S. reservation, because:

21 *The Corfu Channel Case (Merits), op. cit.* (note 4), p. 22.

22 In the course of its Memorial to the Court, the United Kingdom argued that: "since the adoption of the Convention in 1907, States have in their practice treated its provisions as having been received into general international law. Even Germany, who in the wars of 1914-1918 and 1939-1945 was guilty of serious breaches of the Convention, publicly professed to be complying with its provisions. The Allied Powers in both wars held themselves bound by the Convention and throughout observed the provisions relating to notification": *ICJ Pleadings*, Vol. 1, p. 39.

23 *Military and Paramilitary Activities in and against Nicaragua, op. cit* (note 5), p. 112, § 215.

24 For a commentary, see: T. Meron, "The Geneva Conventions as Customary Law", *American Journal of International Law*, Vol. 81, 1987, pp. 348-370; R. Abi-Saab, "The 'general principles' of humanitarian law according to the International Court of Justice", *op. cit.* (note 3), pp. 381-389.

"[I]n its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law".[25]

The Court began its analysis with the general and unchallengeable assessment that:

"[I]n its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles".[26]

Although the Court focused its judgment on two particular articles of the Geneva Conventions as reflecting customary law (i.e. common Articles 1 and 3), the generality of the formula cited above seems to postulate the customary nature of the Geneva Conventions as such, or at least of the great majority of their provisions. As Judge Koroma recognized ten years later:

"By reference to the humanitarian principles of international law, the Court recognized that the Conventions themselves are reflective of customary law and as such universally binding".[27]

The intermingling of treaty law and customary law confirms that, contrary to the commonly held opinion, custom cannot be reduced to only general legal principles and may be as detailed and technical as conventional provisions. But the conclusion of the Court was essentially declaratory, without deeming it necessary to examine the *opinio juris* and State practice relating to the customary nature of the Geneva Conventions. Indeed, the Court gave a tautological explanation mainly based on the common articles on denunciation, according to which:

"[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 the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[28]

The Court added in the same vein that the fundamental rules contained in common Article 3

25 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 113, para. 218.

26 *Ibid.*

27 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Koroma, *op. cit.* (note 6), p. 580.

28 Cited in: *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), pp. 103-104, para. 218.

"are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'."[29]

The Court seemed to consider that the intrinsically humanitarian character of the Geneva Conventions dispensed it from any explicit discussion of the process by which treaty obligations reflect or become customary obligations.[30] The Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* was the occasion for the Court to give an *a posteriori* justification of its affirmation formulated ten years before. In that Opinion the Court begins by recalling the importance of the humanitarian values on which the whole law of armed conflicts is based:

"It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity', as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel Case* (...), that the Hague and Geneva Conventions have enjoyed a broad accession".[31]

The Court sees a confirmation of the customary nature of humanitarian law in the declarations of other international bodies. It recalls that:

"The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 'were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war'."[32]

The Court also refers to the Report of the Secretary-General adopted in 1993 and introducing the Statute of the International Tribunal for the former Yugoslavia, which was unanimously approved by the Security Council, according to which:

"The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV)

29 *Ibid.*, p. 104.

30 For a critique of this approach, see in particular: A. D'Amato, "Trashing customary international law", *American Journal International Law*, Vol. 81, 1987, pp. 101-105; R.G. Clark, "Treaty and custom", in L. Boisson de Chazourne. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 171-180.

31 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 79.

32 *Ibid.*, p. 258, para. 80.

Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."[33]

The International Court of Justice concludes on that basis that:

"The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a *corpus* of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles."[34]

The Court confirms in unambiguous terms that the large majority of the provisions of the Hague and Geneva Conventions are declaratory of customary law. However, the Court is less categorical with regard to the provisions of Protocol I:

"[T]he Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I".[35]

The Court suggests therefore that Protocol I is only in part a codification of customary rules of humanitarian law.[36] However, this qualification of the declaratory nature of Protocol I does not mean that many of its provisions, which did not codify custom at the time of their adoption, may be considered nowadays as customary norms. Indeed, in its famous *North Sea Continental Shelf Cases*, the Court recognizes that the set of rules contained in a multilateral Convention may be considered

"as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as

33 *Ibid.*, para. 81.

34 *Ibid.*, para. 82.

35 *Ibid.*, p. 259, para. 84.

36 See, however, the Dissenting Opinion of Judge Koroma, considering that: "Additional Protocol I (...) constitutes a restatement and a reaffirmation of customary law rules based on the earlier Geneva and Hague Conventions. To date, 143 States have become parties to the Protocol, and the customary force of the provisions of the Protocol are not based on the formal staus of the Protocol itself": *ibid.*, p. 580.

such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. (...) [E]ven without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected".[37]

Although the Court did not feel the need to examine that question in the context of Protocol I, the accession of 143 States and the continued restatement of its validity constitute substantial signs of the customary process in which that Protocol is involved.[38]

Jus cogens and principles of humanitarian law

Traditionally linked to the notion of international public order, the concept of *jus cogens* presupposes that there are some rules which are so fundamental to the international community that States can not derogate from them.[39] *Jus*

37 *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Danemark/Netherlands)*, ICJ Reports 1969, pp. 41-42, paras. 71 and 73.

38 See on this question: A. Cassese, "The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law", *UCLA Pacific Basin Law Journal*, 1984, pp. 57-118; D.W. Greig, "The underlying principles of international humanitarian law", *Australian Year Book of International Law*, Vol. 9, 1985, pp. 46-85; G.H. Aldrich, "Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva Protocol I", *Virginia Journal of International Law*, Vol. 27, 1986, pp. 693-720; C. Greenwood, "Customary law status of the 1977 Geneva Protocols", in A.J.M. Delissen & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven, op. cit.* (note 11), pp. 93-114; G. Abi-Saab, "The 1977 Additional Protocols and general international law", *ibid.*, pp. 115-126; L.R. Penna, "Customary international law and Protocol I: An analysis of some provisions", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, op. cit.* (note 8), pp. 201-225.

39 See among the classic literature: A. Verdross, "*Jus dispositivum* and *jus cogens* in international law", *American Journal of International Law*, Vol. 60, 1966, pp. 55-63; M. Virally, "Réflexions sur le *jus cogens*", *AFDI*, Vol. XII, 1966, pp. 5-29; E. Suy, "The concept of *jus cogens* in public international law", in *Lagonissi Conference on International Law*, Geneva, 1967, pp. 17-77; K. Marek, "Contribution à l'étude du *jus cogens* en droit international", in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Graduate Institute of International Studies, Geneva, 1968, pp. 426-459; A. Gomez Robledo, "Le *ius cogens* international: sa genèse, sa nature, ses fonctions", *RCADI*, 1981, III, pp. 9-217; L. Alexidze, "Legal nature of *jus cogens* in contemporary international law", *ibid.*, pp. 223-268; G. Gaja "*Jus cogens* beyond the Vienna Convention", *ibid.*, pp. 271-316. See also: R. St. J. Macdonald, "Fundamental norms in contemporary international law", *Canadian Yearbook of International Law*, Vol. XXV, 1987, pp. 115-149; G.A. Christenson, "*Jus cogens*: Guarding interests fundamental to international society", *Virginia Journal of International Law*, Vol. 28, 1988, pp. 585-628; G.M. Danilenko, "International *jus cogens*: Issues of law-making", *European Journal of International Law*, Vol. 2, 1991, pp. 42-65; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 131-166.

cogens was defined for the first time in an international instrument in Article 53 of the 1969 Vienna Convention on the Law of Treaties, according to which:

> "[a] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[40]

The International Court of Justice has addressed the issue of *jus cogens* or related concepts, such as obligations *erga omnes*, in various contexts closely linked to humanitarian law, e.g. fundamental human rights,[41] the prohibition of the threat or use of force,[42] and the peoples' right to self-determination.[43] The Court's first reference to the notion of obligation *erga omnes* was made with regard to the outlawing of genocide. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 28 May 1951, the Court highlights the particular nature of this Convention so as to recognize implicitly that the outlawing of genocide represents an obligation *erga omnes*:

> "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[44]

40 See also Article 53 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

41 *Barcelona Traction, Light and Power Compagny Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 32, para. 33.

42 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 100, para. 190.

43 *Case concerning East Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 102, para. 29.

44 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 23.

Later, in its *Barcelona Traction* Judgment of 5 February 1970, the Court expressly confirms that the outlawing of genocide is an obligation of this nature and clarifies the general concept of obligation *erga omnes*. According to the Court:

> "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State (...). By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[45]

More recently, in the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary objections)* of 11 July 1996, the Court reiterates its Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, according to which:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (...). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)".[46]

The Court deduces from the object and purposes of the Convention as set out in its Opinion of 28 May 1951 that:

45 *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), op. cit.* (note 41), p. 32, para. 33.

46 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, op. cit.* (note 10), p. 616, para. 31.

"the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*".[47]

This latter confirmation is particularly interesting for two reasons. First, the Court considers that the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 had the effect of crystallizing the outlawing of genocide as an obligation *erga omnes*. Secondly, it admits that it is not only the outlawing of genocide itself which has acquired the status of an obligation *erga omnes*, but the entire Convention, including in particular the obligation to bring to trial or extradite persons having committed, incited or attempted to commit such an international crime.

Conversely, the Court was much less clear with regard to the legal character of norms applicable to the conduct of hostilities and the protection of victims of armed conflicts. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that there was no need for it to deal with the issue of whether such rules are part of *jus cogens* or not. It considered that the request by the General Assembly raised the question of the *applicability* of humanitarian law with regard to the use of nuclear weapons but not the question of the *legal character* of these norms.[48] By so doing, the Court unfortunately missed the opportunity to clarify the status of *jus cogens* in international humanitarian law.[49] Nevertheless the Court recognized that:

"[The] fundamental rules [of humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute *intransgressible principles of international customary law*".[50]

This last expression does not belong to the existing legal vocabulary and it was previously unknown in international law. As Professor Condorelli rightly observed, "it is unlikely that the Court merely meant [...] that those principles must not be transgressed. That, indeed, is true of any rule of law that imposes any

47 *Ibid.*

48 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 6), p. 258, para. 83.

49 See J. Werksman & R. Khalastchi, "Nuclear weapons and *jus cogens:* Peremptory norms and justice preempted?", in L. Boisson de Chazournes & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons, op. cit.* (note 7), pp. 181-198.

50 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 6), p. 257, para. 79 (emphasis added).

obligation at all!"[51] The solemn tone of the phrase and its wording show, on the contrary, that the Court intended to emphasize the importance of humanitarian norms for international law and order as a whole and the particularity of such norms in comparison with the other ordinary customary rules of international law. This enigmatic expression of "intransgressible principles" may therefore be interpreted in two different ways. On the one hand, the Court could be suggesting that fundamental principles of humanitarian law constitute norms of *jus cogens in statu nascendi*, which are on the point of becoming peremptory norms of international law but cannot yet be plainly considered as such. It can be argued, on the other hand, that by underlining the intransgressible character of the fundamental rules of humanitarian law, the Court implicitly admits the peremptory character of such rules, but refrains from doing so explicitly, because it is dealing with the more limited issue of the applicability of such norms to the case under consideration. Following the same line of reasoning, some judges go one step further and acknowledge in clear terms that the principles and rules of international humanitarian law do have the character of *jus cogens*. President Bedjaoui holds, in his Separate Opinion, that the majority of rules of humanitarian law have to be considered as peremptory norms of international law.[52] Judge Weeramantry, in his Dissenting Opinion, states categorically that:

> "The rules of the humanitarian law of war have clearly acquired the status of *ius cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect."[53]

51 L. Condorelli, "Nuclear weapons: A weighty matter for the International Court of Justice", *International Review of the Red Cross*, No. 319, 1997, p. 14.

52 "Il ne fait pas de doute pour moi que la plupart des principes et règles du droit humanitaire et, en tout cas, les deux principes interdisant l'un l'emploi des armes à effets indiscriminés et l'autre celui des armes causant des maux superflus, font partie du *jus cogens*. La Cour a évoqué cette question dans le présent avis; mais elle a toutefois déclaré qu'elle n'avait pas à se prononcer sur ce point dans la mesure où la question de la nature du droit humanitaire applicable aux armes nucléaires ne rentrait pas dans le cadre de la demande que lui a adressée l'Assemblée générale des Nations Unies. La Cour n'en a pas moins expressément considéré ces règles fondamentales comme '*des règles intransgressibles du droit international coutumier*'", *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), para. 21, p. 273.

53 *Ibid.*, p. 496. He notices that Judge Roberto Ago considered in 1971 in his course at The Hague Academy of International Law that the rules of *jus cogens* include: "the fundamental rules concerning the safeguarding of peace, and notably those which forbid recourse to force or threat of force; *fundamental rules of a humanitarian nature* (prohibition of genocide, slavery and racial discrimination, *protection of essential rights of the human person in time of peace and war*)".

Judge Koroma likewise points out that:

"Already in 1980, the [International Law] Commission observed that 'some of the rules of humanitarian law are, in the opinion of the Commission, rules which impose obligation of *jus cogens*'."[54]

It is regrettable that the Court raises the issue of the fundamental nature of humanitarian law without clarifying the existing link between this body of international rules and their potential character of peremptory norms of general international law. Nevertheless, whatever the uncertainties regarding the definitive position of the Court on this point may be, its case law certainly contributed to the identification of fundamental principles of humanitarian law able to be considered as norms of *jus cogens*.

The fundamental principles of international humanitarian law

A major contribution of the International Court of Justice is that it has singled out, clarified and specified fundamental principles of international humanitarian law. Its case law, although sparse and fragmented, enables the identification of the basic rules of humanitarian law — qualified by the Court sometimes as "fundamental general principles of humanitarian law"[55] and sometimes as "the cardinal principles [...] constituting the fabric of humanitarian law".[56] These principles may be regrouped in three different categories: the fundamental principles relating to the conduct of hostilities, those governing the treatment of persons in the power of the adverse party, and those relating to the implementation of international humanitarian law.

Fundamental principles relating to the conduct of hostilities

The fundamental principles relating to the conduct of hostilities identified in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* are: the principle of the distinction that must be made between civilians and combatants; the prohibition of the use of weapons that cause

54 *Ibid.*, p. 574. This interpretation has likewise gained the recognition of the majority of legal opinion. See in addition to the references already mentioned: G. Abi-Saab, "The specificities of humanitarian law", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, *op. cit.* (note 8), pp. 265-280; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, Helsinki, 1988; J. Kasto, *Jus Cogens and Humanitarian Law*, International Law Series, Vol. 2, London, 1994.

55 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.* (note 5), p. 113, para. 218.

56 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

superfluous injury or unnecessary suffering; and the residual principle of humanity contained in the Martens Clause.

- The principle of the distinction between combatants and non-combatants

The principle of the distinction between combatants and non-combatants is the first of "the cardinal principles (...) constituting the fabric of humanitarian law" identified by the Court in its Advisory Opinion of 1996. According to the Court, this principle:

> "is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets".[57]

The Court thus reaffirms a well-established principle in international case law.[58] A few months before the World Court delivered its Advisory Opinion, the First Chamber of the International Tribunal for the former Yugoslavia concluded that:

> "the rule that the civilian population as such, as well as individual civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts".[59]

The distinction between combatant and non-combatant is the cornerstone of all humanitarian law.[60] This basic principle derives from the axiom that is the very foundation of international humanitarian law, namely that only the weakening of the military potential of the enemy is acceptable in

57 *Ibid.*

58 As early as 1927, the Greco-German Mixed Tribunal considered in the case of *Coenca Brothers* v. *Germany* that « il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter, pour autant que possible, la population civile ainsi que les biens appartenant aux civils »: *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. 7, p. 683. See also: Greco-German Arbitral Tribunal, *Kiriadolou* v. *Germany*, 10 May 1930, *ibid.*, Vol. 10, p. 100; District Crt. of Tokyo, *Shimoda case*, 7 December 1963, *ILR*, 32, pp. 629-632.

59 ICTY, case IT-95-11-R61, 8 March 1996, *Prosecutor* v. *Martic*, para. 10.

60 See in particular: F. Kalshoven, *The Law of Warfare. A Summary of its Recent History and Trends in Development*, A.W. Sijthoff/Henry Dunant Institute, Leiden/Geneva, 1973; E. Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems*, Henry Dunant Institute, Geneva, 1979; R.R. Baxter, "The duties of combatants and the conduct of hostilities (Law of the Hague)", in *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 93-133.

time of armed conflict. The St Petersburg Declaration of 29 November/ 11 December 1868 was the first multilateral instrument to embody the principle of distinction. Since then it has been reiterated in numerous instruments and in various forms.[61] But it was not until 1977, with the adoption of the two Protocols additional to the Geneva Conventions, that this customary rule was given formal clear-cut expression at the universal level. In its Article 48, entitled "Basic rule", Protocol I states:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Therefore, according to Article 57(1) of Protocol I:

> "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

It is specifically prohibited to launch attacks directed deliberately at civilian objects,[62] attacks with the purpose of terrorizing the population,[63] reprisals against civilians[64] and indiscriminate attacks.[65] The Protocol purports to give a comprehensive definition of "indiscriminate attacks" in all forms of warfare. Article 51(4) describes and prohibits three types of indiscriminate attacks:

"(a) those which are not directed at a specific military objective;

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

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

61 See for example the texts cited by Judge Weeramantry in his Dissenting Opinion: Regulations respecting the Laws and Customs of War on Land (Article 25) in Annex to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land; 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War (Article 1); 1923 Hague Rules of Aerial Warfare (Articles 22 & 24); League of Nations Assembly Resolution of 30 September 1928; United Nations General Assembly Resolutions 2444 (XXIII) of 19 December 1968 and 2675 (XXV) of 9 December 1970.

62 Articles 52-56 of Protocol I and Article 13(2) of Protocol II.

63 Article 51(2) of Protocol I and Article 13(2) of Protocol II.

64 Articles 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4) of Protocol I.

65 Article 51(4) and (5) of Protocol I.

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction".

It goes on to give two particular examples:

"(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

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

It is thus clear that the fundamental principle of distinction between combatant and non-combatant cannot be easily dissociated from the rules inherent in its implementation. The statement by the International Court of Justice cited above follows the same reasoning. After having formulated the principle of distinction, it specifies its content by including both the prohibition of attacks against civilians and the prohibition of indiscriminate weapons. This judicial acknowledgement is at first sight self-evident, since, for practical purposes, the use of indiscriminate weapons must be equated with the deliberate use of weapons against civilians.[66] But from a normative point of view, as Louise Doswald-Beck points out,[67] this equation of the use of indiscriminate weapons with a deliberate attack on civilians should not be overlooked. By confirming that the prohibition of the use of indiscriminate weapons is an integral part of the customary principle of distinction, it is a welcome clarification of the state of the law, for the only conventional expression of that prohibition is contained in Additional Protocol I.[68] Moreover, the Court's interpretation implies that, despite the absence of any explicit mention to that effect, the prohibition contained in Additional Protocol II of deliberate attacks on civilians automatically

66 A. Cassese, "Means of warfare: the traditional and the new law", in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 164.

67 L. Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, No. 316, 1997, p. 37.

68 See: A. Cassese, "The prohibition of indiscriminate means of warfare", in R.J. Akkermann. (ed.), *Declarations on Principle: A Quest for Universal Peace. Liber Amicorum Discipulorumque Prof. Dr. Bert V.A. Röling*, Leiden, 1977, pp. 171-194; H. Blix, "Area bombardment: rules and reasons", *British Yearbook of International Law*, Vol. 49, 1978, pp. 31-69.

means that indiscriminate weapons must not be used in non-international armed conflicts.

- The prohibition of the use of weapons that cause superfluous injury or unnecessary suffering[69]

This prohibition is, for the Court, the second of "the cardinal principles (...) constituting the fabric of humanitarian law" on the conduct of hostilities:

> "According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."[70]

Like the foregoing principle, it is a reaffirmation of a long-established provision of international customary law, codified in the Preamble to the 1868 St Petersburg Declaration and the Hague Regulations of 1899 and 1907,[71] and restated in Additional Protocol I.[72] Despite broad recognition of the existence of this basic rule of international humanitarian law, its application raises the difficult question of the criteria to be used in distinguishing between necessary and unnecessary suffering.[73] The Court proposes a pragmatic approach to this difficult issue. It defines "the unnecessary suffering caused to combatants" as "a harm greater than that unavoidable to achieve legitimate military objectives".[74] The assessment of the legality of a weapon or its use depends therefore on the balance between the degree of injury or suffering inflicted and the degree of military necessity, in the light of the particular circumstances of each case. Judge Shahabuddeen observes that:

> "[S]uffering is superfluous or unnecessary if it is materially in excess of the degree of suffering which is justified by the military advantage sought to

69 See: M. Aubert, "The International Committee of the Red Cross and the problem of excessively injurious or indiscriminate weapons", *International Review of the Red Cross*, No. 279, 1990, pp. 477-497; H. Meyrowitz, "The principle of superfluous injury or unnecessary suffering. From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", *International Review of the Red Cross*, No. 299, 1994, pp. 198-122.

70 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

71 Article 23(e) of the Hague Regulations of 1899 and 1907.

72 Article 35(2) of Protocol I: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

73 See in particular H. Blix, "Means and methods of combat", in *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 138-140.

74 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

be achieved. A mechanical or absolute test is excluded: a balance has to be struck between the degree of suffering inflicted and the military advantage in view. The greater the military advantage, the greater will be the willingness to tolerate higher levels of suffering".[75]

Implementation of the rule necessarily requires a case-by-case assessment, within the general framework provided by the Court, of the specific circumstances of a particular situation. It is difficult in the abstract to go beyond that general criteria relating to the prohibition of the use of weapons that cause unnecessary suffering or superfluous injury.

- The Martens Clause

The Martens Clause, named after the Russian delegate to the 1899 Hague Peace Conference, is one of the most enigmatic and elusive provisions of international humanitarian law.[76] The Court notes that:

"[T]he Martens Clause (...) was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:
In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'."[77]

The Court's Advisory Opinion confirms that the Martens Clause is a customary rule and is therefore of normative status, regulating State conduct despite the absence of any particular rule. According to Jean Pictet, the basic rules contained in that clause "serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of

75 *Ibid.*, p. 402. See also: Dissenting Opinion of Judge Guillaume, *ibid.*, p. 289; Dissenting Opinion of Judge Higgins, *ibid.*, pp. 586-587.

76 See on this clause: S. Miyazaki, "The Martens Clause in international humanitarian law", in: C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, op. cit. (note 8)* , pp. 433-444; R. Ticehurst, "The Martens Clause and the laws of armed conflict", *International Review of the Red Cross*, No. 824, 1997, pp. 125-134.

77 *Legality of the Threat or Use of Nuclear Weapons, op. cit.* (note 6), p. 257, para. 78.

dissemination".[78] However, there is no generally accepted interpretation of the Martens Clause and its precise meaning is highly debated. The Clause may indeed be understood in two different ways. First, it may merely be intended to recall the continued relevance of customary law when treaty law is not applicable, in which case the "principles of humanity" and the "dictates of public conscience" referred to in the Clause would be redundant and would only provide the ethical foundations of the customary laws of war. Secondly, it may however be argued that the "principles of international law" referred to in the Clause are derived from three different and autonomous sources, namely "established custom", the "principles of humanity" and the "dictates of public conscience". Arguably, the Martens Clause enables one to look beyond treaty law and customary law, and to consider principles of humanity and the dictates of the public conscience as separate and legally binding yardsticks.

The International Court of Justice unfortunately does not settle this question. Nevertheless, Judge Shahabuddeen, in his Dissenting Opinion, gives a very thorough analysis in favour of the second interpretation:

> "[T]he Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community.[79] (...) It is (...) difficult to accept that all that Martens Clause did was to remind States of their obligations under separately existing rules of customary international law. (...) The basic function of the Clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to 'the principles of humanity and ... the dictates of public conscience'." [80]

He quotes the United States Military Tribunal at Nuremberg in the *Krupp* case in 1948, which stated that:

> "[The Martens Clause] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the

78 J. Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1985, p. 59.

79 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen, *op. cit.* (note 6), p. 406.

80 *Ibid.*, p. 408.

laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention (...) do not cover specific cases occurring in warfare, or concomitant to warfare."[81]

Judge Shahabuddeen points out that the Court had used "elementary considerations of humanity" as the basis for its judgment in the *Corfu Channel Case*; it therefore implies that "those considerations can themselves exert legal forces".[82] In other words, the Martens Clause would be a specification of the "elementary considerations of humanity" applied in the context of armed conflict. He concludes that as far as nuclear weapons were concerned, the risks associated with them meant that their use was unacceptable in all circumstances.[83] We know, however, that the Court did not agree with this last interpretation.[84] Although the debate on the legal meaning of the Martens Clause remains open, the merit of the Advisory Opinion was to underline this significant and frequently overlooked provision of international humanitarian law and allow a dynamic approach to the law of armed conflict.

Fundamental principles relating to the treatment of persons in the power of the adverse party

The basic rules governing the treatment of persons in the power of the adverse party are contained in Article 3 common to the four Geneva

81 *Loc. cit.*

82 *Ibid.*, p. 497.

83 *Ibid.*, p. 411.

84 By seven votes to seven, the Court concludes with the President's casting vote that: "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". By doing so, the Court seems to blur the traditional distinction between *jus ad bellum* and *jus in bello*. For a critical commentary on the position of the Court, see in particular: E. David, "Le statut des armes nucléaires à la lumière de l'avis de la CIJ du 8 juillet 1996", in L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 209-227; L. Condorelli, "Le droit international humanitaire, ou de l'exploration par la Cour d'une *terra* à peu près *incognita* pour elle", *ibid.*, pp. 228-246; C. Greewood, "*Jus ad bellum* and *jus in bello* in the *Nuclear Weapons* Advisory Opinion", *ibid.*, pp. 247-266; R. Müllerson, "On the relationship between *jus ad bellum* and *jus in bello* in the General Assembly Advisory Opinion", *ibid.*, pp. 267-274; J. Gardam, "Necessity and proportionality in *jus ad bellum* and *jus in bello*", *ibid.*, pp. 275-292. For an exercise of legal deconstruction of the so-called concept of State survival, see M.G. Kohen, "The notion of 'State survival' in international law", *ibid.*, pp. 293-314.

Conventions, which is traditionally regarded as a sort of treaty in miniature. This provision lays down a minimum standard of humanity and was pronounced by the Court in its Judgment of 27 July 1986 on *Military and Paramilitary Activities in and against Nicaragua* to be one of "the fundamental general principles of humanitarian law".[85] According to common Article 3:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for (...)".

This provision was the only treaty law applicable to internal armed conflict until the adoption of Protocol II in 1977.[86] But the Court does

85 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), pp. 113-114, para. 218.

86 J.E. Bond, "Internal conflict and Article Three of the Geneva Conventions", *Denver Law Journal*, Vol. 48, 1971, pp. 263-285; H.T. Taubenfeld, "The applicability of the laws of war in civil war", in: J.N. Moore (ed.), *Law and Civil War in the Modern World*, The Johns Hopkins University Press, Baltimore/London, 1974, pp. 518-536; R.R. Baxter, "*Ius in bello interno*: The present and future law", *ibid.*, pp. 499-517; C. Lysaght, "The scope of Protocol II and its relation to Common Article 3 of the Geneva Conventions of 1949 and other human rights instruments", *American University Law Review*, Vol. 33(1), 1983, pp. 9-27; S.S. Junod, "Additional Protocol II: History and scope", *ibid.*, pp. 29-40; R. Abi-Saab, *Droit humanitaire et conflits internes: Origine de la réglementation internationale*, A. Pedone/Henry Dunant Institute, Paris/Geneva 1986; G. Abi-Saab, "Non-international armed conflicts", in *International Dimensions of Humanitarian Law, op. cit.* (note 12), pp. 217-239.

not conclude that the conventional text is an exact equivalent to the customary rules to which the Conventions give specific expression. The general principle of humanitarian law expressed in common Article 3 goes beyond the conventional restraints of the Geneva Conventions and is applicable to every type of armed conflict, whether internal or international. The Court explains in concise terms that:

> "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'".[87]

It confirms the interpretation already given in 1952 by the Commentary to the Geneva Conventions published by the International Committee of the Red Cross, for which:

> "[Article 3] merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. (...) The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, 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".[88]

Without prejudicing — as the Court points out — the other rules of humanitarian law specifically applicable to international armed conflicts, Article 3 accordingly constitutes a common humane basis from which belligerents should never depart in any circumstances,. The Court's *dictum* testifies to a more general trend towards an increasing connection between the law of internal armed conflicts and the law of international armed conflicts,[89] a trend which is moreover not confined solely to the basic rules

87 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 114, para. 218.

88 J. Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, International Committee of the Red Cross, Geneva, 1952, pp. 50 and 52.

89 R. Abi-Saab, "Humanitarian law and internal conflicts: The evolution of legal concern", in A.J.M. Delissen & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven, op. cit.* (note 11), p. 223.

contained in common Article 3.[90] All the fundamental principles of humanitarian law identified in the present study must, by their very nature, be considered applicable to all types of armed conflict. To quote the Court's own words in the *Nuclear Weapons* Opinion:

> "[T]he intrinsically humanitarian character of the legal principles in question (...) permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future".[91]

Fundamental principles relating to the implementation of international humanitarian law

The case law of the International Court of Justice enables three basic rules governing respect for international humanitarian law to be drawn, namely: the obligation to respect and to ensure respect for humanitarian law; humanitarian assistance; and the prohibition of genocide.

- Obligation to respect and to ensure respect for international humanitarian law

The obligation to respect and to ensure respect for international humanitarian law is expressed in Article 1 common to the Geneva Conventions and Additional Protocol I:

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [or Protocol] in all circumstances".[92]

90 See, for example, in the context of rules applicable to the conduct of hostilities: ICTY, Case No. IT-94-I-AR72, Oct. 2, 1995, *Prosecutor* v. *Tadic*, paras. 126-127. For a commentary on this case, see C. Greenwood, "International humanitarian law and the *Tadic* case", *European Journal of International Law*, Vol. 7, 1996, No. 2, pp. 265-283. For a general assessment of this trend, see also: F. Kalshoven, "Applicability of customary international law in non-international armed conflicts", in: A. Cassese (ed.), *Current Problems of International Law: Essays on U.N. Law of Armed Conflict*, Dott. A. Giuffre, Milan, 1975, pp. 267-285; K. Obradovic, "Les règles du droit international humanitaire relatives à la conduite des hostilités en période de conflits armés non-internationaux", *Yearbook of the International Institute of Humanitarian Law*, 1989-1990, pp. 95-115; R.S. Myren, "Applying international laws of war to non-international armed conflicts: Past attempts, future strategies", *Netherlands International Law Review*, 1990, pp. 347-371; M.N. Shaw, *International Law*, 4th ed., Grotius Publications, Cambridge, 1996, pp. 815-818.

91 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 259, para. 86.

92 For a commentary on this provision, see: L. Condorelli. & L. Boisson de Chazournes, « Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toute circonstance' », in: C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, *op. cit.* (note 8), pp. 17-35; F. Kalshoven, "The undertaking to respect and ensure respect in all circumstances: From tiny seed to ripening fruit", *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3-61.

This provision draws attention to the special character of international humanitarian law instruments. They are not commitments entered into on a basis of reciprocity, binding on each State party only insofar as the other State party complies with its own obligations. By their absolute character, norms of international humanitarian law lay down obligations vis-à-vis the international community as a whole. Each member of the international community is therefore entitled to demand that they be respected. The International Court of Justice confirms that common Article 1 is not a stylistic clause devoid of any real legal weight, but a norm firmly anchored in customary law and entailing obligations for every State, whether or not they have ratified the treaties in question. The Court acknowledges in its Judgment of 27 July 1986 concerning *Military and Paramilitary Activities in and against Nicaragua* that:

> "There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression".[93]

The World Court concludes that:

> "The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions".[94]

The United States consequently violated the customary obligation to respect and to ensure respect for international humanitarian law by publishing and distributing a military manual encouraging the *contras* to commit acts contrary to general principles of that law.[95] This was a manifest breach of the obligations expressed in common Article 1, but the obligation to respect and to ensure respect for international humanitarian law goes far beyond this passive duty not to encourage violation of humanitarian law. As Professors Laurence Boisson de Chazournes and Luigi Condorelli point out, "the obligation to respect and to ensure respect for humanitarian law is a

93 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 114, para. 220.
94 *Ibid.*
95 *Ibid.*, p. 130, para. 256.

two-sided obligation, for it calls on States both 'to respect' *and* 'to ensure respect' for the Conventions. 'To respect' means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. 'To ensure respect' means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict".[96] Although it is still difficult to grasp all the various practical implications of this obligation, the judicial acknowledgement of such a general principle of humanitarian law provides a firm legal basis for the international community as a whole to bear a wider and more active responsibility in ensuring respect for international humanitarian law.[97]

- Humanitarian assistance

Humanitarian assistance is one of the most direct and practical means of assuring respect for international humanitarian law. The Court acknowledges, in its Judgment of 27 July 1986 concerning *Military and Paramilitary Activities in and against Nicaragua*, that:

> "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross. (...) [According to those principles], an essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to

96 L. Boisson de Chazournes & L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective interests", *International Review of the Red Cross*, No. 837, 2000, p. 69.

97 For an in-depth study of the practical consequences of the obligation to respect and to ensure respect notably within the framework of the United Nations system, see the article by L. Boisson de Chazournes. & L. Condorelli cited above (note 96). See also: N. Levrat, "Les conséquences de l'engagement pris par les Hautes Parties Contractantes de 'faire respecter' les conventions humanitaires", in F. Kalshoven. & Y. Sandoz (eds), *Implementation of International Humanitarian Law, op. cit.* (note 19), pp. 236-296; K. Sachariew, "State's entitlement to take action to enforce international humanitarian law", *International Review of the Red Cross*, No. 270, 1989, pp. 177-195; H.P. Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations", in: H. Fox. & M.A. Meyer (eds), *Armed Conflict and the New Law*, Vol. II, *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49; U. Palwankar, "Measures available to States for fulfilling their obligations to ensure respect for international humanitarian law", *International Review of the Red Cross*, No. 298, 1994, pp. 9-25.

escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes allowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents".[98]

This ruling is extremely important for two main reasons: first, the Court not only confirms the customary character of the fundamental principles of the Red Cross, but considers that these principles have to be respected with regard to any kind of humanitarian assistance, whether it is provided by the Red Cross, or through the United Nations or by States individually. Secondly, such assistance has to meet two basic requirements: its purpose must be truly humanitarian, namely to protect human beings from the suffering caused by war; and it must be given without any discrimination between the beneficiaries. However, the Court does not clearly settle the much debated question as to the right to intervene on humanitarian grounds (the so-called "*droit d'ingérence humanitaire*").[99] The generality of the opening sentence to this paragraph seems to suggest that the two requirements governing humanitarian assistance are self-sufficient and do not need the express consent of the State concerned. It could nevertheless be argued that these conditions deal only with the implementation of humanitarian assistance, and not with its legality. However controversial that question may be, it is clear today that gross violations of humanitarian law are deemed to be a matter of international concern. Measures taken under Chapter VII of the United Nations Charter to redress those violations

98 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), pp. 124-125, paras. 242-243.

99 See on this question: M. Bettati & B. Kouchner (eds), *Le devoir d'ingérence*, Denoël, Paris, 1987; M.J. Domestici-Met, "Aspects juridiques récents de l'assistance humanitaire", *AFDI*, 1989, pp. 117-148; Y. Sandoz, "'Droit' or 'devoir d'ingérence' and the right to assistance: The issues involved", *International Review of the Red Cross*, No. 288, 1992, pp. 215-227; M. Torelli, "From humanitarian assistance to 'intervention on humanitarian grounds'?", *ibid.*, pp. 228-248; D. Plattner, "Assistance to the civilian population: The development and present state of international humanitarian law", *ibid.*, pp. 249-263; L. Condorelli, "Intervention humanitaire et/ou assistance humanitaire? Quelques certitudes et beaucoup d'interrogations", in N. Al-Nauimi & R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague/Boston/London, 1995, pp. 999-1012; J. Patrnogic, "Humanitarian assistance — humanitarian intervention", *ibid.*, pp. 1013-1034; O. Corten & P. Klein, *Droit d'ingérence ou obligation de réaction?*, 2nd ed., Bruylant, Brussels, 1996.

cannot be considered as a breach of the principle of non-intervention in the internal affairs of States.

- Prevention and punishment of the crime of genocide

In its Judgment of 11 July 1996 concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court significantly clarified the meaning and legal scope of the obligation to prevent and punish the crime of genocide, in particular the definition of genocide, the imputability of this international crime and the territorial extent of the obligation to punish such a crime.

First, the Court confirms in unequivocal terms that the legal qualification of the crime of genocide is independent of the type of conflict — whether internal or international — where it takes place. The Court begins by recalling the terms of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, worded as follows:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

It then explains that:

> "The Court sees nothing in this provision which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict. The contracting parties expressly state therein their willingness to consider genocide as 'a crime under international law', which they must prevent and punish independently of the context 'of peace' or 'of war' in which it takes place. In the view of the Court, this means that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical."[100]

100 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, op. cit.* (note 10), p. 615, para. 31.

Secondly, the Court clarifies the material scope of the obligations undertaken by States parties to the said Convention. It rejects the objection of Yugoslavia, according to which the 1948 Convention would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment and would exclude the responsibility of a State for an act of genocide perpetrated by the State itself:

> "The Court would observe that the reference in Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III' does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'."[101]

Thirdly, the Court determines the territorial scope of the obligation to punish the crime of genocide. It explains, briefly and to the point, that:

> "[T]he rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. (...) [T]he obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".[102]

The Court thus seems to admit — at least implicitly — that by virtue of the legal character of this obligation, States must exercise a universal jurisdiction under general international law. It is a welcome and quite unexpected statement, for, unlike crimes against humanity or grave breaches of humanitarian law, the Convention on the Prevention and Punishment of the Crime of Genocide does not contain any specific provision in that regard.[103]

Conclusion

Though the decisions of the International Court of Justice relating to international humanitarian law are sparse, its case law has a highly substantive importance that goes well beyond the immediate cases before it. Although we may regret the cautious and somewhat ambiguous position of

101 *Ibid.*, p. 616, § 32.

102 *Ibid.*, p. 615, § 31.

103 See on this question: E. David, *Principes de droit des conflits armés*, 2nd ed., Bruylant, Brussels, 1999, pp. 665-668.

the Court regarding the compatibility of the threat or use of nuclear weapons with international humanitarian law, the Court's case law as a whole has certainly helped to strengthen and clarify the normative basis of international humanitarian law by highlighting its relationships with general international law and by setting out the basic principles governing the conduct of hostilities and the protection of victims of war.

The Court has recognized that fundamental rules of international humanitarian law embedded in multilateral treaties go beyond the domain of purely conventional law. These obligations have a separate and independent existence under general international law, since they derive from the general principles of humanitarian law to which the Conventions have merely given specific expression. The fundamental principles of humanitarian law identified by the International Court of Justice provide a condensed synthesis of the law of armed conflicts and constitute the normative quintessence of this traditional branch of international law. They give expression to what the Court has called "elementary considerations of humanity". As general principles of international law, they thus provide a minimum standard of humane conduct in the particular context of armed conflict.

These rules reflect one of the most significant developments of contemporary international law, characterized by the emergence of core norms designed to protect certain overriding universal values. International humanitarian law itself preserves a certain universal ethical foundation based on a minimum of essential humanitarian norms which constitute the common legal heritage of mankind.

Résumé

La contribution de la Cour internationale de Justice au droit international humanitaire

Vincent Chetail

L'article évalue la contribution de la Cour internationale de Justice au droit international humanitaire. En tant que principal organe judiciaire du droit international public, la Cour internationale de Justice concourt à mettre en évidence les valeurs fondamentales que la communauté internationale a exprimées dans le droit international humanitaire. Sa jurisprudence représente un apport essentiel, car, d'une part, elle clarifie la relation entre le droit international humanitaire et le droit international général, et d'autre part, elle précise le contenu des principes fondamentaux du droit international humanitaire. L'article examine les arrêts et avis consultatifs de la Cour et évalue la perception que celle-ci a de la relation complexe entre les traités de droit humanitaire, les règles coutumières et le jus cogens.

La Cour internationale de Justice a en outre dégagé et spécifié les principes fondamentaux du droit international humanitaire, lesquels peuvent être regroupés en trois catégories : les principes fondamentaux relatifs à la conduite des hostilités, ceux qui gouvernent le traitement des personnes au pouvoir de la partie adverse, et ceux qui touchent à la mise en œuvre du droit international humanitaire. Ces règles constituent à la fois une synthèse du droit des conflits armés et la quintessence normative de cette branche traditionnelle du droit international.

Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie : évaluation de l'apport de sa jurisprudence au droit international humanitaire

JEAN-FRANÇOIS QUÉGUINER*

« The experience gave me also an opportunity to learn a fact, a remarkable one in my opinion: a new scientific truth does not triumph by convincing its opponents and making them see the light but rather because its opponents eventually die and a new generation grows up that is familiar with it. » (Max PLANCK, prix Nobel de physique)

La création du Tribunal pénal international pour l'ex-Yougoslavie (TPIY)[1] fut marquée par des doutes profonds quant à la capacité effective de cette juridiction d'accomplir son mandat – à savoir, engager la responsabilité pénale individuelle des auteurs de violations graves du droit international humanitaire (DIH)[2] commises sur les territoires de l'ex-Yougoslavie depuis 1991 et contribuer au maintien de la paix et de la sécurité internationales[3]. À l'orée du XXIe siècle, ces incertitudes initiales peuvent être définitivement classées dans les archives de l'histoire, et la création du Tribunal peut être saluée comme un événement majeur pour le développement des mécanismes de mise en œuvre du DIH. En effet, au terme d'une décennie d'existence, un bilan cursif de l'activité de cet organe juridictionnel révèle que 31 personnes sont en phase préliminaire de procès, huit sont en cours d'instance et 37 ont été jugées (parmi lesquelles 17 ont été condamnées définitivement)[4]. En conséquence, on peut désormais affirmer sans l'ombre d'un doute que le

* Jean-François Quéguiner est conseiller juridique à la division juridique du Comité international de la Croix-Rouge. Le présent article est la version passablement remaniée d'une allocution prononcée par l'auteur lors d'un colloque en l'honneur du professeur Antonio Cassese à l'occasion de la remise du doctorat *honoris causa* par la Faculté de droit de l'Université de Genève et l'Institut universitaire de hautes études internationales. Organisé le 15 juin 2000, ce colloque avait pour thème « L'apport de la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie au droit international ». L'auteur tient à exprimer ses vifs remerciements au professeur Luigi Condorelli ainsi qu'à M. Knut Dörmann pour leurs commentaires avisés après la lecture d'une ébauche du présent manuscrit.

Tribunal a parfaitement assumé la double fonction, essentielle à l'application présente et future du DIH, qui lui avait été assignée. Une fonction répressive d'abord, l'activité du Tribunal ayant contribué à infléchir (au moins partiellement) la politique d'impunité qui sévissait alors sur ces territoires; une fonction dissuasive ensuite, qu'il convient de ne pas négliger tant il est vrai que l'envergure internationale du Tribunal, sa haute autorité morale et l'influence de ses décisions sur l'opinion publique internationale ont contribué à l'accentuer[5]. De plus, au-delà de l'apport fonctionnel du TPIY à l'application concrète du DIH, on ne peut manquer de rappeler l'importance catalytique qu'a revêtu l'avènement de cette instance au niveau des mécanismes de mise en œuvre, puisqu'il a constitué le point de départ d'une véritable résurrection des tribunaux pénaux sur la scène internationale[6]. Il a été le détonateur d'un vaste élan qui s'est poursuivi avec la création d'un second tribunal *ad hoc* pour le Rwanda[7] puis, surtout, l'adoption à Rome, le 17 juillet 1998, du Statut d'une Cour pénale internationale (CPI).

Pourtant – et quelle que soit son importance à cet égard – il serait fort réducteur de limiter l'apport du TPIY au DIH à ce simple rôle de mise en œuvre. En effet, si tout juge dispose, de par sa fonction, du pouvoir de dire le droit, il doit nécessairement, pour mener à bien cette tâche initiale, se voir également investi d'une charge d'interprétation dont il pourra, selon les contingences, faire un usage plus ou moins modéré. Il est inutile de tenter ici de ménager un faux suspense: sommés d'appliquer un droit fort complexe, dont les dispositions conventionnelles ne sont pas toujours (loin s'en faut!)

1 Cette juridiction a pour titre officiel «Tribunal international pour juger les personnes présumées responsables de violations graves du droit humanitaire international commises sur le territoire de l'ex-Yougoslavie depuis 1991». Pour d'évidentes raisons de commodité, il sera également nommé ci-après «le Tribunal».

2 Bien que ces expressions ne reflètent pas nécessairement la même réalité, nous utiliserons les expressions «droit international humanitaire» et «droit des conflits armés» comme si elles étaient synonymes.

3 C. Greenwood, «The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia», *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 97.

4 Chiffres au 1er mai 2003, <http://www.un.org/icty/glance/index.htm>.

5 Notons, en passant, que le Tribunal considère également la réconciliation des peuples comme l'un des éléments de sa mission et donc logiquement de sa politique judiciaire; *Furundzija*, jugement du 10 décembre 1998, para. 288.

6 Cette décision a mis un terme à une longue traversée du désert entamée avec l'achèvement des travaux des Tribunaux militaires internationaux consécutifs à la Seconde Guerre mondiale.

7 Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (ci-après TPIR).

d'une clarté limpide, les juges du Tribunal ont fait un usage résolu de cette fonction interprétative, contribuant par-là même au développement d'une vision fort progressiste du DIH. Le dessein du présent travail consiste à exposer, de manière synthétique, les points saillants de cette herméneutique prétorienne du DIH.

À cette fin, il importe de préciser d'emblée que le but affiché du Tribunal n'est pas d'assurer le respect du DIH dans son ensemble. Il s'agit exclusivement de sanctionner les individus reconnus coupables de l'une ou de plusieurs des incriminations recensées aux articles 2 à 5 de son Statut[8]. Toute réflexion relative à la contribution de la jurisprudence du TPIY au DIH impose, par conséquent, de se replacer dans le contexte du champ de compétence précis de cet organe juridictionnel: ce n'est qu'à travers le prisme particulier de la responsabilité pénale individuelle et, plus précisément encore, de la répression des crimes mentionnés dans son Statut, que le Tribunal va appliquer cet ensemble normatif que constitue le DIH.

En dépit de ces limites statutaires inhérentes à son mandat, lesquelles lui imposaient une compétence en apparence étroite, le TPIY a pu balayer l'ensemble du spectre, pourtant relativement large, du DIH. Il nous sera donc impossible, dans le cadre d'un travail aussi bref, de faire une présentation exhaustive de tous ces apports de la jurisprudence du TPIY au DIH[9]. Seuls les aspects fondamentaux seront abordés et présentés conformément à la division – certes réductrice mais fort pratique – entre le droit de La Haye (II) et le droit de Genève (III). On ne peut toutefois commencer sans rappeler la contribution de cette jurisprudence à la définition et à la classification des conflits (I).

Le champ d'application du DIH: de la définition et la classification des conflits armés

La notion de conflit armé représente l'écorce du DIH: si l'on veut bien exclure quelques obligations spécifiques applicables dès le temps de paix, seule la présence factuelle d'une réalité « belligène » pourra engendrer l'application de cet ensemble normatif. Il importe donc de définir précisément le concept de « conflit armé », véritable acte-condition de l'applica-

8 Ces articles visent respectivement: les infractions graves aux Conventions de Genève de 1949 (art. 2) ; les violations des lois ou coutumes de la guerre (art. 3) ; le génocide (art. 4) ; et les crimes contre l'humanité (art. 5).

9 En particulier, nous ne développerons pas les questions relatives au sens et au champ d'application du crime contre l'humanité; à l'étendue de la responsabilité pénale individuelle (y compris la question de la responsabilité du commandant) ; et à la contrainte comme circonstance exonératoire de responsabilité.

tion du DIH[10]. Cela étant, le caractère protéiforme de la notion de conflit armé nous interdit une définition unique de ce concept. Or, il va sans dire que le DIH est un droit à géométrie variable dans la mesure où l'étendue – plus ou moins large – des normes juridiques applicables dépend, en premier lieu, du type de conflit[11]. La détermination des critères de classification des conflits revêt donc une importance majeure, car elle va conditionner l'amplitude des normes substantielles.

La notion de conflit armé et les conditions d'application du DIH

En affirmant que l'existence d'un conflit armé est une condition nécessaire à l'application du DIH, le Tribunal indique la limite fondamentale du champ d'application de ce droit et s'impose donc de définir précisément le concept de «conflit armé» afin de délinéer les contours de sa compétence (1). Mais si elle s'avère nécessaire, cette condition n'est pas suffisante. Le déclenchement d'un conflit armé n'épuise pas – loin s'en faut – toutes les questions qui se posent quant à l'étendue du champ d'application temporel, spatial et matériel de ce *corpus iuris* (2).

- Définition de la notion de conflit armé

Bien que l'existence d'un conflit armé constitue la condition *sine qua non* de l'application du DIH[12], aucun instrument conventionnel régissant cette matière ne définit, de près ou de loin, ce que recouvre cette notion[13]. Le TPIY a, quant à lui, été contraint de se livrer à cet exercice de sémantique

10 Pour reprendre la célèbre formule utilisée par C. Rousseau, *Le droit des conflits armés*, Paris, Pedone, 1983, p. 7.

11 On sait que le DIH ne s'applique intégralement que dans le contexte des conflits armés internationaux. L'étendue du droit applicable, déjà restreinte dans le contexte des conflits non internationaux régis par le Protocole II additionnel aux Conventions de Genève, sera plus étroite encore dans le cadre des conflits qui tombent sous le coup de l'art. 3 commun desdites Conventions.

12 Dans l'affaire *Celebici* (jugement du 16 novembre 1998) la Chambre de première instance affirme qu'afin «de pouvoir appliquer le corpus juridique désigné par le terme «droit international humanitaire» à une situation particulière, il convient en premier lieu de déterminer s'il y avait, dans les faits, un «conflit armé», qu'il soit de nature interne ou internationale» (para. 182).

13 L'art. 2(1) commun aux Conventions de Genève se contente en effet de préciser que, en dehors des dispositions applicables dès le temps de paix, ces instruments conventionnels entreront en application «en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'elles». Cette omission aurait été intentionnelle, les rédacteurs de ces instruments conventionnels souhaitant – sans doute un peu naïvement – que ce terme ne reflète qu'une réalité purement factuelle dénuée de toutes les scories juridiques ayant auparavant entaché le terme «guerre» ; C. Greenwood, «Scope of Application of Humanitarian Law», in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 42, para. 202.

particulièrement périlleux, car l'existence d'un conflit armé est l'une des conditions d'application des articles 2, 3 et 5 de son Statut[14]. Ainsi, la Chambre d'appel a contribué à combler une lacune importante lorsque, dans un paragraphe maintes fois repris, elle a considéré qu'existait un conflit armé:

> « chaque fois qu'il y a un recours à la force armée entre États ou un conflit prolongé entre les autorités gouvernementales et des groupes armés organisés ou entre de tels groupes au sein d'un État.»[15]

Par cette formule, le Tribunal reprend à son compte la dichotomie traditionnelle entre conflits armés internationaux et conflits non internationaux et admet que la différence de nature juridique quant aux sujets impliqués dans ces diverses catégories de conflits requiert deux définitions distinctes qu'il nous incombe d'analyser successivement.

Dès lors que deux entités étatiques au moins sont impliquées, le Tribunal dégage une définition très large de la notion de conflit armé puisque tout type de recours à la force peut être caractérisé ainsi[16]. Le Tribunal offre, par ce biais, une réponse claire aux atermoiements insistants d'une partie de la doctrine, qui hésitait à qualifier de conflit armé des incidents isolés tels que des escarmouches à la frontière ou des incidents navals: il confirme implicitement que les critères de durée ou d'intensité des combats sont indifférents à la qualification d'un conflit armé international. Notons en passant que, hormis les quelques réticences doctrinales auxquelles nous avons fait allusion, cette définition large se révèle être en phase avec la majeure partie, aussi bien de la pratique étatique que de la doctrine moderne[17].

14 Cette condition n'est pas requise en ce qui concerne l'art. 4, l'incrimination du génocide étant possible même en l'absence de conflit armé.

15 Cette définition est apparue pour la première fois dans l'affaire *Tadic*, décision du 2 octobre 1995 (para. 70).

16 On peut penser que, compte tenu du cadre d'action du Tribunal, cette définition n'est applicable qu'en ce qui concerne les aspects de DIH proprement dit. Elle ne couvre donc pas la problématique relative à la notion « d'état de guerre » dont les conséquences peuvent être multiples au niveau aussi bien international (comme sur le droit de la neutralité ou des prises) qu'interne (sur le droit des assurances par exemple).

17 Le Commentaire des Conventions de Genève édité par le CICR prône une vision très large des actes qui impliquent un conflit armé: « Tout différend surgissant entre deux États et provoquant l'intervention de membres des forces armées, est un conflit armé au sens de l'article 2, même si l'une des Parties conteste l'état de belligérance. Ni la durée du conflit, ni le caractère plus ou moins meurtrier de ses effets ne jouent un rôle. Le respect dû à la personne humaine ne se mesure pas au nombre des victimes. », *Commentaire de la Convention de Genève IV*, p. 26 et Greenwood, « Scope of Application of Humanitarian Law », *op. cit.* (note 13), p. 40, para. 202 précise: « An international armed conflict exists if one party uses force of arms against another party (...) » ; ce dernier auteur cite d'ailleurs un exemple précis démontrant qu'un seul incident suffit à l'existence d'un conflit armé. Voir aussi les illustrations pratiques du caractère large de la notion de conflit armé international offertes par E. David, *Principes de droit des conflits armés*, 2e éd., Bruylant, Bruxelles, 1999, p. 100 (note 4).

Pourtant l'expression générique « recours à la force armée entre États », utilisée par le Tribunal pour caractériser un conflit armé international, n'est pas dénuée d'une certaine ambiguïté et deux précisions s'imposent donc pour délinéer plus avant les contours de cette notion.

En premier lieu, il convient de préciser qu'en dépit de ce que suggère cette formulation, la présence d'actes d'hostilité active n'est pas requise pour que l'on puisse parler de conflit armé[18]. En d'autres termes – et aussi paradoxal que cela puisse paraître – deux États peuvent se trouver en situation de conflit armé sans qu'un seul coup de feu ait été échangé. Cette hypothèse est régie par le droit conventionnel, l'article 2(2) commun des Conventions de Genève qualifiant en effet de conflit armé l'occupation militaire totale ou partielle réalisée sans la moindre résistance. La qualité de conflit armé correspond, en l'espèce, à une logique certaine, le franchissement hostile d'une frontière internationale par des forces belligérantes autorisant à parler de recours à la force armée même en l'absence de tout affrontement. Mais, sans même qu'une frontière ait été violée, on considère qu'un conflit armé a éclaté dès lors que de simples déclarations formelles en ce sens ont été promulguées et cela même si les actes de violence ne sont que futurs, voire potentiels[19]. Dans ce cas très précis (et celui-là seulement)[20], le pouvoir de qualification formelle des États l'emporte sur la réalité matérielle pour assurer un champ d'application maximal au droit humanitaire, et donc une protec-

18 Voir cependant la réserve formulée par le Royaume-Uni au moment de la signature des Protocoles selon laquelle « the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocols are to apply to any given situation ». On peut toutefois s'interroger sur la portée – générale ou spécifique – de cette réserve dont l'objet visait uniquement à éviter que les conditions d'application du Protocole I aux guerres de libération nationale soient moins contraignantes que les dispositions plus restrictives du Protocole II.

19 On a vu que l'art. 2 para. 1 commun des Conventions de Genève délimitait le champ d'application de ces instruments en mentionnant, en premier lieu, les situations de guerres déclarées avant de citer tous les autres cas de conflits armés. Le Commentaire du premier Protocole additionnel précise à cet égard : « Une guerre déclarée ou autrement reconnue comme telle entraîne l'application du droit humanitaire ; *même en l'absence d'hostilités*, il peut notamment offrir des garanties précieuses aux ressortissants ennemis sur le territoire d'un État en guerre » (p. 39, para. 60). Voir aussi : *Fight it Right, Model Manual on the Law of Armed Conflict for Armed Forces*, CICR, Genève, 1999, p. 25, para. 502, qui dispose qu'un conflit armé international existe « when a state of war has been declared even if there is no military activity » ; J. Rao, « When does war begin ? », *Indian Journal of International Law*, Vol. 12, 1972, p. 376 et pp. 379-380.

20 Le pouvoir subjectif de qualification des États ne prédomine que dans l'hypothèse où ceux-ci admettent expressément l'existence d'un conflit armé et, de ce fait, l'application des normes conventionnelles pertinentes et des protections correspondantes. En revanche, on sait que le refus de promulgation d'une déclaration de guerre ne peut prévaloir sur la réalité factuelle et justifier le refus de considérer des actes de violence comme un conflit armé ; cf. art. 2(1) commun des Conventions de Genève, *op. cit.* (note 13).

tion accrue aux victimes. Cette constatation pourra avoir des conséquences pratiques essentielles puisque dans une telle éventualité, qui peut parfois perdurer, si l'un des États belligérants décide d'interner les civils de nationalité ennemie présents sur son territoire, ces derniers pourront bénéficier des dispositions de la IVe Convention de Genève bien que les combats n'aient pas encore éclaté[21].

En second lieu, on peut légitimement penser que cette définition rejette l'exigence que l'usage de la force se fasse de manière intentionnelle et que l'action soit autorisée (ou du moins tolérée) par les autorités gouvernementales compétentes. Une telle restriction a parfois été mentionnée pour exclure de la notion de conflit armé, notamment, les incursions à travers des frontières causées, par exemple, par des erreurs de navigation[22]. Pourtant, dans l'hypothèse où un incident de ce type devait dégénérer et entraîner l'emploi des armes entre forces armées, aucun argument juridique dirimant ne permettrait d'exclure l'application du DIH. En d'autres termes, l'exigence d'un recours à la force armée «entre États» ne peut se concevoir comme impliquant nécessairement un *animus belligerendi*. Elle requiert simplement que les forces engagées soient, de droit ou de fait, des organes de l'État agissant dans l'exercice de leurs fonctions.

On peut donc qualifier d'omni-compréhensive la définition du conflit armé international proposée par le TPIY. En revanche, à partir du moment où les combats se déroulent sur le territoire d'un seul État, entre les autorités gouvernementales et des groupes rebelles ou entre des groupes rebelles, la notion de conflit armé se révèle beaucoup plus restrictive. D'après le Tribunal, deux conditions cumulatives seraient alors requises pour que l'on puisse parler de conflit armé non international.

La première concerne le degré minimum d'organisation requis des groupes armés qui participent aux hostilités. Cette condition, consubstantielle au respect du DIH par les forces armées, est récurrente dans les instruments conventionnels pertinents[23] et il n'est donc pas nécessaire de s'y attarder. Elle s'explique naturellement par la volonté des États d'éviter que ce *corpus iuris* ne puisse réglementer les manifestations spontanées de violence telles que les émeutes.

21 C. Greenwood, «The Concept of War in Modern International Law», *International and Comparative Law Quarterly*, Vol. 36, 1987, p. 285.

22 *Cf. Fight it Right, Model Manual on the Law of Armed Conflict for Armed Forces, op. cit.* (note 13), p. 25.

23 L'exigence d'un groupe organisé sous un commandement responsable figure, avec quelques différences cosmétiques de terminologie aussi bien dans les Conventions de La Haye de 1907, que dans les Conventions de Genève ainsi que leurs deux Protocoles additionnels.

En revanche, la seconde – la condition de durée – paraît beaucoup plus discutable. En effet, en exigeant, pour que l'on puisse parler de conflit armé non international, que les actes de recours à la force s'étendent sur une période relativement longue, le Tribunal exclut les affrontements qui, bien que d'une grande intensité, ne s'étendent que sur un court délai. Le Tribunal a explicitement motivé l'inclusion de cette condition temporelle par le souci de prévenir une extension du champ d'application du DIH aux activités de troubles civils ou de terrorisme[24]. Mais cette préoccupation, ô combien légitime, animait déjà les rédacteurs du second Protocole additionnel (dont l'article 1(2) dissocie les situations de tensions internes et de troubles intérieurs à l'image des émeutes, des actes isolés et sporadiques de violence... qui ne sont pas couverts par le concept de conflit armé), sans qu'ils aient pour autant ressenti le besoin d'inclure une quelconque condition de durée pour caractériser un conflit armé non international.

En l'absence de toute définition générale dans les instruments conventionnels, la difficulté consiste alors à déterminer si le facteur temps constitue le seul élément objectif qui permette, en pratique, de différencier le conflit armé de la simple opération de pacification ou de maintien de l'ordre. Or, au terme d'une analyse succincte, tant de la pratique que de la doctrine la plus qualifiée, on peut affirmer que la durée n'est que l'un des multiples critères susceptibles d'être utilisés pour circonscrire la présence d'un conflit armé. Il ne nous incombe pas ici de tenter une énumération exhaustive ni même une classification de tous les éléments de différenciation. Précisons simplement que des critères tels que le nombre et l'encadrement des groupes rebelles, l'installation ou l'action de ces groupes sur une partie du territoire, le degré d'insécurité, l'existence ou non de victimes, les moyens mis en œuvre par le gouvernement pour rétablir l'ordre... constituent, *inter alia*, autant de facteurs aussi pertinents que la durée pour la qualification d'un conflit armé non international. Bien sûr, il n'est en aucun cas requis que tous ces ingrédients soient cumulativement réunis. La combinaison interactive d'un certain nombre d'entre eux suffit à considérer que des hostilités ouvertes et collectives entre groupes armés organisés ont atteint le seuil requis pour être qualifiées de conflit armé.

En résumé, si personne ne conteste son existence juridique, la ligne de démarcation entre tensions internes et troubles intérieurs d'un côté, et

24 Dans son jugement du 16 novembre 1998 en l'affaire *Celebici*, la Chambre de première instance affirme que « l'accent est mis sur l'usage prolongé de la force armée et sur le degré d'organisation des parties en présence, afin de bien marquer la différence avec les troubles civils ou le terrorisme » (para. 184).

conflit armé non international de l'autre, est aussi étroite que la lame d'un couteau. Il nous semble qu'elle ne peut être tracée qu'en recourant à l'analyse combinée de toute une série d'indices parmi lesquels la durée ne joue pas nécessairement un rôle prépondérant. En tout état de cause, elle ne peut être isolée comme le seul facteur déterminant puisque, dans certains cas, la nature et le niveau de la violence, autrement dit l'intensité des combats, peuvent également constituer un facteur adéquat et suffisant de différenciation[25]. C'est ce que consacre d'ailleurs sans appel le raisonnement de la Commission interaméricaine des droits de l'homme dans l'affaire *Abella*. Dans le cas d'espèce, relatif à l'attaque d'une caserne militaire argentine par une cinquantaine de personnes en janvier 1989, et à la réaction des forces militaires, la Commission a considéré que, malgré son caractère particulièrement bref (deux jours), la confrontation entre les attaquants et les forces militaires pouvait être définie comme un conflit armé et tombait sous le coup notamment de l'article 3 commun des Conventions de Genève[26]. Cela signifie tout simplement que la brièveté des opérations peut être compensée par leur intensité pour autoriser la qualification de conflit armé, et, par conséquent, que l'exigence d'un caractère prolongé des actes de violence requis par la jurisprudence du Tribunal restreint exagérément la notion de conflit armé.

Quoique le TPIY n'ait pas indiqué expressément que telle fut son ambition, on peut néanmoins se demander si l'introduction *ex nihilo*[27] de cette restriction temporelle ne visait pas, plutôt que de prodiguer une définition générale de la notion de conflit armé non international, à dégager une catégorie particulière de ce type de conflit à laquelle seraient attachées des

25 Ce que mentionne d'ailleurs un certain nombre de manuels militaires dont le récent Manuel français de droit des conflits armés qui dispose clairement que « C'est l'intensité des combats qui permet de faire la différence entre un tel conflit [armé non international] et une simple situation de troubles ou de tensions internes » (p. 41).

26 La Commission affirme que « what differentiates the events at the Tablada base from these situations [large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom...] are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. (...) The Commission concludes therefore that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of common article 3, as well as other rules relevant to the conduct of internal hostilities »; Inter-American Commission on Human Rights, Report n° 55/97, Case n° 11.137 Argentina, Approved by the Commission on November 18, 1997, para. 155-156.

27 À l'exclusion du Statut de Rome, nous n'avons trouvé trace de cette exigence de durée comme facteur déterminant de qualification d'un conflit armé non international ni dans les instruments conventionnels pertinents, ni dans la jurisprudence ni dans la pratique interne des États (notamment les manuels militaires).

conséquences juridiques spécifiques. La question mérite d'autant plus d'être posée que les rédacteurs du Statut de Rome ont suivi une telle approche. En effet, le Statut de la CPI commence par indiquer que les violations graves de l'article 3 commun aux quatre Conventions de Genève constituent des crimes de guerre dans le contexte de tout conflit armé ne présentant pas un caractère international[28]; puis, il isole de nouvelles violations graves des lois et coutumes applicables lors des conflits non internationaux, lesquelles ne constituent des crimes de guerre que si elles sont commises dans le cadre d'une confrontation armée « prolongée » entre le gouvernement d'un État et des groupes armés organisés ou entre de tels groupes armés[29]. Cela signifie qu'à la traditionnelle ramification duale des conflits armés non internationaux, fondée sur une notion large découlant de l'article 3 commun et une notion restreinte consacrée par le Protocole II, viendrait se greffer une troisième branche englobant exclusivement les conflits internes prolongés[30].

Or, l'inclusion de cette nouvelle catégorie pose des problèmes délicats. D'abord, parce qu'elle implique un troisième cercle de conflits non internationaux, qui empiète sur les deux catégories précédentes, sans que leurs liens réciproques soient fermement établis. Autrement dit, loin de contribuer à l'application stable et uniforme du droit, elle introduit un élément de complexité et d'incertitude supplémentaire. Ensuite, parce qu'aucune raison objective ne justifie de procéder à une restriction temporelle en ce qui concerne la notion de crime de guerre; en particulier, aucune motivation de

28 Art. 8(2)(c) du Statut. Pour être qualifiés de crimes de guerre, ces actes doivent toutefois être accomplis à l'encontre de personnes qui ne participent pas directement aux hostilités. L'alinéa (d) du même paragraphe rappelle par ailleurs que cette disposition ne peut s'appliquer que dans le contexte d'un conflit armé, à l'exclusion des troubles ou tensions internes.

29 L'art. 8(2)(f) du Statut de Rome précise que « L'alinéa (e) du paragraphe 2 (...) s'applique aux conflits armés qui opposent de manière prolongée sur le territoire d'un État les autorités du gouvernement de cet État et des groupes armés organisés ou des groupes armés organisés entre eux ».

30 À cet égard voir L. Condorelli, « La Cour pénale internationale: un pas de géant (pourvu qu'il soit accompli...) », *RGDIP*, 1999 (1), p. 13. Notons toutefois qu'une partie de la doctrine a assimilé les conflits armés internes prévus par le Protocole II et ceux mentionnés à l'art. 8(2) alinéas (d) et (e), au motif qu'il est peu probable que les États aient souhaité créer une troisième catégorie de conflits armés non internationaux; David, *Principes de droit des conflits armés*, *op. cit.* (note 17), pp. 106-107 et 588-589. Pourtant, si la correspondance entre la durée du conflit et le contrôle d'une partie du territoire peut sembler logique *prima facie*, elle n'est pas systématique. En théorie, on peut parfaitement concevoir un conflit prolongé au cours duquel le ou les groupes armés rebelles ne parviennent pas à contrôler une portion du territoire étatique; à l'inverse, on peut imaginer que le contrôle d'une partie du territoire soit éphémère et n'implique pas nécessairement un conflit qui s'étende dans le temps. Il s'agit donc bien de deux critères distincts et, nous semble-t-il, d'une troisième catégorie de conflits armés non internationaux.

politique judiciaire ne peut présider à la consécration d'une telle restriction de compétence. L'objectif assigné tant au TPIY qu'à la CPI est de ne poursuivre que les personnes présumées responsables des violations les plus graves du DIH, ces dernières étant, certes, vraisemblablement beaucoup plus fréquentes dans le contexte des conflits se poursuivant dans le temps. Mais le lien entre la durée du conflit et la gravité des violations ne peut être établi de manière logique et systématique[31].

Face à une dichotomie que les États estiment irréductible, entre les conflits armés internationaux et non internationaux[32], le seul idéal juridique que l'on puisse considérer comme réaliste à l'heure actuelle consiste à unifier le régime juridique applicable aux conflits armés internes tout en maintenant un seuil d'applicabilité qui, sans inclure les tensions internes et les troubles intérieurs, soit aussi bas que possible. Or, que l'introduction de cette notion de durée soit considérée comme le critère déterminant de la notion de conflit armé non international ou permette de consacrer une troisième catégorie de ce type de conflit, il nous semble que la jurisprudence du Tribunal a, en l'espèce, manqué sa cible.

- Le champ d'application du DIH

La délimitation du champ d'application du DIH impose de délinéer les frontières extérieures et internes de cet ensemble normatif. Quant aux limites externes, on a vu qu'elles découlaient (sauf exception) de la notion de conflit armé. Les circonstances autorisant l'application initiale du DIH ayant déjà été envisagées dans le contexte de la définition des conflits armés, il ne sera pas nécessaire d'y revenir. Il importe, en revanche, de se pencher brièvement sur l'identification du moment précis qui scelle la fin de l'application de ce *corpus iuris*. Il importe, surtout, de préciser s'il existe des limites qui bornent l'étendue du DIH à l'intérieur d'une situation de conflit armé: cet ensemble normatif est-il applicable sur tout le territoire des Puissances belligérantes ou sur une partie seulement? Peut-il régir tous les actes délictueux ou seulement ceux qui touchent de près au conflit armé? La réponse à ces diverses questions revient à poser la problématique du champ d'application du DIH, qui se situe à trois niveaux distincts que nous allons aborder succes-

31 Il suffit, hélas, de fort peu de temps pour commettre des infractions d'une extrême gravité: par exemple, l'envoi par un gouvernement d'une bombe chimique ou bactériologique sur sa propre population civile et les conséquences désastreuses qui en découlent ne requièrent pas plus de quelques minutes...

32 Une partie de la doctrine commence néanmoins à contester la pertinence de cette «*two box approach*» ; W. Fenrick, «The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia», *International Law Studies*, Vol. 71, 1998, p. 78.

sivement: *ratione temporis* (étendue temporelle de l'application), *ratione loci* (étendue spatiale) et *ratione materiae* (étendue matérielle).

Au niveau temporel, on connaît l'embarras de la doctrine à définir exactement le moment qui clôture le champ d'application du DIH, la difficulté résultant ici tant de la diversité que de l'imprécision des formules utilisées dans le droit conventionnel[33]. Le TPIY a tenté d'éclairer – ne serait-ce que d'une lumière tamisée – cette problématique fort complexe en affirmant que:

> «le droit international humanitaire s'applique dès l'ouverture de ces conflits armés et s'étend au-delà de la cessation des hostilités jusqu'à la conclusion générale de la paix; ou, dans le cas de conflits internes, jusqu'à ce qu'un règlement soit atteint»[34].

Le Tribunal commence donc par rejeter le critère factuel que constitue la cessation des actes d'hostilité. Cette précision implique que la conclusion d'un cessez-le-feu – temporaire ou définitif – ou même d'un armistice ne peut suffire à suspendre ou à mettre un terme à l'application du DIH[35]. Elle est d'une grande importance dès lors qu'une majorité des conflits armés modernes aboutissent à des cessez-le-feu instables ou à des interventions extérieures (d'un ou de plusieurs États ou de la communauté internationale) qui, certes, permettent de réduire l'intensité du conflit armé, mais bien souvent ne suffisent pas à y mettre un terme définitif. Or, confrontés à une telle situation, on sait que les divers opérateurs humanitaires éprouvent les pires difficultés à démontrer que le DIH continue à régir de telles situations, que les Parties se refusent à assimiler encore à un conflit armé[36].

Cela étant, on ne peut s'empêcher de souligner que l'expression de «conclusion générale de la paix» utilisée ensuite par le TPIY pour désigner le point final à l'application du DIH présente les inconvénients récursifs d'une

33 La IVe Convention, par exemple, parle de «fin générale des opérations militaires» (art. 6(2)) ; le Protocole II utilise l'expression de «fin du conflit armé» (art. 2(2)).

34 Cf. entre autres, les affaires *Tadic*, décision du 2 octobre 1995 (para. 67-70) ; *Blaskic*, jugement du 3 mars 2000 (para. 64).

35 La notion de cessez-le-feu se définit comme une trêve des hostilités, caractérisée le plus souvent par sa finalité humanitaire (rechercher et recueillir les blessés et malades ainsi que les morts...) et sa nature circonscrite et temporaire. L'armistice, en revanche, est un traité qui prévoit la suspension des hostilités sur tout le théâtre de guerre souvent pour une durée indéterminée. Ces deux notions doivent donc être soigneusement distinguées de la «conclusion générale de la paix» puisque juridiquement elles ne signifient pas la fin des hostilités ni de l'état de guerre.

36 M. Sassòli et A. Bouvier, *How Does Law Protect in War?*, CICR, Genève, p. 93.

généralité et d'une imprécision trop grandes[37]. En effet, si l'on veut bien admettre que cette expression sera le plus souvent assimilée à un traité de paix[38], le critère utilisé par le TPIY ne reflète alors que très superficiellement la réalité, car les instruments conventionnels pertinents disposent qu'un certain nombre de régimes juridiques continuent à s'appliquer jusqu'à l'apparition d'une situation factuelle totalement indépendante de la conclusion d'un traité de paix. Ainsi, pour ne citer que quelques exemples, la protection prévue au profit des personnes internées en raison du conflit (notamment les prisonniers de guerre et les civils détenus) s'applique jusqu'à leur libération définitive et leur rapatriement ou leur établissement dans le pays de leur choix[39]. De même, pour ce qui concerne les biens transportés à l'étranger, la protection ne cesse de s'appliquer qu'après leur retour sur le territoire de l'État d'origine. Enfin, et sans prolonger ici une énumération fastidieuse, précisons que le Protocole II de la Convention de 1980 affirme l'obligation faite aux parties belligérantes de coopérer à l'enlèvement des mines et des pièges, sans qu'aucun délai, autre que la réalisation effective et complète de ce retrait, ne soit prévu: elle reste donc pertinente même après la conclusion d'un traité de paix[40]. La multitude et l'importance de ces exceptions nous amènent, sans contester la pertinence générale de la formule utilisée par le Tribunal, à considérer simplement qu'elle ne reflète que très partiellement une réalité beaucoup plus complexe.

S'agissant du champ d'application spatial du DIH, le TPIY affirme que ce corps de règles opère sur l'ensemble du territoire des États belligérants dans le cas des conflits armés internationaux, et sur l'ensemble du territoire sous le contrôle d'une partie dans le cas d'un conflit non international[41].

37 On peut notamment se demander si cette conclusion générale de la paix requiert l'adoption formelle d'un acte matériel comme un traité de paix; si tel était le cas, la signature de ce traité suffirait-elle à parler de conclusion générale de la paix ou faudrait-il attendre la mise en œuvre – partielle ou complète – de ses dispositions? Nous ne tenterons pas ici de répondre à ces questions complexes qui dépassent largement le champ de notre étude.

38 Le Manuel militaire allemand de 1992 dispose notamment: «*A conclusion of peace is generally brought about by a peace treaty. The application of humanitarian law between the parties to a conflict (...) will thereupon terminate*» (para. 246). Il faut noter que la formule n'est pas impérative, d'autres options qu'un traité de paix pouvant dès lors être envisagées.

39 Cette exception est fondée notamment sur les art. 5 de la IIIe Convention, 6(4) de la IVe Convention et sur les art. 3(b) du Protocole I et 2(2) du Protocole II; elle est mentionnée par le TPIY lui-même, notamment dans l'affaire *Tadic*, décision du 2 octobre 1995 (para. 69).

40 Notons toutefois qu'en vertu de l'art. 9 du Protocole II de la Convention de 1980 sur l'interdiction ou la limitation de l'emploi de certaines armes classiques, un accord est requis pour mettre en œuvre cette coopération.

41 Voir notamment les affaires *Tadic*, décision du 2 octobre 1995 (para. 67-70) ; *Blaskic*, jugement du 3 mars 2000 (para. 64).

Cette formulation doit naturellement être replacée dans son contexte afin d'éviter tout contresens. Elle ne peut être interprétée, *a contrario*, comme impliquant une exclusion de l'application du DIH au-delà des zones contrôlées par les diverses parties belligérantes. Quelle que soit la nature du conflit, il est clair que des actes d'hostilités peuvent se dérouler en dehors du territoire de l'État proprement dit, par exemple dans la zone économique exclusive d'un État belligérant, en haute mer, voire dans les espaces sous-marins ou, sans tomber dans la science-fiction, dans l'espace extra-atmosphérique... Or, personne ne conteste que les belligérants qui agissent dans ou depuis de telles zones restent soumis aux normes humanitaires.

En réalité, la problématique visée par le Tribunal consistait exclusivement à délimiter le champ d'application du DIH à l'intérieur du territoire des parties en conflit et, en particulier, à rappeler qu'aucune restriction du champ d'application spatial n'est recevable au sein de telles zones: peu importe, notamment, que des combats effectifs s'y déroulent ou non. En d'autres termes, il suffit de constater une situation générale de conflit armé pour que le DIH s'applique à l'ensemble du territoire de l'État ou des États impliqués ou à toute la zone sous le contrôle d'une Partie. En effet, aucun argument juridique sérieux ne pouvait étayer l'assertion développée dans l'affaire *Tadic* par la défense, qui soutenait que l'application du DIH était limitée aux zones d'hostilité active. Au contraire, de nombreuses dispositions de cet ensemble normatif, par exemple celles qui touchent aux conditions de détention des prisonniers de guerre, s'appliquent bien au-delà de l'aire de combat.

En dernier lieu, eu égard au champ d'application matériel, notons qu'en principe le DIH ne s'applique que dans le cadre des relations conflictuelles entre les belligérants. Il faut donc, pour que cet ensemble normatif puisse régir une situation, qu'existe un «lien suffisant» entre les actes incriminés et le conflit armé. Les actes criminels sans aucun lien avec le conflit, tels que l'attaque d'une banque par des malfaiteurs aux fins exclusives de l'enrichissement personnel, ne peuvent donc *a priori* être couverts par le DIH, même s'ils sont commis sur un territoire où se déroule un conflit armé[42]. Le maintien, au

42 «The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law» ; *Tadic*, jugement du 7 mai 1997 (para. 572). La Chambre de première instance mentionne, dans l'affaire *Blaskic*, l'exigence d'un «lien manifeste» entre les actes criminels allégués et le conflit armé dans son ensemble; *Blaskic*, jugement du 3 mars 2000 (para. 69). Voir aussi *Celebici*, jugement du 16 novembre 1998 (para. 193).

demeurant logique, de la distinction entre les infractions pénales « classiques » et les violations graves du DIH ne va pas, toutefois, sans poser certaines difficultés au moment de son application concrète, la principale consistant naturellement à identifier le degré précis de la connexion requise entre l'acte juridique et la donnée conflictuelle pour que le DIH puisse s'appliquer.

À cet égard, la jurisprudence du TPIY indique qu'il serait suffisant qu'un acte soit commis « *in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties* »[43]. Elle précise néanmoins, dans le même temps, qu'un lien aussi direct avec des hostilités effectives n'est pas systématiquement requis, pourvu que les crimes présumés soient étroitement liés aux hostilités se déroulant dans d'autres parties des territoires contrôlés par l'un des belligérants[44]. La Chambre d'appel a néanmoins donné des indications supplémentaires lorsqu'elle précise que :

> « les crimes de guerre se distinguent des infractions de pur droit interne en ce qu'ils sont déterminés par le contexte dans lequel ils sont commis – le conflit armé –, ou en dépendent. Le crime de guerre n'est pas nécessairement un acte planifié ou le fruit d'une politique quelconque. Un lien de cause à effet n'est pas exigé entre le conflit armé et la perpétration du crime mais il faut, à tout le moins, que l'existence du conflit armé ait considérablement pesé sur la capacité de l'auteur du crime à le commettre, sa décision de le commettre, la manière dont il l'a commis ou le but dans lequel il l'a commis. Partant, s'il peut être établi, comme en l'espèce, que l'auteur du crime a agi dans l'optique de servir un conflit armé ou sous le couvert de celui-ci, cela suffit pour conclure que ses actes étaient étroitement liés audit conflit »[45].

Autant d'indications, certes utiles, mais fractionnaires et superficielles, donc largement insuffisantes pour régler l'ensemble des interrogations engendrées par cette exigence.

43 *Tadic*, jugement du 7 mai 1997 (para. 573).

44 *Ibid.* ; *Celebici*, jugement du 16 novembre 1998 (para. 193). Les juges ajoutent par ailleurs qu'il n'est pas nécessaire que cet acte fasse partie d'une politique ou d'une pratique avalisée ou tolérée officiellement par l'une des parties, voire que cet acte serve *de facto* une politique associée à la poursuite de la guerre ou qu'il soit dans l'intérêt effectif de l'une des Parties.

45 La Chambre d'appel poursuit d'ailleurs en indiquant que « Pour déterminer si un acte donné est suffisamment lié au conflit armé, la Chambre de première instance peut tenir compte, entre autres, des indices suivants : le fait que l'auteur du crime est un combattant, le fait que la victime n'est pas un combattant, le fait que la victime appartient au camp adverse, le fait que l'acte pourrait être considéré comme servant l'objectif ultime d'une campagne militaire, et le fait que la commission du crime participe des fonctions officielles de son auteur ou s'inscrit dans leur contexte » ; *Kunarac*, jugement du 12 juin 2002 (para. 58 et suivants).

D'autres précisions ont été apportées à cette problématique complexe lors des débats ayant présidé, dans le cadre d'une commission préparatoire, aux négociations du document intitulé « Éléments des crimes » destiné à aider la CPI dans l'interprétation et l'application des dispositions du Statut de Rome relatives aux crimes[46]. Sans pour autant permettre d'appréhender précisément un ou plusieurs critères juridiques précis... En effet, dans ce contexte, les délégations ont reconnu que la formule utilisée n'impliquerait pas une évaluation légale de la part du criminel quant à l'existence ou pas d'un conflit armé; elle ne requerrait pas non plus une quelconque appréciation juridique de sa part quant au caractère interne ou international de ce conflit; elle exigerait seulement « the awareness of the factual circumstances that established the existence of an armed conflict...». Cette formule – qui, par sa clarté et sa précision sera, n'en doutons pas, d'un grand secours pour les futurs juges de La Haye qu'elle est censée assister ! – impliquerait que la seule condition posée à l'application matérielle du DIH serait la conscience de la part du criminel d'un lien, quels qu'en soient la nature ou le degré, entre ses actes délictueux et le conflit armé.

Précisons, à titre conclusif, que ce critère est bien plus large que celui qui découle des motivations de l'acte (personnelles ou en liaison avec le conflit armé) dans chaque cas d'espèce. Certes, se sont parfois les intentions des auteurs qui permettront d'établir le lien avec le conflit armé : ainsi, pour reprendre l'exemple cité plus haut, on peut penser que le DIH serait applicable dès lors que l'assaut contre une banque a été mené par un groupe armé non à des fins purement vénales mais pour obtenir des fonds nécessaires à la poursuite de la lutte armée. Mais dans d'autres cas, un individu pourra être mû par des motifs purement personnels sans que cela fasse entrave à l'existence d'un tel lien. Par exemple, si un gardien de prison dépouillait les internés civils dont il a la garde de leurs biens aux fins d'appropriation personnelle, le lien de connexité découlerait alors de la position des victimes et de la conscience du geôlier des motifs de leur internement.

46 On sait que les négociateurs de la Commission préparatoire, inspirés par la jurisprudence du TPIY, ont prévu que la notion de crime de guerre au sens de l'art. 8 para. 2 a) du Statut de Rome impliquait, *inter alia*, que l'acte criminel soit accompli « dans le contexte de et était associé à un conflit armé international ». La teneur des débats permettant de préciser le sens de cette expression sont parfaitement résumés par K. Dörmann, « Preparatory Commission for the International Criminal Court — The Elements of War Crimes », *Revue internationale de la Croix-Rouge*, Vol. 82, No. 839, pp. 779-782.

Les critères de qualification des conflits armés

Compte tenu de l'écheveau de conflits armés qui s'imbriquent plus ou moins les uns dans les autres, il est naturellement tentant d'esquiver tout développement théorique et d'affirmer que tous les combats qui ont ensanglanté le territoire de l'ex-Yougoslavie entre 1991 et 1995 faisaient partie d'un seul et même conflit armé international[47]. Ce postulat fut expressément rejeté par le Tribunal qui consacra la théorie dite du « fractionnement » en vertu de laquelle un même conflit peut présenter simultanément des aspects internationaux et internes[48]. Une analyse quant à la qualification est donc requise dans chaque cas d'espèce.

Cette qualification est aisée dès lors que s'affrontent les forces armées de deux entités étatiques : le conflit est, par définition, international. En revanche, si les combats se déroulent sur le territoire d'un seul État entre les forces gouvernementales et un groupe rebelle ou entre des groupes rebelles, le conflit, qui présente de prime abord un caractère interne, pourra néanmoins être qualifié d'international dans deux situations particulières.

Premièrement, si les troupes d'un autre État interviennent dans le conflit. D'après le Tribunal, on retombe alors tout simplement dans la première hypothèse envisagée ci-dessus. Cela est incontestable dès lors que l'État intervenant s'affronte aux autorités gouvernementales légitimes de l'État sur le territoire de ce dernier[49]. La situation est, en revan-

47 Ce fut notamment la position défendue par la Commission d'experts établie en vertu de la résolution 780 (1992) du Conseil de sécurité dans son premier rapport en date du 10 février 1993 (Doc. S/25274, para. 45) puis dans son rapport final de mai 1994 (Doc. S/1994/674, para. 44). Exemples à l'appui, une partie de la doctrine rejeta cependant cette simplification : comment, en effet, assimiler le conflit entre les forces armées du gouvernement bosniaque et la faction dissidente agissant dans la poche de Bihac sous les ordres de Fikret Abdic à un conflit international ? Cf. Fenrick, *op. cit.* (note 32), p. 81.

48 La Chambre d'appel affirme que « the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context » ; *Tadic*, décision du 2 octobre 1995 (para. 77).

49 « (...) the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one » ; *Rajic*, décision du 13 septembre 1996 adoptée en application de l'ancien article 61 du Règlement (para. 13). La Chambre de première instance considéra également, dans l'affaire *Blaskic*, que les éléments de preuve démontraient une intervention directe de la Croatie dans la zone opérationnelle de Bosnie centrale et suffisaient donc à qualifier le conflit d'international ; *Blaskic*, jugement du 3 mars 2000 (para. 76 et suivants).

che, beaucoup plus délicate dès lors que l'État intervenant se positionne aux côtés des forces armées gouvernementales, afin de réprimer une insurrection ou de lutter contre un groupe rebelle. On peut toutefois douter, dans un tel contexte, que l'ensemble des relations conflictuelles puisse être qualifié d'international : en tout état de cause, en application de la théorie précitée du fractionnement, les relations entre les autorités gouvernementales et le groupe rebelle sur le territoire restent purement « internes ». La question reste ouverte de savoir si les relations entre l'État intervenant et les rebelles peuvent être assimilées à un conflit international[50].

Deuxièmement, si certains des participants au conflit armé agissent de fait pour le compte d'un autre État[51]. Se pose alors la problématique, très complexe, des critères juridiques permettant de rattacher les forces armées à une puissance étrangère, question qu'il ne nous incombe pas ici de reprendre en détail, dans la mesure où elle a déjà fait l'objet de nombreuses analyses doctrinales éminemment pertinentes. Contentons-nous de rappeler les deux objections principales suscitées par l'application de la théorie des organes dits *de facto* à la qualification des conflits. En premier lieu, on a affirmé que les standards du droit de la responsabilité ne seraient pas nécessairement appropriés pour effectuer une telle opération[52]. En second lieu, l'établissement de la nature et du degré exacts des relations entre les forces étrangères et leurs alliés serait une question de fait, souvent controversée, et, dans bien des cas, ne pourrait être résolue avec certitude que des années après la cessation des hostilités, donc de manière rétrospective. Or, la réponse à cette question présente un intérêt majeur, car elle conditionne les règles de substance applicables qui peuvent différer considérablement, en particulier au niveau de la conduite des hostilités.

50 On sait qu'une partie de la doctrine soutient qu'une intervention étrangère, même au côté du gouvernement en place, conduit à l'internationalisation générale du conflit ; David, *op. cit.* (note 17), pp. 129 et 139 (para. 1.85 et 1.96). Cette position minoritaire ne semble toutefois pas être soutenue par le CICR comme le démontre la déclaration adoptée au sujet de la situation au Kosovo : en dépit de l'intervention armée des forces de l'OTAN, l'institution genevoise considère que le conflit entre les forces gouvernementales yougoslaves et les troupes de l'UCK conserve un caractère non international.

51 Voir notamment *Blaskic*, jugement du 3 mars 2000 (para. 76).

52 Cf. en particulier l'opinion dissidente du juge MacDonald jointe au jugement du 7 mai 1997 en l'affaire *Tadic* ainsi que l'opinion séparée du juge Shahabuddeen dans le jugement rendu par la Chambre d'appel en la même affaire.

L'apport de la jurisprudence du TPIY à la conduite des hostilités (droit de La Haye)

En ce qui concerne le droit de la conduite des hostilités[53], le Tribunal était confronté à un fort clivage, au niveau conventionnel, entre les conflits armés internationaux et non internationaux. En effet, une réglementation relativement précise des méthodes de combat s'applique dans le contexte des conflits internationaux et la violation des dispositions les plus importantes engendre, sans aucun doute possible, la responsabilité pénale individuelle du criminel. La situation est beaucoup plus complexe en revanche dans le cas des conflits armés non internationaux. D'abord, en raison du caractère squelettique – tant quantitativement que qualitativement – des normes internationales régissant la conduite des hostilités dans un cadre interne[54]. Ensuite, parce que ni l'article 3 commun ni le Protocole additionnel II ne prévoient de mécanismes de mise en œuvre de la responsabilité pénale individuelle, laissant ainsi planer un doute sur la possibilité d'engager une telle responsabilité dans le contexte des conflits non internationaux. Compte tenu de ces divergences contextuelles, l'apport de la jurisprudence du Tribunal implique une présentation qui reprenne à son compte cette dichotomie traditionnelle entre conflits armés internationaux et non internationaux.

La conduite des hostilités dans le contexte des conflits armés internationaux

L'apport en la matière de la jurisprudence du TPIY se situe sur deux plans distincts. Premièrement, l'étendue du droit applicable à la légalité

53 Notons que la jurisprudence du TPIY a effleuré la question des moyens de combats, amorçant en la matière des raisonnements importants. Ainsi, dans l'affaire *Blaskic*, le TPIY a condamné l'utilisation de mortiers artisanaux (qualifiés de «bébés-bombes») au motif que de telles armes sont extrêmement difficiles à diriger correctement, leur trajectoire n'étant pas linéaire: leur emploi est donc assimilable à une attaque indiscriminée; Affaire *Blaskic*, jugement du 3 mars 2000 (para. 512). Cela étant, les développements du Tribunal à cet égard nous apparaissent encore trop embryonnaires pour faire l'objet de développements doctrinaux sérieux, ce qui explique que ces quelques lignes relatives au droit de La Haye aient exclu de l'analyse la question des moyens de combat pour se concentrer sur les assertions du Tribunal dans le domaine des méthodes de combat.

54 Une très grande majorité de la doctrine (voir par exemple David, *op. cit.* (note 17), p. 367, para. 2.179) considère en effet, à tort ou à raison, que l'art. 3 commun ne concerne que le traitement des personnes au pouvoir de l'ennemi et ne peut donc être exploité dans le domaine du droit de La Haye. Quant au Protocole II, les règles régissant la conduite des hostilités se résument aux articles 4 (Garanties fondamentales) et 13 (Protection de la population civile), auxquels s'ajoutent les articles 14 à 16 prévoyant une protection spéciale au profit tant des biens indispensables à la survie de la population civile, que des ouvrages et installations contenant des forces dangereuses et des biens culturels et lieux de cultes.

d'une attaque ou, plus précisément, l'affirmation de la nature coutumière de certaines règles du droit des conflits armés. Deuxièmement, l'identification précise des éléments requis pour qu'une attaque illégale contre des personnes ou des biens civils puisse être assimilée à une violation des lois et coutumes de la guerre au sens de l'article 3 du Statut du Tribunal.

- Le droit applicable à la légalité d'une attaque

Le principe de distinction (de discrimination ou encore de précaution) s'énonce comme l'obligation pour toute Partie à un conflit de faire, en tout temps, la distinction entre la population civile et les biens civils d'un côté, les combattants et les objectifs militaires de l'autre, afin d'assurer aux premiers une protection générale contre les effets des hostilités. Il constitue le socle sur lequel repose tout le droit relatif à la conduite des hostilités. Consacré à l'article 48 du Protocole I, ce principe normatif n'est que l'expression moderne d'une idée aussi vieille que le droit des conflits armés: la nécessité de protéger juridiquement les personnes qui ne participent pas ou qui ne participent plus aux opérations militaires.

Il est vrai qu'en consacrant la nature coutumière du principe juridique fondamental de la distinction[55], le TPIY n'a pas révolutionné le droit des conflits armés: universellement reconnue, cette norme centralise un très large consensus et bénéficie d'un vaste soutien dans la pratique tant diplomatique que militaire[56]. Cela étant, lorsque l'on connaît les obstacles qu'engendre systématiquement la preuve de l'(in)existence d'une norme coutumière, nul doute que le sceau complémentaire apporté à cet égard par un organe juridictionnel tel que TPIY offre un poids considérable.

Par ailleurs, il est d'une implacable logique que le Tribunal, après avoir consacré le caractère coutumier du principe de distinction, en tire les conclusions qui s'imposent et octroie une valeur normative identique aux règles, que l'on peut qualifier de dérivées, qui concrétisent en pratique ce principe général. Rentrent évidemment dans cette catégorie des

55 *Cf.* en l'espèce les affaires *Tadic*, décision du 2 octobre 1995 (para. 100 et suivants), *Kupreskic*, jugement du 14 janvier 2000 (para. 521 et suivants) et *Blaskic*, jugement du 3 mars 2000 (para. 180).

56 À l'appui de cette assertion, notons que la CIJ, après avoir qualifié le principe de distinction de principe cardinal du DIH, affirme que des règles aussi fondamentales «are to be observed by all States whether or not they have ratified the Conventions that contain them, because they constitute intransgressible principles of international customary law» ; Cour internationale de Justice, Avis consultatif, *affaire de la licéité de la menace ou de l'emploi des armes nucléaires, Rec.* 1996, p. 257, para. 78-79.

normes qui, en tant que telles, ne prêtent guère à controverse, par exemple, l'immunité de la population et des biens civils ou l'interdiction des attaques indiscriminées[57]. Mais le Tribunal s'est montré beaucoup plus hardi en alléguant également du caractère coutumier des règles codifiées aux articles 57 et 58 du Protocole I et relatives aux précautions requises tant dans l'attaque que contre les effets de celle-ci. D'autant plus que les juges ne citent aucune pratique à l'appui de leur conclusion, qui repose exclusivement sur une argumentation logique (le développement de principes préexistants) et sur l'absence d'opposition des États (notamment ceux qui ne sont pas parties au Protocole)[58]. Si l'on ne peut que se féliciter d'une telle assertion, il n'en reste pas moins que la transposition littérale de ces dispositions relativement précises dans le *corpus* du droit coutumier suscite un certain nombre de questions qui découlent notamment du grand nombre de réserves ou déclarations interprétatives accolées à ces articles par les États au moment de la signature, de la ratification ou de l'adhésion au Protocole I. Très audacieuse, également, était l'affirmation du caractère coutumier du principe de proportionnalité[59]. S'il est vrai qu'il procède, lui aussi, de la distinction, il n'en reste pas moins que son adoption avait suscité de vifs débats au moment de la négociation de l'instrument final, débats qui, pour s'être atténués, n'ont pas pour autant pris fin.

En résumé, le TPIY soutient que toute la chaîne normative enracinée dans le principe de distinction présente un caractère coutumier et s'impose donc à tous les États, qu'ils soient ou non parties au Protocole I. Pourtant, une tache vient souiller le beau tableau que nous avons dépeint. Elle a pour origine un passage pour le moins malheureux de la Chambre de première instance en l'affaire *Blaskic*, qui considère que le

57 Le Tribunal consacre leur caractère coutumier dans les affaires *Tadic*, jugement du 2 octobre 1995 (para. 127) et *Kupreskic*, jugement du 14 janvier 2000 (para. 524). Voir également la décision du 8 mars 1996 adoptée en application de l'ancien art. 61 du Règlement en l'affaire *Martic* (para. 10 et suivants).

58 «These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol»; *Kupreskic*, jugement du 14 janvier 2000 (para. 524).

59 Nous visons ici le principe de proportionnalité entendu au sens strict, c'est-à-dire le principe selon lequel sont interdites les attaques dont on peut s'attendre qu'elles causent incidemment des pertes en vie humaines dans la population civile ou/et des dommages aux biens civils qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu.

ciblage des personnes ou des biens civils n'est une infraction que dans la mesure où il ne peut se justifier par la nécessité militaire[60]. L'exception découlant du lien introduit entre le principe de distinction et les nécessités militaires constitue, selon nous, une véritable erreur de droit. On sait que le concept de « nécessité militaire » désigne les mesures indispensables qui s'imposent d'urgence aux forces armées pour conduire à bien une opération et accomplir, ce faisant, la mission qui leur a été assignée. Cependant, il est clair que les mesures adoptées à ce titre doivent être licites ; autrement dit, on ne peut déroger à une règle du droit des conflits armés en se targuant des nécessités militaires qu'à la condition que cette possibilité soit expressément prévue par la règle en question. Or, aucun des instruments conventionnels qui se réfèrent directement ou indirectement au principe de distinction n'autorise de dérogation fondée sur la notion de nécessité militaire, qui n'est donc pas pertinente en l'espèce. Il est d'ailleurs symptomatique à cet égard que ni la CIJ ni la Chambre d'appel du Tribunal, qui ont toutes deux consacré la nature coutumière de ce principe, n'aient fait référence à cette exception. La conclusion qui s'impose naturellement est que les nécessités militaires ne pourront, en aucun cas, justifier une attaque dirigée contre la population ou des biens civils.

Le principe de distinction n'est pas pour autant un principe absolu. Comme le rappelle la Chambre compétente en l'affaire *Kupreskic*, le droit des conflits armés mentionne deux exceptions incontestables. Premièrement, celle qui découle d'un abus de droit par les civils, par exemple d'un usage de la force armée en contradiction avec l'obligation qui leur est imposée de ne pas participer directement aux hostilités. Deuxièmement, celle qui résulte de la désormais célèbre doctrine des « dommages collatéraux », intrinsèquement rattachée au principe de proportionnalité[61]. Une troisième exception est parfois évoquée et c'est à son propos que le Tribunal a produit l'une des avancées jurisprudentielles les plus significatives en ce qui concerne la conduite des hostilités : il s'agit de la théorie des représailles à laquelle il convient de consacrer quelques lignes.

60 *Blaskic*, jugement du 3 mars 2000 (para. 180) ; la Chambre de première instance a réitéré cette assertion dans l'affaire *Kordic* en stipulant que « on entend par attaques proscrites celles qui prennent délibérément pour cible des civils ou des objectifs civils au cours d'un conflit armé et que les nécessités militaires ne justifient pas » ; jugement du 21 février 2001 (para. 328).

61 *Kupreskic*, jugement du 14 janvier 2000 (para. 522).

Rappelons simplement que l'interdiction des représailles à l'encontre de la population ou des biens civils est relativement ancienne. Elle figurait déjà à l'article 33 de la IVe Convention, disposition pertinente uniquement dans le contexte des personnes et des biens protégés situés en territoire occupé. Ce sont les articles 51(6) et 52(1) du Protocole I qui ont permis d'étendre le champ d'application de cette théorie à tous les individus et biens de caractère civil. Cette généralisation ne s'est d'ailleurs pas faite sans mal: en effet, l'adoption de ces dispositions a suscité une vaste controverse lors des négociations relatives au Protocole. De nombreuses délégations craignaient en effet qu'une prohibition absolue des représailles contre la population ou les biens civils ne soit impossible à mettre en œuvre: outre le fait qu'elle dépouillerait les États d'un moyen efficace de faire respecter le droit des conflits armés, elle placerait un gouvernement victime de violations dudit droit dans une position intenable vis-à-vis de son opinion publique si celle-ci s'avisait de réclamer des représailles. L'adoption formelle du texte n'a d'ailleurs pas mis fin à la polémique qui s'est poursuivie dans la pratique et la doctrine ultérieures[62].

C'est dans ce contexte que le TPIY est venu attester formellement tant l'interdiction des représailles à l'encontre de la population et des biens civils que le caractère coutumier de cette prohibition. Un premier satisfecit a été octroyé dans le cadre de la décision prise conformément à l'article 61 du Statut, en l'affaire *Martic*[63]. La Chambre de première instance a justifié sa décision en invoquant, outre la majorité de la doctrine la plus qualifiée, l'obligation de respecter et de faire respecter le DIH en toutes circonstances (qui figure à l'article 1 commun) interprétée comme interdisant toute possibilité de représailles dans le cas de normes aussi fondamentales que l'interdiction des attaques contre les civils. Elle s'est appuyée également sur la résolution 2675 de l'Assemblée générale des Nations Unies ainsi que les articles 51(6) du Protocole I et 4 du Protocole II[64]. Mais aucune pratique étatique n'est venue étayer cette démonstration...

62 Pour une description des critiques – qu'il ne partage pas – formulées à l'encontre de l'interdiction des représailles, voir David, *op. cit.* (note 17), p. 363 et les références bibliographiques citées notes 2 et 3.

63 *Martic*, décision du 8 mars 1996 (para. 15-17).

64 La Chambre précise que, bien que l'art. 4 du Protocole II ne se réfère pas explicitement aux représailles, leur interdiction se déduit implicitement de cette disposition. En effet, les prescriptions mentionnées dans cet article seraient absolues et non dérogatoires, même à titre de représailles, comme le démontre l'obligation de les respecter « *at any time and any place whatsoever* ».

Dans l'affaire *Kupreskic*, le Tribunal a réitéré de manière solennelle l'interdiction des représailles contre les personnes et les biens civils tout en étoffant son argumentation[65]. Il a considéré en premier lieu que, le DIH ne visant pas à protéger les intérêts des États mais ceux des individus en tant qu'êtres humains, ce *corpus iuris* ne repose en aucun cas sur un paradigme synallagmatique mais énonce des obligations absolues, inconditionnelles, qui ne peuvent être écartées en application du principe de réciprocité. Sur la base de cette structure, le Tribunal affirme que viser à titre de représailles, sans aucune recherche préalable de culpabilité ou forme de procès, des personnes innocentes qui n'ont bien souvent aucun degré de solidarité avec les auteurs de la violation initiale peut être caractérisé comme une violation flagrante des principes les plus fondamentaux des droits de l'homme. Or, une lente mais profonde transformation du DIH se serait produite sous l'effet des droits de l'homme qui aurait eu pour conséquence d'interdire les représailles, comme le confirme d'ailleurs l'article 50d) du Projet d'articles de la Commission du droit international (CDI) sur la responsabilité des États, qui interdit toute contre-mesure dérogeant aux droits fondamentaux de la personne humaine[66]. De plus, s'il était, par le passé, possible d'argumenter que les représailles constituaient le seul moyen efficace d'obliger l'ennemi à renoncer à ses actes illicites et à se conformer au droit, tel n'est plus le cas aujourd'hui. D'autres moyens d'assurer le respect du DIH sont à présent disponibles, en particulier la poursuite et le châtiment des crimes de guerre et des crimes contre l'humanité par des juridictions nationales ou internationales.

Cette argumentation relativement convaincante constitue certainement l'un des points d'orgue de l'apport du Tribunal au droit des conflits armés. Il n'empêche que l'on peut s'interroger sur son aptitude à gommer d'un trait l'opposition résolue que certains États ont manifestée jusque très récemment à l'égard de cette norme. Pour ne citer qu'un seul exemple, rappelons que trois États au moins ont contesté le caractère coutumier de l'interdiction des représailles contre les personnes ou les biens civils lors des plaidoiries en l'affaire de la licéité de la menace ou de l'emploi des armes nucléaires portée devant la CIJ[67].

65 Affaire *Kupreskic*, jugement du 14 janvier 2000 (para. 515 et suivants puis para. 527 à 536).

66 Il s'agit désormais de l'article 51(1)(b) du projet d'article provisoire adopté en seconde lecture par le Comité de rédaction. Voir le document des Nations Unies publié le 21 août 2000 sous la côte A/CN.4/L.600*.

67 Il s'agit des États-Unis, du Royaume-Uni et des Pays-Bas. La Cour, quant à elle, ne s'est pas prononcée sur la question; CIJ, Avis consultatif, *affaire de la licéité de la menace ou de l'emploi des armes nucléaires*, *Rec.* 1996, p. 246, para. 46.

• Les éléments constitutifs du crime d'attaque illégale de civils ou de biens civils

Après avoir apporté des précisions importantes quant au droit applicable à la légalité d'une attaque, le Tribunal s'est logiquement penché sur les conditions requises pour qu'une attaque illégale de personnes ou de biens civils puisse constituer un crime entraînant la responsabilité pénale de son auteur. Nous ne développerons pas de manière extensive ce point, qui relève beaucoup plus de la problématique des éléments du crime que du DIH *stricto sensu*. Mais dans la mesure où le TPIY a défriché, en la matière, un terrain presque vierge[68], il importe d'indiquer brièvement les grandes lignes de ses conclusions.

Le Tribunal considère que trois conditions doivent être réunies pour qu'une attaque illégale soit constitutive d'un crime tombant sous le coup de l'article 3 du Statut.

En premier lieu, l'attaque doit avoir causé des morts (ou de graves atteintes corporelles) au sein de la population civile et/ou des dommages à des biens de caractère civil. Il s'agit ici d'une constante dans la jurisprudence du Tribunal, qui a toujours considéré qu'une violation du DIH ne pouvait être qualifiée de grave au sens du Statut, et donc engendrer sa compétence, qu'à la condition d'entraîner des conséquences graves pour la victime[69]. On peut toutefois se demander si cette exigence est l'un des éléments constitutifs de ce crime en général ou si elle n'est prescrite en l'espèce que dans la mesure où les infractions poursuivies devant le Tribunal dérivent directement du Protocole I, dont l'article 85(3) exige, pour qu'une violation soit assimilable à une infraction grave, qu'elle ait entraîné la mort ou causé des atteintes graves à l'intégrité physique ou à la santé. Un premier élément de réponse découle certainement du fait que cette exigence ne figure pas dans la liste des éléments du crime prévu à l'article 8(2)(b)(i) du Statut de Rome. Cette dernière solution semble d'ailleurs juridiquement plus logique : pour prendre une image simpliste, on conçoit difficilement que la maréchaussée soit contrainte d'attendre un accident et d'éventuelles victimes pour sanctionner un chauffard coupable d'excès de vitesse...

68 De manière quelque peu superficielle, on peut affirmer que les Tribunaux pénaux internationaux constitués suite à la Seconde Guerre mondiale se sont limités à la répression d'infractions commises à l'encontre de personnes au pouvoir de l'ennemi et n'ont pas abordé directement – pour des raisons politiques évidentes – les problématiques touchant à la conduite des hostilités.

69 Il faut également que cette une infraction porte atteinte à une règle protégeant des valeurs importantes, ce qui ne pose pas problème dans le cas d'espèce.

En deuxième lieu, l'attaque doit avoir été entreprise à l'encontre de personnes ou de biens dont la nature civile était connue ou ne pouvait être ignorée. Le Tribunal n'a malheureusement pas profité, dans le cadre de l'affaire *Blaskic*, de l'occasion offerte pour procéder à un affinement précis des définitions de notions aussi fondamentales que celles de population civile ou d'objectif militaire. On ne peut que le regretter. Une lecture globale du jugement rendu le 3 mars 2000 permet pourtant, au détour d'un paragraphe, de glaner quelques indications qui ne sont pas dénuées d'intérêt. En particulier, le Tribunal semble considérer qu'une faible résistance à une attaque de la part d'éléments, certes armés mais bien mal équipés, ne suffit pas à faire perdre à la population le bénéfice de la protection qui lui est due ni d'ailleurs à assimiler le village dans lequel ces éléments agissent à un objectif militaire[70]. Dans un autre registre, le Tribunal semble admettre qu'une attaque indiscriminée ou disproportionnée peut suffire à prouver que celle-ci était en fait dirigée contre la population civile. En d'autres termes, il n'est pas nécessaire de prouver que toutes les victimes bénéficiaient d'une immunité contre les effets des hostilités: il suffit à cet égard de démontrer que combattants et civils étaient visés sans distinction ou que le nombre de civils ayant péri était manifestement excessif[71]. Cette assimilation peut s'avérer d'une grande importance puisqu'on sait que le Protocole II, qui prohibe les attaques directes contre la population civile, est muet en ce qui concerne les attaques indiscriminées ou disproportionnées.

Enfin, en troisième et dernier lieu, les actes ou omissions ayant permis l'attaque doivent revêtir un caractère intentionnel. Le Tribunal affirme expressément que cette notion englobe aussi bien une intention coupable

70 Dans l'affaire *Blaskic*, le Tribunal, décrivant la défense territoriale qui s'employait dans le village d'Ahmici, constate qu'elle était composée d'environ 120 hommes dont la tâche principale se résumait à accomplir, sur une base purement volontaire, des rondes de nuit. Le Tribunal poursuit: « Elle constituait donc une sorte de défense civile plutôt qu'une armée à proprement parler. Les membres de la défense territoriale étaient très mal équipés et la plupart d'entre eux étaient habillés en civils et ne se considéraient pas comme des soldats. Il n'y avait pas de caserne à Ahmici » (para. 407). Et le Tribunal de conclure, au-delà de tout doute raisonnable, qu'aucun objectif militaire ne justifiait ces attaques (para. 410).

71 *Blaskic*, jugement du 3 mars 2000 (para. 509-510). Voir aussi, en la matière, l'affirmation de la chambre compétente en l'affaire *Kupreskic*: « (...) it is nevertheless beyond dispute that at a minimum, large numbers of civilian casualities would have been interspersed among the combatants. The point which needs to be emphasised is the sacrosanct character of the duty to protect civilians (...) Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians » ; *Kupreskic*, jugement du 14 janvier 2000 (para. 513).

qu'une imprudence délibérée, assimilable à une négligence criminelle grave[72]. Cette affirmation est d'autant plus importante qu'une partie de la doctrine – et pas uniquement la plus réactionnaire – s'était prononcée en sens contraire. Espérons, tant pour la sécurité du droit que pour la protection des victimes, que la future CPI entendra la voix réformatrice du TPIY.

Ces éléments constitutifs du crime d'attaque illégale de civils ou de biens civils ont été présentés comme un apport essentiel à la conduite des hostilités dans le contexte des conflits armés internationaux, car la jurisprudence du Tribunal ne les a exploités, pour l'instant, que dans ce contexte. Mais on peut légitimement penser qu'il les transposera *mutatis mutandis* dans le contexte d'une violation grave à la conduite des hostilités dans le cadre d'un conflit armé interne.

La conduite des hostilités dans le contexte des conflits armés non internationaux

Il est devenu trivial de souligner le caractère lacunaire du droit conventionnel à l'égard des règles du droit de La Haye applicables dans le contexte des conflits armés non internationaux. Les affirmations du TPIY concernant le développement d'un corps de règles coutumières régissant la conduite des hostilités dans ce contexte présentent donc une importance majeure. D'autant qu'en l'espèce le Tribunal n'a pas fait dans la demi-mesure, allant jusqu'à consacrer la nature coutumière de règles qui ne figurent expressément ni dans l'article 3 commun ni dans le Protocole II.

À l'image de papillons attirés par la lumière, ce développement des règles coutumières s'est en grande partie inspiré des principes fondamentaux régissant les conflits armés internationaux. Pourtant, le Tribunal a pris la double précaution d'affirmer, premièrement que cette extension ne présentait qu'un caractère partiel dans la mesure où certains principes seulement avaient pu en bénéficier; et deuxièmement, qu'elle ne pouvait se résumer à une simple transplantation intégrale et mécanique des normes relevant du droit des conflits armés internationaux vers les conflits internes. Ce sont les principes généraux dans leur essence, beaucoup plus que les réglementations précises et détaillées, qui peuvent être transposés dans le contexte des conflits non internationaux[73].

72 *Blaskic*, jugement du 3 mars 2000 (para. 152 en ce qui concerne l'art. 2 du Statut et 179 par rapport à l'art. 3).

73 *Tadic*, décision du 2 octobre 1995 (para. 126).

Sans prétendre dresser ici une liste exhaustive, notons que le Tribunal a consacré le caractère coutumier des principes généraux relatifs à la protection des personnes civiles et des biens de caractère civils contre les effets des hostilités ainsi que l'obligation parallèle de limiter les attaques aux objectifs militaires[74]; l'interdiction des représailles contre la population ou les biens civils[75]; l'obligation de ne pas utiliser des moyens illimités de nuire à l'ennemi et les conséquences qui en découlent concernant la prohibition de l'utilisation de certaines armes telles que les armes chimiques[76]; l'interdiction de recourir à certaines méthodes de combat comme la perfidie[77]; ainsi que la protection de certains biens tels que les biens culturels[78].

Mais le Tribunal ne s'est pas contenté de recenser les normes coutumières régissant la conduite des hostilités lors d'un conflit armé non international: il a franchi un pallier supplémentaire en affirmant que la violation desdites normes était susceptible d'engendrer la responsabilité pénale individuelle de son auteur[79]. Cette allégation, qui pourrait paraître d'un banal affligeant à l'observateur extérieur, n'allait pourtant pas de soi, car – ainsi qu'on l'a déjà noté – aucun des instruments conventionnels régissant les conflits armés non internationaux n'avait prévu un régime de responsabilité pénale applicable aux délinquants. La Chambre d'appel a justifié sa conclusion principalement en invoquant le précédent découlant de la position du Tribunal militaire international de Nuremberg face à une problématique similaire. Ce dernier avait affirmé que l'absence de toute disposition conventionnelle ne pouvait suffire à entraver la répression pénale des individus coupables de violations graves aux lois et coutumes de la guerre dès lors que la règle incriminée faisait l'objet d'une reconnaissance claire et non équivoque au niveau du droit international et que la pratique des États reflétait une intention de cri-

74 *Tadic*, décision du 2 octobre 1995 (para. 100 et suivants) ; *Martic*, décision du 8 mars 1996 (para. 10-15) ; *Kupreskic*, jugement du 14 janvier 2000 (para. 521).

75 *Martic*, décision du 8 mars 1996 (para. 14-15).

76 *Tadic*, décision du 2 octobre 1995 (para. 119 et suivants) ; *Martic*, décision du 8 mars 1996 (para. 11). Notons, en passant, que le Statut de Rome n'a pourtant pas retenu d'incrimination découlant de l'usage des armes chimiques dans le contexte des conflits armés non internationaux.

77 *Tadic*, décision du 2 octobre 1995 (para. 125).

78 Pour la Chambre d'appel, l'art. 19 de la Convention de La Haye de 1954 relative à la protection des biens culturels en cas de conflit armé ferait désormais partie intégrante du droit coutumier; *Tadic*, décision du 2 octobre 1995 (para. 98).

79 Précisons que cette conclusion, présentée dans le contexte de la conduite des hostilités, est naturellement transposable aux violations des normes afférentes au droit de Genève commises lors d'un conflit armé non international.

minaliser sa violation. S'appuyant tant sur des législations nationales[80] que sur des manuels militaires, des résolutions du Conseil de sécurité des Nations Unies et des accords conclus par les Parties belligérantes sous les auspices du CICR, le TPIY a conclu:

> « All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife »[81].

Le traitement des personnes au pouvoir de l'ennemi (droit de Genève)

De manière très schématique, deux problématiques successives se sont posées en ce qui concerne ce que l'on qualifie communément de droit de Genève, c'est-à-dire l'ensemble des normes qui tendent à assurer la sauvegarde des personnes au pouvoir de l'ennemi. La première visait à tracer les contours précis de la notion de « personne protégée » en DIH. Plus précisément, il s'agissait de déterminer quels individus – ou catégories d'individus – bénéficiaient de la protection prévue par la IVe Convention de Genève. Une fois précisément délinéé le champ d'application *ratione personae* de cette Convention, une seconde problématique s'est alors naturellement présentée quant à l'interprétation des droits susceptibles d'être invoqués par les personnes protégées.

La notion de « personne protégée » au sens de la IVe Convention de Genève

L'expression « personne protégée » est polymorphe: si elle vise toujours à qualifier les individus bénéficiant des normes protectrices du DIH, les personnes visées diffèrent selon l'instrument conventionnel contenant cette locution. La jurisprudence du TPIY s'est focalisée, jusqu'à présent, sur le contenu de cette expression au sens de la IVe Convention de Genève relative à la protection de la population civile.

80 En particulier, mais non exclusivement, sur les législations internes pertinentes de l'État prédécesseur (la RSFY) et de l'État successeur (la Bosnie-Herzégovine); *Tadic*, décision du 2 octobre 1995 (para. 135).

81 *Tadic*, décision du 2 octobre 1995 (para. 134).

La problématique a été posée en des termes identiques dans tous les jugements ayant abordé cette question[82] : il s'agissait de déterminer si des ressortissants bosniaques détenus dans un camp situé en Bosnie pouvaient bénéficier de la protection octroyée par la IVe Convention aux civils internés. La controverse découlait essentiellement du fait qu'aux termes de l'article 4 de cet instrument conventionnel « (s)ont protégées par la Convention les personnes qui, à un moment quelconque et de quelque manière que ce soit, se trouvent, en cas de conflit ou d'occupation, au pouvoir d'une partie au conflit ou d'une puissance occupante dont elles ne sont pas ressortissantes »[83]. Une interprétation littérale de cette formulation conduirait donc à exclure du bénéfice de la Convention tous les nationaux au pouvoir de l'État dont ils sont ressortissants et donc les ressortissants bosniaques, quelle que soit leur origine, au pouvoir d'une partie adverse de même nationalité. Cette vision correspondrait d'ailleurs très certainement à la conception souverainiste qui prévalait en 1949 et qui tendait à limiter au maximum toute immixtion du droit international dans les rapports entre un État et ses propres ressortissants.

Toutefois, le TPIY souligne que le critère de la nationalité, qui découlait logiquement de la typologie essentiellement inter-étatique des conflits qui prévalait lors de la rédaction des Conventions de Genève, correspond très peu aux réalités « belligènes » modernes[84]. En effet, selon le Tribunal, la désintégration de l'ex-Yougoslavie, à l'image de nombreux autres conflits récents, s'est produite essentiellement sur des critères ethniques, l'appartenance à une communauté spécifique étant devenue beaucoup plus importante que la nationalité pour établir les loyautés ou engagements. D'ailleurs, dès lors que ces conflits interethniques se doublent d'une succession d'État violente, comme ce fut le cas en l'espèce, les règles applicables en matière de nationalité restent floues. En tout état de cause, l'adoption d'une législation interne et sa mise en œuvre concrète nécessitent un délai pendant lequel la nationalité d'une partie importante de la population peut faire l'objet d'une controverse.

82 Cette problématique fut abordée de front dans le cadre de plusieurs procès dont les affaires *Tadic*, *Celebici*, et *Blaskic*.

83 Art. 4 de la Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949.

84 À cet égard, voir notamment les affaires *Tadic*, jugement du 15 juillet 1999 (para. 166), *Celebici*, jugement du 16 novembre 1998 (para. 266) et *Blaskic*, jugement du 3 mars 2000 (para. 126).

Sur de tels fondements, le TPIY a érigé en principe interprétatif l'impossibilité que le droit interne de la nationalité puisse, seul, exclure un groupe de personnes du bénéfice des normes protectrices du DIH. Il souligne conséquemment la nécessité d'adapter les conditions posées à l'article 4 de la IVe Convention aux réalités contemporaines, quitte à exclure la condition de nationalité pour permettre l'octroi d'un statut protecteur aux individus même s'ils sont titulaires d'une nationalité identique à celle de leurs capteurs. Au critère juridique traditionnel de la nationalité vient donc se substituer un critère alternatif découlant de la condition d'allégeance à une Partie au conflit.

Plusieurs arguments juridiques ont été invoqués à l'appui de cette conclusion. Si l'on veut bien exclure les motivations – qui apparaissent tout de même très discutables – reposant sur le texte même de la Convention ainsi que sur les travaux préparatoires[85], le raisonnement s'appuie d'abord sur une interprétation téléologique de l'instrument conventionnel en cause[86]. La IVe Convention ayant pour objet et pour but d'assurer la protection des civils dans la mesure la plus large possible, le seul critère véritable présidant à son application doit être celui de l'allégeance à une Partie au conflit et, de manière correspondante, le contrôle par cette Partie du territoire ou de la population d'un autre belligérant[87]. L'argumentation du Tribunal se fonde

85 L'argument avancé repose sur l'idée qu'en 1949 déjà, le lien de nationalité n'était pas considéré comme crucial dans certaines circonstances spéciales comme dans l'hypothèse des réfugiés. De même, d'après l'art. 4(2) de la IVe Convention, les ressortissants d'États neutres ou co-belligérants ne pourraient être assimilés à des personnes protégées qu'à la condition que leur État ne dispose pas d'une représentation diplomatique normale auprès de l'État où ils sont détenus: ce qui signifie que s'ils ne peuvent pas (ou ne peuvent plus) jouir de la protection diplomatique de leur État, ils retombent alors logiquement au bénéfice de la Convention. Toutefois, il semble que ce soit précisément pour tenir compte de ces circonstances spéciales que des dispositions spécifiques ont été intégrées dans le texte de la Convention ou son commentaire. Il apparaît donc fort critiquable d'utiliser à présent des dispositions conçues comme dérogatoires pour remettre en cause l'équilibre général d'un système fondé textuellement sur la condition de nationalité.

86 «if the special legal characteristics of the Geneva Conventions and Protocols ultimately derive from their object and purposes, they in turn command the teleological interpretation of those instruments in the light of their object and purposes; an interpretation which provides the thrust and continuous drive towards perfecting the content and expanding the ambit of humanitarian protection»; G. Abi-Saab, «The specificities of humanitarian law», in C. Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, CICR, Genève, 1984, p. 273.

87 La Chambre d'appel affirme que «*not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test*»; *Tadic*, jugement du 15 juillet 1999 (para. 166).

ensuite sur le fait qu'une telle interprétation serait la seule permettant de préserver la pertinence et l'efficacité des normes des Conventions de Genève puisqu'elle supprime tout statut intermédiaire et garantit que tout individu se trouvant aux mains de l'ennemi soit protégé par le droit. Elle évite, en particulier, tout hiatus entre les IIIe et IVe Conventions et assure qu'une personne qui n'a pas droit au statut de prisonnier de guerre bénéficie alors nécessairement, en qualité de civil, de la protection octroyée par la IVe Convention. Enfin, en dernier lieu, la démonstration juridique du Tribunal repose sur l'évolution du DIH sous l'impulsion des droits de l'homme: il serait en effet contraire au concept même de droits de l'homme, qui protègent les individus contre les abus de leur propre État, d'appliquer de façon rigide la condition de la nationalité, condition apparemment insérée pour empêcher toute immixtion dans les rapports entre un État et ses propres ressortissants.

La position suivie en la matière par le TPIY force le respect. Le cheminement argumentatif courageux – qui interprète et applique la IVe Convention dans le contexte de l'ensemble du système juridique en vigueur au moment de l'interprétation[88] – dépasse la simple analyse de texte pour assurer une meilleure protection aux victimes. Pourtant, après avoir rendu hommage à la démarche, il nous incombe d'analyser brièvement les conséquences qui peuvent en découler. Et, au risque de passer pour un rabat-joie, on se doit de constater qu'elles ne sont pas toutes nécessairement positives...

La première critique que l'on peut formuler tient au doute subsistant quant au champ d'application de l'argumentation suivie par le Tribunal. Fondée sur le scénario d'un conflit interethnique se déroulant sur le territoire d'un seul État, l'interprétation donnée de l'article 4 de la IVe Convention est-elle strictement restreinte à ces hypothèses ou peut-elle s'étendre à tous les types de conflits internationaux, y compris les conflits inter-étatiques classiques? Le choix de la première option de l'alternative entraînerait indubitablement un élément de différenciation important entre les victimes de conflits armés internationaux quant à la protection octroyée. Le choix de la seconde option, plus logique juridiquement, risque de se heurter de front à l'opposition des États: on peut douter que ces derniers soient prêts, dans un contexte interétatique, à considérer comme personnes protégées leurs propres ressortissants ayant exprimé un lien d'allégeance avec l'ennemi. L'argumentaire devra proba-

88 «Tout instrument international doit être interprété et appliqué dans le cadre de l'ensemble du système juridique en vigueur au moment ou l'interprétation a lieu», CIJ, Rec. 1971, p. 31.

blement être un peu plus solide pour les convaincre que des individus, susceptibles éventuellement d'être qualifiés de « traîtres » par leur Code pénal, peuvent bénéficier du régime protecteur de la IVe Convention !

La seconde critique tient au fait que le critère retenu de l'allégeance est entaché de nébulosité. La manière dont est censée se concrétiser l'obédience à l'une des Parties au conflit demeure un mystère que le Tribunal n'a pas dissipé. On peut, certes, se contenter d'affirmer que « dans un conflit armé interethnique l'appartenance ethnique peut être considérée comme un facteur déterminant »[89], mais cette assertion ne règle pas vraiment le problème. Outre le fait que cette « appartenance ethnique » ne dicte pas systématiquement le lien d'allégeance (le Tribunal a d'ailleurs fait l'expérience d'une telle situation), ce critère peut perdre toute signification concrète, par exemple dans le cas d'un mariage mixte ou des enfants issus d'un tel mariage. D'ailleurs, le contenu juridique que recouvre la notion éminemment sociologique d'ethnicité reste sujet à caution. Des efforts de définition ont, certes, été accomplis par la Chambre de première instance du TPIR qui a affirmé, dans l'affaire *Akayesu*, qu'un groupe ethnique se caractérise par le partage d'une langue ou d'une culture commune[90]. Mais cette jurisprudence s'est avérée sans suite, la même Chambre disposant, quelques mois après, qu'il n'existe pas, en l'état, de définitions précises, généralement et internationalement reconnues, du concept d'ethnie, qui doit toujours être apprécié à la lumière d'un contexte politique, social et culturel donné[91]. On peut donc, en droit, légitimement s'interroger sur l'opportunité de l'emploi de concepts aussi vagues que ceux d'allégeance ou d'appartenance ethnique, surtout lorsqu'ils sont destinés à servir d'éléments constitutifs d'une infraction grave, susceptible d'engager la responsabilité pénale de l'individu.

Les droits octroyés aux personnes protégées : morceaux choisis

Le lecteur nous pardonnera de ne pas effectuer ici une analyse exhaustive de l'ensemble des apports de la jurisprudence du TPIY aux multiples droits attribués aux personnes protégées : un tel recensement dépasserait largement le cadre et de notre étude et de nos connaissances[92]. Beaucoup plus

89 *Blaskic*, jugement du 3 mars 2000 (para. 127).

90 TPIR, *Akayesu*, jugement du 2 septembre 1998 (para. 512).

91 TPIR, *Musema*, jugement du 27 janvier 2000 (para. 161).

92 En particulier, la problématique des crimes de nature sexuelle aurait ici mérité quelques développements substantiels, d'autant que la jurisprudence du Tribunal n'a pas été linéaire en la matière.

humblement, l'objectif de cette section se limite donc à présenter de manière cursive, et sans transition, les points saillants de la jurisprudence en la matière, à mettre en relief les innovations notables sans omettre toutefois d'indiquer les difficultés qu'elles sont susceptibles de poser éventuellement à l'avenir.

- La notion de traitements inhumains

La jurisprudence du Tribunal certifie que la notion de « traitements inhumains » ne se limite pas au fait de causer intentionnellement de grandes souffrances ou des atteintes graves à l'intégrité physique ou mentale et à la santé, mais s'étend aussi aux actes portant atteinte à la dignité humaine[93]. Pourtant, lors de la négociation du document intitulé « Éléments des crimes » destiné, rappelons-le, à assister la future CPI dans l'interprétation et l'application des dispositions relatives aux crimes, il a été décidé de ne pas intégrer ces atteintes à la dignité humaine dans la catégorie des « traitements inhumains », au motif que ces actes seraient déjà couverts par le crime « d'atteinte à la dignité de la personne, notamment les traitements humiliants et dégradants »[94]. Or, si cette classification n'a aucune conséquence dans le contexte du Statut de Rome, elle peut en avoir en ce qui concerne l'interprétation des Conventions de Genève puisque, selon la classification adoptée, le régime des infractions graves (et donc de la juridiction universelle) s'applique ou ne s'applique pas.

- La notion de torture

La Convention des Nations Unies de 1984 contre la torture requiert, notamment, la présence de deux éléments pour que l'existence de ce crime soit constatée, à savoir, premièrement, la poursuite d'un but précis (obtenir une information ou une confession, punir, intimider ou contraindre...) et, deuxièmement, que l'acte soit commis à l'instigation, avec le consentement ou l'acquiescement d'un officier public ou d'une personne agissant en capacité officielle. La jurisprudence initiale du Tribunal – arguant du caractère coutumier de cette Convention – a confirmé l'exigence de ces deux éléments, qui ne figurent pourtant pas dans le Statut de Rome[95]. Lors de la négociation du document « Éléments des crimes », certaines délégations ont

93 *Celebici*, jugement du 16 novembre 1998 (para. 544) ; *Blaskic*, jugement en date du 3 mars 2000 (para. 155).

94 Art. 8(2)(b)(xxi) du Statut de Rome. Voir Dörmann, *op. cit.* (note 46), pp. 786-787.

95 *Furundzija*, jugement du 10 décembre 1998 (para. 160-162) ; *Celebici*, jugement du 16 novembre 1998 (para. 459 et 494). La jurisprudence récente fait toutefois preuve d'une plus grande prudence à cet égard ; *Kunarac*, jugement du 12 juin 2002 (para. 483 et suivants).

d'ailleurs maintenu que l'approche fondée sur ces deux critères était la seule permettant de distinguer la torture des traitements inhumains; d'autres délégations, en revanche, ont soutenu que le critère déterminant à cet égard était uniquement fondé sur le degré de douleur ou de souffrance infligée. La décision finalement adoptée à titre de compromis a consisté à maintenir l'exigence d'un but précis, mais à supprimer la référence à toute capacité officielle, solution à laquelle semble se ranger la Chambre d'appel du Tribunal dans sa récente jurisprudence en l'affaire *Kunarac*[96]. Il n'en reste pas moins qu'une analyse cursive des « Éléments des crimes » confirme que le seul élément distinctif des crimes de torture d'un côté, et de traitement cruel et inhumain de l'autre, réside dans l'objectif poursuivi par le délinquant. La contradiction est ici flagrante avec la jurisprudence du Tribunal, qui a toujours soutenu que « le degré de souffrance physique ou psychologique requis pour qualifier des actes de traitements cruels est moindre que dans le cas de la torture »[97].

- La notion de pillage

Le pillage fait partie des infractions systématiquement inscrites sur la liste des actes entraînant la responsabilité pénale de leur auteur mais qui n'ont pas, pour autant, fait l'objet d'une définition conventionnelle précise. La Chambre de première instance compétente en l'affaire *Jelisic* a donc comblé une lacune importante en caractérisant le pillage comme toute soustraction frauduleuse de biens publics ou privés appartenant à l'ennemi ou à la partie adverse, perpétrée dans le cadre d'un conflit armé et liée à celui-ci[98]. Le problème essentiel en l'espèce découlait des affirmations développées par la défense dans l'affaire *Celebici*, pour cantonner la notion de pillage aux actes accomplis sur une grande échelle, impliquant une nature et un degré que l'on pourrait qualifier de systématiques. Une telle thèse conduisait les conseils des accusés à exclure de toute incrimination pour pillage des actes accomplis par de simples soldats dérobant aux civils des objets de faible valeur. De telles allégations se heurtaient de front à une partie de la pratique et de la doctrine récentes qui, au contraire, restreignent la notion de pillage aux seuls actes accomplis par un ou plusieurs militaires dans un but d'appropriation person-

96 *Kunarac*, jugement du 12 juin 2002 (para. 142-148 et 153-156).

97 Voir, notamment, *Kvocka*, jugement du 2 novembre 2001 (para. 161). Cf. K. Dörmann, « War Crimes under the Rome Statute for the International Criminal Court, with a special focus on the negotiations on the Elements of Crimes » (à paraître), *Max Planck Yearbook of United Nations Law*, 2003, Vol. 7.

98 *Jelisic*, jugement du 14 décembre 1999 (para. 29) ; *Blaskic*, jugement du 3 mars 2000 (para. 48).

nelle ou privée[99]. Or, plutôt que de se limiter à affirmer que des actes individuels de pillage commis par des soldats isolés mus par la cupidité pouvaient engager la responsabilité pénale individuelle de leurs auteurs, approche qui aurait suffi en l'espèce, la Chambre a jugé que la notion de pillage, qui offre une portée générale, s'étendait également à la saisie organisée de biens, opérée dans le cadre d'une exploitation économique systématique du territoire occupé[100]. Cette définition extensive apparaît pourtant contradictoire avec les éléments du crime requis au sens de l'article 8 para. 2 b) xvi) du Statut de Rome, qui implique une intention de spolier le propriétaire des biens et de se les approprier à des fins privées ou personnelles[101].

- La détention illégale de civils

Le DIH considère traditionnellement que l'internement ou la détention de civils[102] font partie des mesures de sécurité susceptibles d'être appliquées par un État en période de conflit armé international[103]. Cependant,

99 Voir le récent Manuel français de droit des conflits armés qui dispose: «Le pillage constitue un acte de spoliation par lequel un ou plusieurs militaires s'approprient des biens pour un usage personnel ou privé, sans le consentement du propriétaire de ces biens» (p. 36) ; *cf.* également le Manuel militaire australien qui définit le pillage comme «the violent acquisition of property for private purpose» ou encore «the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes» (Australian Defense Force Manual, para. 743 et 1224. Le Manuel publié par le CICR intitulé *Fight it Right*, *op. cit.* (note 19) fait aussi référence à ce critère, toutefois considéré comme non impératif: «It is taking advantage of the chaos of war, or using force or the threat of force in wartime to steal property, usually to satisfy private greed», p. 59 (para. 1004.1).

100 *Celebici*, jugement du 16 novembre 1998 (para. 590) ; *Kordic*, jugement du 21 février 2001 (para. 352).

101 Noter que cet élément figure de manière identique pour l'incrimination de pillage dans un contexte non international (art. 8(2)(e)(v)). Cela n'implique en aucun cas que la «saisie organisée de biens opérée dans le cadre d'une exploitation économique systématique du territoire occupé» visée par le Tribunal ne soit pas une infraction: elle tomberait plutôt sous la catégorie des appropriations de biens non justifiées par des nécessités militaires et exécutées à grande échelle de façon illicite et arbitraire (voir les art. 50 de la I^e^ Convention, 51 de la IIe, 146 de la IVe et l'art. 4 du Protocole II ainsi que le Statut de Rome, arts. 8(2)(b)(xiii) et 8(2)(e)(xii)).

102 On distingue en général les mesures d'internement et de détention par le fait que les premières sont adoptées par des autorités administratives ou militaires, alors que les secondes sont en principe le fait d'autorités judiciaires; F. Bouchet-Saulnier, *Dictionnaire pratique du droit humanitaire*, La découverte, Paris, 1998, p. 230.

103 Dans le cadre d'un conflit armé international, la possibilité d'adopter des mesures de contrôle et de sécurité (dont l'internement) figure notamment aux articles 5, 27, 41 et 78 de la IVe Convention de Genève. Elles peuvent concerner, par exemple, les civils ressortissants ennemis résidant sur le territoire national ou les membres de la population des territoires occupés qui constituent une menace. En ce qui concerne les conflits armés non internationaux, notons qu'aucune disposition conventionnelle ne fait spécifiquement référence à des mesures d'internement; les articles 4 et 5 du Protocole II régissent toutefois la situation des personnes privées de liberté pour des motifs en relation avec le conflit armé.

hormis l'hypothèse dans laquelle la personne civile réclame elle-même l'internement, on estime que de telles mesures ne peuvent être justifiées que si la sécurité de la puissance au pouvoir de laquelle ces personnes se trouvent les rend absolument nécessaires[104]. La Chambre de première instance se situe dans le droit fil de cette ligne classique; elle affirme d'abord que:

> «(...) la liberté de circulation des civils «ennemis» peut en temps de guerre être limitée, voire, si les circonstances l'exigent, être suspendue. C'est pourquoi le droit à la liberté de circulation ne figure pas parmi les droits absolus consacrés par les Conventions de Genève. Cependant, cela ne signifie point qu'il y a une suspension générale de ce droit pendant le conflit armé. Au contraire, les règles concernant les civils sur le territoire d'une partie à un conflit armé procèdent de l'idée que la liberté personnelle des personnes civiles devrait être préservée. Il s'agit donc d'un droit relatif qui peut être restreint»[105].

Elle en déduit ensuite que seule la nécessité absolue, fondée sur les exigences de la sécurité de l'État, peut justifier le recours à ces mesures et encore à l'unique condition que cette sécurité ne puisse être préservée par d'autres moyens moins rigoureux[106].

Cela étant, la Chambre note opportunément que les mesures de contrôle et de sécurité que la puissance détentrice est autorisée à prendre ne sont pas spécifiées dans les dispositions applicables de la IVe Convention et que, par conséquent, la nature de l'activité préjudiciable à la sécurité interne ou externe de la puissance détentrice et susceptible de justifier un internement est largement laissée à la seule appréciation des autorités de cette dernière[107]. Pourtant, elle poursuit affirmant que cette large marge d'appréciation ne peut se résumer à l'arbitraire; son principal apport a consisté alors à délinéer plus précisément les circonstances préjudiciables à la sécurité pouvant légitimer des mesures restrictives de liberté.

À cet égard, le Tribunal note que l'évolution récente des normes du droit international rejette sans ambiguïté l'idée que les décisions d'emprisonnement

104 Voir l'art. 42(1) de la IVe Convention de Genève.

105 *Celebici*, jugement du 16 novembre 1998 (para. 565).

106 *Celebici*, jugement du 16 novembre 1998 (para. 576). La Chambre d'appel en déduit, dans son jugement du 20 février 2001 en la même affaire, que «la détention de civils contre leur gré lorsque la sécurité de la Puissance détentrice ne l'exige pas est illégale».

107 «Il revient en grande partie aux autorités de l'État de décider des activités préjudiciables à la sécurité intérieure ou extérieure de l'État qui justifient l'internement ou la mise en résidence forcée»; *Celebici*, jugement du 16 novembre 1998 (para. 574).

puissent constituer *de facto* une mesure collective visant un groupe spécifique de personnes, essentiellement en raison de son origine ethnique. Il doit s'agir, par conséquent, de mesures individuelles, prises au coup par coup, et qui ne peuvent être motivées simplement par le fait qu'un sujet soit de la nationalité ou de la même opinion qu'une Puissance ennemie[108]. De même, la Chambre affirme que le fait d'être un homme en âge de porter les armes ne peut seul justifier l'application de telles mesures[109]. Seules les menées subversives conduites sur le territoire d'une partie au conflit ou les actes favorisant directement une partie ennemie tomberaient dans la catégorie des agissements attentatoires à la sécurité de l'État, et légitimeraient l'internement d'une personne qui représenterait, par ses activités, connaissances ou qualifications, une menace véritable pour la sécurité d'une partie belligérante[110]. On peut cependant regretter que la Chambre se soit arrêtée en si bon chemin et qu'elle ait renoncé à établir si la détention de civils en possession d'armes qui auraient pu être ou auraient effectivement été utilisées contre les forces de Bosnie-Herzégovine était nécessaire pour assurer la sécurité de la puissance détentrice et pouvaient donc se justifier au regard du DIH[111]

Par ailleurs, la Chambre rappelle que le droit conventionnel impose le respect d'un certain nombre de garanties procédurales pour les civils ainsi détenus, parmi lesquelles figure en bonne place le droit d'introduire un recours contre la décision de mise en détention et le droit de voir cette décision régulièrement reconsidérée[112]. En tout état de cause, et même si la détention initiale des civils était justifiée au regard du DIH, la détention prolongée constituerait donc une violation dès lors que les détenus n'ont pas bénéficié de ces garanties procédurales fondamentales[113].

108 *Celebici*, jugement du 16 novembre 1998 (para. 1130-1134).

109 *Celebici*, jugement du 16 novembre 1998 (para. 576-577).

110 *Celebici*, jugement du 16 novembre 1998 (para. 576-577). Dans l'affaire *Kordic*, la Chambre de première instance a spécifié que « la notion d'activité préjudiciable à la sécurité de l'État vise avant tout l'espionnage, le sabotage, la collusion avec le gouvernement ou les ressortissants ennemis, et exclut, par exemple, l'attitude politique d'un individu à l'égard de l'État » ; jugement du 21 février 2001 (para. 280).

111 *Celebici*, jugement du 16 novembre 1998 (para. 1131). La Chambre se contente beaucoup plus modestement d'affirmer, exemples à l'appui, que certains des civils détenus ne pouvaient représenter une menace suffisamment grave pour justifier leur détention. Elle en conclut donc qu'un grand nombre de personnes ont été incarcérées dans le camp de *Celebici* sans qu'aucune raison sérieuse ou légitime ne permette de conclure qu'ils menaçaient la sécurité de l'État bosniaque.

112 Voir l'art. 43 de la IVe Convention de Genève.

113 Le Tribunal constate qu'une commission d'enquête militaire a bien été créée afin de déterminer les crimes éventuellement commis par les personnes détenues dans ce camp. Mais l'autorité de ladite commission se limitait de fait à ouvrir des enquêtes sur les prisonniers et à les interroger pour obtenir des informations sur d'autres personnes non encore détenues et soupçonnées de rébellion armée. Cette commission

Conclusion

Au terme de cette brève présentation de la jurisprudence du TPIY, on peut affirmer que l'apport de cette jurisprudence au droit international humanitaire se situe dans trois directions distinctes mais qui se recoupent les unes les autres. En premier lieu, le Tribunal a affirmé le caractère coutumier d'un certain nombre de principes qui lient donc tous les États, qu'ils soient ou non parties aux instruments conventionnels qui les contiennent. Par le biais de la consécration du caractère coutumier de certaines normes, le Tribunal a, deuxièmement, contribué à considérablement rétrécir le fossé séparant les règles substantielles applicables dans le cadre des conflits armés internationaux et non internationaux. Enfin, par son interprétation parfois très libérale de certaines dispositions relativement anciennes du droit de La Haye comme du droit de Genève, le Tribunal a contribué à une certaine adaptation du DIH pour tenir compte des réalités modernes.

La vraie question n'est donc pas de savoir si le TPIY a beaucoup apporté au DIH – tout le monde s'accordera sur ce point – mais, assez bizarrement, de déterminer s'il ne lui a pas trop apporté. Geoffrey Best se fait, dans son principal ouvrage, l'écho d'une anecdote qui nous aidera à préciser ce point. Au cours de la négociation des Conventions de Genève de 1949, une représentante de la délégation française, probablement irritée par la position jugée trop conservatrice du colonel Hodgson, chef de la délégation australienne, interpella ce dernier, lui demandant s'il considérait que l'objet de la Conférence visait à protéger les intérêts des civils ou des États. La réponse tomba, cinglante: tant les États que les civils sont titulaires de droits et d'obligations au regard du DIH, et le succès de la Conférence dépend uniquement de la capacité d'assurer un compromis équilibré entre les deux[114]! Le message sous-jacent est simple: l'objectif final du DIH, qui consiste à assurer la protection des victimes contre les effets des hostilités, ne pourra être atteint qu'avec le consentement et la participation directe des États. En effet, compte tenu des circonstances particulières dans lesquelles ce *corpus iuris* s'applique et des intérêts en jeu, toute tentative de développement du DIH contre la volonté des États semble vouée à l'échec.

n'avait pas les pouvoirs nécessaires pour prononcer définitivement la libération des prisonniers détenus sans motifs valables. Et même lorsqu'ils en avaient fait la demande, les membres de la commission n'avaient aucun moyen de vérifier si les prisonniers étaient effectivement libérés; *Celebici*, jugement du 16 novembre 1998 (para. 1135-1137).

114 G. Best, *War and Law since 1945*, Clarendon Press, Oxford, 1997, pp. 105-106.

On peut, certes, argumenter que, conscients des difficultés inhérentes à toute réforme conventionnelle, les États se seraient accordés sur la voie coutumière pour rénover le DIH et l'adapter aux réalités sociales contemporaines. Loin de créer du droit, le TPIY aurait alors simplement fait preuve de sa très grande capacité d'appréhender une réalité coutumière en perpétuel mouvement; pour reprendre une image fort heureuse, sa jurisprudence ne serait donc que le reflet d'une « coutume à grande vitesse »[115]. Pourtant, il faut bien l'admettre, certains développements du Tribunal semblent relever bien plus de la création prétorienne que de la pratique et de l'*opinio iuris* des États.

On peut alors imaginer, sur la base de l'aura dont jouit le Tribunal et de la qualité de ses raisonnements, que de telles assertions joueront un rôle d'aiguillon et conduiront les États à endosser, *ex post facto*, la réforme du DIH conduite par les juges du Tribunal. C'est, naturellement, tout le mal que nous leur souhaitons. Cela étant, il n'est pas non plus totalement exclu qu'un certain nombre d'États contestent les conclusions du Tribunal, jugées trop progressistes. Les conséquences immédiates seraient alors désastreuses tant pour le DIH lui-même que pour la crédibilité de la justice pénale internationale. Cela n'empêcherait pourtant pas ces idées, toujours orientées vers une meilleure protection des victimes, de triompher à terme, lorsque les générations futures de juristes internationaux s'en seront imprégnées...

115 L. Condorelli, « La Cour pénale internationale : un pas de géant (pourvu qu'il soit accompli...) », *RGDIP*, 1999 (1), p. 12.

Abstract

Ten years after the creation of the International Criminal Tribunal for the former Yugoslavia: evaluation of the impact of its jurisprudence on international humanitarian law

Jean-François Quéguiner

The initial uncertainties as to the eventual capacity of the International Criminal Tribunal for the former Yugoslavia to accomplish its mandate can definitively be relegated to the archives of history and the creation of this Tribunal be heralded as a major step in the quest to develop mechanisms to implement international humanitarian law. But after ten years of existence, it appears that the role of the Tribunal cannot be limited to the mere enforcement of international humanitarian law: while exercising its repressive function, the Tribunal has been interpreting this complex area of law and — in so doing — has greatly contributed to a more progressive vision of international humanitarian law. The aim of this article is to briefly set out the more important contributions of this judicial hermeneutic reading of international humanitarian law.

It is argued that the Tribunal contributed to international humanitarian law in three ways, which interact with each other: first, by affirming the customary nature of a certain number of principles; second, by reducing the substantive gap separating the rules applicable to international versus non-international armed conflicts; and finally, by adapting international humanitarian law to modern realities through a liberal interpretation of certain relatively old provisions of humanitarian treaties.

Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict

JAMES G. STEWART*

International humanitarian law applies different rules depending on whether an armed conflict is international or internal in nature. Commentators agree that the distinction is "arbitrary,"[1] "undesirable,"[2] "difficult to justify,"[3] and that it "frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs". [4] The views are not new. In 1948 the International Committee of the Red Cross (ICRC) presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law "[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties".[5] In 1971, it submitted a draft to a Conference of Government Experts recommending a further proposition that was intended to make the whole body of international humanitarian law applicable to a civil war if foreign troops intervened.[6] The ICRC put forward a more subtle proposal along the same lines the following year.[7] Finally, in 1978 the Norwegian delegation of experts to the same Conference proposed that the two categories of armed conflict be dropped in favour of a single law for all kinds of armed conflict, again without success.[8] Somewhat surprisingly, calls for a unified body of international humanitarian law have since died out, even though "the manifold expressions of dissatisfaction with the dichotomy between international and internal armed conflicts"[9] persist.

* LLB (Hons) / BA, Dipl. Droit International Humanitaire (ICRC), Barrister and Solicitor of the High Court of New Zealand. I am greatly indebted to Neil Boister of the University of Canterbury and Gabriël Oosthuizen for their criticism of an earlier version of this paper. Errors or misconceptions are nevertheless mine alone. I am also enormously grateful to the staff at Victoria University of Wellington's Law Library, without whose generosity this paper would not have been possible.

This article revives the calls for a single law of armed conflict by illustrating the failure of the current regime to deal with conflicts that contain both international and non-international elements, namely internationalized armed conflicts. While the article does not attempt to comprehensively plot the content of a single law applicable to all armed conflict, it does sketch the outlines of a unified regime that might better account for the intricacies of internationalized warfare.

1 R. J. Dupuy and A. Leonetti "La notion de conflict armé à caractère non international" in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971, p. 258. "Elle produit une dichotomie arbitraire entre les conflits, puisque la distinction, purement formelle, ne se fonde pas sur une observation objective de la réalité ...". See also G. Aldrich, "The laws of war on land", *American Journal of International Law*, Vol. 94, 2000, p. 62. "Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories – international and non-international – into which international humanitarian law is divided."

2 "It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict." I. Detter, *The Law of War*, Cambridge University Press, London, 2002, p. 49.

3 C. Warbrick and P. Rowe, "The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadić case", *International & Comparative Law Quarterly*, Vol. 45, 1996, p. 698.

4 "The 'distinction' between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs." W. Michael Reisman and J. Silk, "Which law applies to the Afghan conflict?", *American Journal of International Law*, Vol. 82, 1988 p. 465.

5 J. Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949*, Vol. III: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 31 (hereinafter *Commentaries*).

6 The paragraph reads: "When, in case of non-international armed conflict, one or the other party, or both, benefits from the assistance of operational armed forces afforded by a third State, the parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts." International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts*, Geneva, 1971, para. 284.

7 The proposal sought to apply the full body of international humanitarian law to internal conflicts when third States intervened in support of both sides. See International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts*, Geneva, 1972, Vol. I, para. 2.332.

8 See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records*, Summary Record, Vol. 5, p. 91 (CDDH/SR.10) (1978).

9 S. Boelaert-Suominen, "Grave breaches, universal jurisdiction and internal armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?" *Journal of Conflict and Security Law*, Vol. 5, No. 63, 2000, at section 5.

The reality of internationalized armed conflict

The term "internationalized armed conflict" describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.[10] The most transparent internationalized internal armed conflicts in recent history include NATO's intervention in the armed conflict between the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999[11] and the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides of the internal armed conflict in the Democratic Republic of Congo (DRC) since August 1998.[12]

The proliferation of nuclear weaponry and its inhibiting impact on direct forms of aggression during the Cold War led to many less transparent internationalized armed conflicts, which although superficially internal were in fact "wars by proxy", taking place in the territory of a single State with the covert intervention of foreign governments.[13] The United States government's support of the *contras* in Nicaragua in the early 1980s is perhaps the best documented example.[14]

Motivations for intervention in civil wars may have changed since the end of the Cold War, but the increased economic interdependence of States born of *globalization*, the development of nuclear capabilities among previously incapable states, the greater incidence of terrorism in Western

10 D. Schindler, "International humanitarian law and internationalized internal armed conflicts", *International Review of the Red Cross*, No. 230, 1982, p. 255.

11 S. Alexeyevich Egorov, "The Kosovo crisis and the law of armed conflicts", *International Review of the Red Cross*, No. 837, 2000, p.183.

12 "By 1999, a new war was raging in the renamed Democratic Republic of the Congo. The Rwandan and Ugandan governments now supported the anti-Kabila opposition. Zimbabwe, Angola and other States backed Kabila." M. Shaw, "From the Rwandan genocide of 1994 to the Congo civil war", <http://www.sussex.ac.uk/Users/hafa3/rwanda.htm>. See also Human Rights Watch, "Eastern Congo ravaged: Killing civilians and silencing protest", Vol. 12, No. 3(A), <http://www.hrw.org/reports/2000/drc/Drc005-01.htm#P68_1748>.

13 G. Abi-Saab, "Non-international armed conflicts", in *International Dimensions of Humanitarian Law*, Henry Dunant Institute / Unesco, Geneva, 1988, p. 222.

14 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14.

countries and the increasing scarcity of natural resources all provide continuing incentives for foreign intervention in domestic conflicts. As a reflection of that reality, internal conflicts are presently more numerous, brutal and damaging than their international counterparts,[15] despite the fact that the State remains the main war-waging machine.[16] Consequently, international humanitarian law still very much exists against a backdrop "d'une fusion des éléments politiques internes et internationaux dont l'effet cumulatif est le phénomène de conflit interne internationalisé: l'intervention d'Etats tiers dans les guerres civiles est un fait constant."[17] There is almost invariably some form of foreign state involvement in internal armed conflicts.[18]

The difficulty from a humanitarian perspective is that although internationalized armed conflicts have special features distinguishing them from both international and internal armed conflicts,[19] there is absolutely no basis whatsoever for a halfway house between the law applicable in internal armed conflicts and that relevant to international warfare.[20] Therefore, the application of international humanitarian law to internationalized armed conflicts involves characterizing events as either wholly international or wholly non-international according to the various tests espoused in the Geneva Conventions, their Protocols and customary international law.

The legal dichotomy

Thresholds for the application of international humanitarian law

Traditionally, international humanitarian law has sought to regulate the conduct of and damage caused by conflict between rather than within States. The distinction was based on the premise that internal armed violence

15 B. De Schutter and C. Van De Wyngaert, "Non-international armed conflicts: The borderline between national and international law", *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, p. 279.

16 Detter, *op. cit.* (note 2), p. 38.

17 R. Bierzanek, "Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés" in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984.

18 According to Detter "... most apparently 'internal' wars do, in fact, receive some kind of outside support." Detter, *op. cit.* (note 2), p. 40. See also L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, London, 2000, p. 46: "Even in the post-Cold War international order, outside involvement in internal armed conflicts is still far from uncommon."

19 H-P. Gasser, "Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon", *American University Law Review*, Vol. 33, 1983, p. 157.

20 C. Byron, "Armed conflicts: International or non-international?", *Journal of Conflict and Security Law*, Vol. 6, No. 1, June 2001, p. 87.

raises questions of sovereign governance and not international regulation. On that basis, the 1899 and 1907 Hague Conventions respecting the Laws and Customs of War on Land applied solely to international warfare.[21]

The Geneva Conventions of 1949 continued to very heavily favour regulation of inter-State rather than domestic warfare, the vast majority of the substantive provisions contained in the Geneva Conventions of 1949 applying solely to:

> "...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." [22]

Although the scope of the article was more restrictive than some would have hoped, the wording marked an important departure from earlier conventions that had required more formalistic declarations of war.[23] From the perspective of internationalized armed conflicts, which are often characterized by covert rather than direct military action, the change was critical.

In addition, the international community's experience of the Spanish Civil War, which was in fact heavily internationalized,[24] and the massive atrocities committed against minority groups within individual nations during the Second World War, contributed to a political willingness to at least superficially regulate some aspects of civil war. After considerable disagreement in giving that willingness form, Article 3 common to the four Geneva Conventions of 1949 extended the most rudimentary principles of humanitarian protection to those persons taking no active part in hostilities and placed *hors de combat*.[25] The problematic issue of defining internal armed

21 Aldrich, "The law of war on land", *op. cit.* (note 1), p.54.

22 Article 2 common to the four Geneva Conventions of 1949.

23 Reisman and Silk, *op. cit.* (note 4), p. 461.

24 K. D. Heath, "Could we have armed the Kosovo Liberation Army? The new norms governing intervention in civil war", *UCLA Journal of International Law & Foreign Affairs*, Vol. 4, 2000, pp. 272 – 274.

25 The principles include prohibition of: "(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". Common Article 3(2) also stipulates that "[t]he wounded and sick shall be collected and cared for".

conflict was circumvented by a negative definition that rendered common Article 3 applicable in "armed conflicts not of an international character," even if "one of the most assured things that might be said about the words 'not of an international character' is that no one can say with assurance precisely what they were intended to convey."[26] Although the substance of common Article 3 defines principles of the Conventions and stipulates certain imperative rules, the article does not contain specific provisions.[27] In addition, the scant principles enumerated in it apply only where the intensity of hostilities reaches the level of "protracted armed violence between governmental authorities and organised armed groups or between such armed groups."[28]

The Additional Protocols to the Geneva Conventions continued the distinction between international and non-international armed conflicts "leaving unresolved the troublesome question of the law to be applied to armed conflicts in which there are both international and non-international elements."[29] Additional Protocol I sought to reaffirm and develop the rules affecting victims of international armed conflicts, specifically indicating in Article 1 that "[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions."[30] Tellingly in relation to internationalized armed conflicts, Article 1(4) of Additional Protocol I also explicitly provides that "...armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" automatically qualify as international armed conflicts for the purposes of the Protocol. Although the subject of some considerable criticism, the inclusion of such conflicts within the scope of Article 1(4) confirms that the dichotomy

26 T. Farer, "The humanitarian laws of war in civil strife: Towards a definition of 'international armed conflict" *Revue Belge du Droit International*, 1971, p. 26 quoted in Moir, *op. cit.* (note 18), p. 46.

27 *Commentaries*, *op. cit.* (note 5), p. 48.

28 *Prosecutor v. Tadić*, IT—94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70 (hereinafter *Tadić Jurisdiction Appeal*).

29 R. Baxter, "The duties of combatants and the conduct of hostilities (Law of the Hague)" in *International Dimensions of Humanitarian Law*, Henry Dunant Institute / Unesco, 1988, p. 100.

30 The aspect of Common Article 2 that the section cross-references reads: "...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

between international and non-international conflict is far from strict or principled: international armed conflict is not a synonym for inter-State warfare, nor does the full extent of international humanitarian law presuppose that the collective belligerents must be States.[31]

The more limited development of the law applicable in non-international armed conflicts was continued by Additional Protocol II, which sought to develop and supplement Article 3 common to the Geneva Conventions of 12 August 1949.[32] While providing greater clarity to the broad principles identified in common Article 3, Additional Protocol II set a significantly higher threshold for its own application, limiting its scope:

> "to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (...) (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." [33]

Therefore, unlike common Article 3 of the Geneva Conventions, Additional Protocol II will not apply to conflicts between two warring dissident groups. It will also only apply in conflicts that in fact approximate to traditional conceptions of inter-State warfare, namely where an organized dissident armed force exercises military control over a part of the territory of a State Party.

In the context of internationalized armed conflicts, which by definition contain both international and internal elements, determining which set of rules applies and to what aspect of the conflict is critically important.

The substantive legal differences

Superficially, the difference between the substantive regulation of international armed conflicts and the laws applicable in non-international armed conflicts is striking. As a reflection of the historical bias in international humanitarian law towards the regulation of inter-State warfare, the

31 Bierzanek, *op. cit.* (note 17), p. 284: "[L]e conflit international n'est pas synonyme de conflit interétatique; de plus, le droit de la guerre ne présuppose pas, pour toutes ses règles, que les collectivités belligérantes doivent être des Etats."

32 Additional Protocol II, Art. 1.

33 *Ibid.*

1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts.[34] In addition and as previously mentioned, the law of The Hague addressing methods and means of combat and conduct of armies in the field is not applicable in internal armed conflicts.[35]

Consequently, a strict reading of the Conventions and their Protocols would suggest that a range of very significant disparities between the two regimes exist. For example, common Article 3 covers only non-participants and persons who have laid down their arms, and does little to regulate combat or protect civilians against the effects of hostilities.[36] Common Article 3 also fails to define elaborate rules of distinction between military and civilian targets[37] and makes no mention of the principle of proportionality in target selection.[38]Although Additional Protocol II does address the protection of civilian populations more explicitly,[39] its coverage does not compare to the prohibitions on indiscriminate attack,[40] on methods and means of warfare causing unnecessary suffering[41] and on damage to the natural environment,[42] that are applicable under Additional Protocol I.

Most significant from a political perspective is the fact that there is no requirement in either common Article 3 or Additional Protocol II that affords combatants *prisoner-of-war* status in non-international armed conflicts, nor is there anything preventing parties from prosecuting enemy combatants in those circumstances for having taken up arms.[43]

34 Boelaert-Suominen, *op. cit.* (note 9), footnote 31.

35 *Ibid.*

36 A. Cassese, "A tentative appraisal of the old and new humanitarian law of armed conflict", in A Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971, pp. 492-493.

37 Article 48 of Additional Protocol I states that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

38 Additional Protocol I, Articles 51(5)(b), 57(2)(iii) and 85(3).

39 Additional Protocol II, Articles 13-15, relating to the protection of the civilian population, of objects indispensable to the survival of the civilian population and of works and installations containing dangerous forces.

40 Additional Protocol I, Art. 51.

41 *Ibid.*, Art. 35(2)

42 *Ibid.*, Art. 35(3).

43 In international armed conflicts, combatants have a "right to participate directly in hostilities." Additional Protocol I, Art. 43(2).

More intricate anomalies are myriad even in instances of overlap between the two systems. For example, while common Article 3 prevents a combatant from being tortured, it does not prevent him or her from being executed for treason.[44] The uncomfortable overlap was also reinforced by the Rome Statute of the International Criminal Court (ICC Statute), which perpetuates the cumbersome international/non-international legal dichotomy. The Statute limits the grave breaches regime to international conflicts[45] and, despite similarities,[46] the serious violations provisions of common Article 3 that are applicable in "armed conflicts not of an international character" are both different and less comprehensive than their international counterparts.[47]

Yet somewhat ironically given the staunch opposition to explicitly assimilating the laws of war applicable in internal and international armed conflict, there is now extensive literature that suggests that customary international law has developed to a point where the gap between the two regimes is less marked.[48] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić Jurisdiction Appeal* held that customary rules governing internal conflicts include:

> "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property,

44 According to Farer, if an internal combatant's punishment is limited to detention, the conditions and form of detention may approach barbarity without manifestly violating common Article 3 and in spite of the more complete protection that the Third Geneva Convention would offer prisoners-of-war in circumstances of international equivalence. T. Farer, "Humanitarian law and armed conflicts: Towards the definition of 'international armed conflict'", *Columbia Law Review*, Vol. 71, 1971, pp. 39-40.

45 ICC Statute, Art. 8(2)(b).

46 The ICTY has held that there is no material difference between the term "wilful killing" within the grave breaches regime and common Article 3's prohibition of "murder" and that "torture" is the same legal phenomenon in both types of conflict. Boelaert-Suominen, *op. cit.* (note 9), citing *Prosecutor* v. *Delalić* et al., Case No. IT-96-21-T, Judgement, 16 Nov. 1998 (hereinafter "*Čelebići Judgement*"), paras 421-23. Other provisions in the ICC Statute, such as those dealing with inhuman treatment including biological experiments (Art. 8(2)(a)(ii)) and wilfully causing great suffering or serious injury to body or health (Art. 8(2)(a)(iii)), correspond to provisions in it relating to violence to life and person (Art. 8(2)(c)(i)) and outrages upon personal dignity (Art. 8(2)(c)(i)).

47 For a detailed comparison see H. Spieker, "The International Criminal Court and non-international armed conflicts", *Leiden Journal of International Law*, Vol. 13, 2000, p. 417.

48 Boelaert-Suominen, *op. cit.* (note 9); Byron, *op. cit.* (note 20); J-M. Henckaerts, "The conduct of hostilities: Target selection, proportionality and precautionary measures under international humanitarian law", in The Netherlands Red Cross, *Protecting Civilians in 21st-Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice*, 8 December 2000, p. 11.

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."[49]

The then President of the ICTY, Antonio Cassese, opined that "there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts..."[50] Similarly minded and in contrast to the terms of the ICC Statute, at least one ICTY Appeals Chamber Judge considered that "a growing practice and *opinio juris*, both of States and international organizations, has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles (...) even when they are committed in the course of an internal armed conflict."[51] In fact, the ICRC has chosen to address what it calls "the insufficiency with respect to content and coverage" of treaty law applicable in non-international armed conflicts by analysis of custom and not promulgation of further treaty-based law.[52] The position reflects the reality that national legislation,[53] international legal instruments[54] and judicial reasoning[55] all show that "states are chipping away at the two-legged edifice of the laws of armed conflict."[56]

On the other hand, the Appeals Chamber of the ICTY warns that even though the chipping away process may have come some distance in

49 *Tadić Jurisdiction Appeal, op. cit.* (note 28), para. 127.

50 Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court, in Moir, *op. cit.* (note 18), p. 51.

51 *Tadić Jurisdiction Appeal, op. cit.* (note 28), Separate Opinion of Judge Abi-Saab.

52 Henckaerts, *op. cit.* (note 48), p. 11.

53 See (Belgium): Law of 16 June 1993 concerning repression of grave breaches ("*infractions*") of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977; (Spain) Codigo Penal, Law 10/1995, of 23 November; (Finland): Chapter 11 of the Revised Penal Code Dealing with War Crimes and Crimes Against Humanity, 21 April 1995, *Finnish Law Gazette* 1995/587; (United States): Article 6 of the United States War Crimes Act 1996; (Netherlands): The Dutch Law of War Crimes 1952; (Sweden): Chapter 22, Section 11, of the Swedish Penal Code, National Council for Crime Prevention, Stockholm (1986); (Switzerland): Code Pénal Militaire, Federal Law of 13 June 1927; (Nicaragua): Ley de Codigo penal de la Republica de Nicaragua, Bibliografía Técnicas, (1997), all cited in Boelaert-Suominen, *op. cit.* (note 9), p. 4.3.1.

54 The Amended Protocol II of 1996 to the 1980 UN Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict all apply equally to international and non-international armed conflicts.

55 See Boelaert-Suominen, *op. cit.* (note 9), section 4.3.2.

56 *Ibid.*, section 5.

eroding the disparity between the laws applicable in international and non-international armed conflict, "this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[57] Consequently, the process has created what Meron describes as "a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non international."[58] Thus, the struggle to determine the law applicable in armed conflicts that as a matter of fact involve both international and internal elements, becomes a complex but important task.

The test for internationalization

In the *Tadić Appeal Judgement*, the Appeals Chamber of the ICTY stipulated that:

> "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."[59]

Agents of a State

The most frequently applied limb of the *Tadić Appeal Judgement's* test for determining whether an internal armed conflict has become international is whether "some of the participants in the internal armed conflict act on behalf of [an]other State."[60] The International Court of Justice (ICJ) was asked to answer a similar question in the *Military and Paramilitary Activities in and against Nicaragua case* in order to determine the responsibility of the United States for armed conflict between the *contras* it had

57 *Tadić Jurisdiction Appeal, op. cit.* (note 28), para. 126.

58 T. Meron, "Classification of armed conflict in the former Yugoslavia: Nicaragua's fallout", *American Journal of International Law*, Vol. 92, 1998 (hereinafter "Nicaragua's fallout"), p. 238.

59 *Prosecutor* v. *Tadić*, T-94-1-A, Judgement, 15 July 1999, para. 84 (hereafter *Tadić Appeal Judgement*).

60 *Ibid.*

sponsored and the Nicaraguan government.[61] In defining the circumstances in which an insurgent's acts can be attributed to a State, the Court applied what it described as an "effective control" test,[62] which involved assessing:

> "whether or not the relationship of the contras to the United States Government was so much one of *dependence on the one side and control on the other* that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government." [63]

In applying that test to the facts, the ICJ found that despite a high degree of participation and a general degree of control over the contras, who were highly dependent on that foreign assistance, the United States was not responsible for violations of humanitarian law perpetrated by the contras since those violations "...could be committed by members of the contras without the control of the United States."[64]

The substance of the decision and its relevance to international humanitarian law have been the subject of considerable judicial inconsistency and academic dispute, the intricacies of which are thoroughly set out elsewhere.[65] For the present purposes, it is sufficient to note that the *Tadić Appeal Judgement* overruled the Trial Chamber's support for the strict "effective control" test espoused in the *Nicaragua case*, declaring the ICJ's reasoning "unconvincing [...] based on the very logic of the entire system of international law on State responsibility."[66] As a result of the overruling, an

61 *Nicaragua case, op. cit.* (note 14). The ICJ somewhat confusingly distinguished the question of whether the acts of the contras were imputable to the United States from the question of whether the United States had breached its international obligations to Nicaragua through its relationship with the contras. The Court concluded that it "...does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras" *Nicaragua* case, *op. cit.* (note 14), para. 116.

62 The Court stated that "for this conduct to give rise to a legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed." *Ibid.*, para. 115 (emphasis added).

63 *Ibid.*, para. 109 (emphasis added).

64 *Ibid.*, para. 115.

65 See Meron, "Nicaragua's fallout", *op. cit.* (note 58), Byron, *op. cit.* (note 20) and Moir, *op. cit.* (note 18), pp. 46-52.

66 *Tadić Appeal Judgement, op. cit.* (note 59), para. 116.

apparently less stringent[67] and some suggest "dubious"[68] test for determining when parties can be considered to be acting on behalf of States has gained ascendency in international criminal law.[69] The test espouses three different standards of control under which an entity could be considered a de facto organ of a State, each differing according to the nature of the entity.[70]

Firstly, where the question involves the acts of a single private individual or a not militarily organized group that is alleged to have acted as a de facto State organ,

> "it is necessary to ascertain whether specific instructions concerning the commission of that particular act has been issued by that State to the individual or group in question, or alternatively, it must be established whether the unlawful act has been publicly endorsed or approved ex post facto by the State at issue."

In the second instance, involving control by a State over subordinate armed forces, militias or paramilitary units, "control must be of an overall character." The Appeals Chamber declared that:

> "... control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training)." [71]

The Appeals Chamber made clear that the overall control test under the second category requires that a State "*has a role in organising, coordinating or planning the military actions of* the military group, in addition to financing, training and equipping or providing operational support to that group" but

67 The Appeals Chamber in Aleksovski declared that "[b]earing in mind that the Appeals Chamber in the Tadić Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in Tadić, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests." *Prosecutor* v. *Aleksovski* IT-95-14/1-A, Judgement, 24 March 2000 (hereinafter "*Aleksovski Appeal Judgement*"), para. 145.

68 Moir describes the overruling as "...an unnecessary (and indeed dubious) piece of reasoning." Moir, *op. cit.* (note 18), p. 49.

69 *See Tadić Appeal Judgement, op. cit.* (note 59); *Aleksovski Appeal Judgement, op. cit.* (note 67), paras 120-154; *Prosecutor* v. *Delalić* et al. IT-96-21-A, Judgement, 20 February 2001, paras 5-50 (hereinafter "*Čelebići Appeal Judgement*"); *Prosecutor v. Naletilić et al*, IT-98-34-T, Judgement, 31 March 2003, paras 183-188.

70 *Čelebići Appeal Judgement, op. cit.* (note 69), para. 13.

71 *Tadić Appeal Judgement, op. cit.* (note 59), para.137.

that it "does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation."[72]

The third and final test involves "assimilation of individuals to State organs on account of their actual behaviour within the structure of a State."[73] The Appeals Chamber's only explanation of the somewhat undeveloped category consisted of three illustrations: an Austrian Jew elevated by German camp administrators to positions of authority over the other internees;[74] a Dutch national who in fact behaved as a member of the German forces;[75] and the attribution of international responsibility to Iran for acts of five Iranian "Revolutionary Guards" in "army type uniforms".[76]

Despite the now extensive literature addressing the issue,[77] application of the three-pronged test remains complex, convoluted and the subject of considerable confusion, even among Appeals Chamber Judges themselves.[78] That complexity is plainly undesirable when, as Judge Shahabuddeen persuasively reiterates in the *Blaskić Judgement*, the degree of control required to internationalize an armed conflict is simply that which "is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned."[79] The question is, after all, whether the insurgent's actions amount to "a resort to armed force between States."[80]

Moreover, if the complexity of the various tests has proved difficult to apply in the context of criminal prosecutions where the full extent of

72 *Ibid.*, para.,137 (emphasis added).

73 *Ibid.*, para.,141.

74 *Ibid.*, para.,142.

75 *Ibid.*, para.,143.

76 *Ibid.*, footnote 174.

77 See Meron, "Nicaragua's fallout", *op. cit.* (note 58), Byron, *op. cit.* (note 20); Moir, *op. cit.* (note 18), pp. 46 – 52; R. Hayden "Bosnia's Internal War and the International Criminal Tribunal", *Fletcher Forum of World Affairs*, Vol. 22, No. 1, 1998, p. 45; R. Hayden, "Biased 'Justice:' Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia" , *Cleveland State Law Review* , Vol. 47, 1999, p. 566.

78 Judge Shahabuddeen claims "I am unclear about the need to challenge *Nicaragua*. I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate." *Tadić Appeal Judgement, op. cit.* (note 59), Separate Opinion of Judge Shahabuddeen, para. 17.

79 *Prosecutor v Blaskić*, IT-95-14, Judgement, 3 March 2000 (hereinafter "*The Blaskić Judgement*") Declaration of Judge Shahabuddeen.

80 An "armed conflict" is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." *Prosecutor v Kunarac et al.*, IT-96-23/1-A, Judgement, 12 June 2002, para. 56 (hereinafter "*Kunarac Appeal Judgement*").

hostilities can be viewed in hindsight,[81] it must be debilitating for forces involved in hostilities on the ground when the very purpose of internationalized armed conflicts is often to employ covert methods of warfare. In those circumstances, relevant information is "the subject of fierce controversy of a political nature",[82] giving rise to "opinions about the facts that often differ widely."[83] The possibility that commanders of the Northern Alliance in present-day Afghanistan could be expected to assess a test the Appeals Chamber itself can hardly agree on, in the heat of battle, based on highly protected intelligence and on an ongoing basis seems slim. Certainly, "there is no reason to think that, during a conflict, one could convince a military commander to respect certain rules by arguing that he is an agent of a foreign country."[84]

The complexity also has serious effects on outside parties seeking to enforce international humanitarian norms. Not only will parties to a conflict involving various international and domestic actors struggle to determine whether detainees qualify for prisoner-of-war status, so too will the ICRC, which is attempting to encourage respect for that status.[85] Moreover, from the perspective of legality the test is a shaky foundation for the application of the very different penal sanctions provided for under the two regimes. It is hardly surprising, then, that the test has unduly delayed proceedings of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

In sum, the three-pronged test may well reflect the current state of public international law on state responsibility, but its application to international humanitarian law undermines the possibility of a consistent or principled application of humanitarian norms in internationalized warfare. As this paper will show, that failing is unfortunately inevitable in a regime that requires armed forces to artificially categorize internationalized armed conflict

81 Much of the evidence used by ICTY decisions to characterize the internal conflicts as internationalized is "[a]n ex post facto confirmation of the fact...". *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 157.

82 Gasser, *op. cit.* (note 19), p. 157.

83 *Ibid.* For example, as Reisman and Silk point out, "the war in Afghanistan has never been either purely internal or purely international. Any determination is further complicated by the lack of neutral accounts of the conflict. Afghanistan is caught up in the politics of East-West rivalry, and most reports of the conflict there rely, to a large degree, on sources with a clear preference for or tie to one side or the other in the larger rivalry." Reisman and Silk, *op. cit.* (note 4), p. 467.

84 M. Sassòli and L. M. Olson, "International decision: *Prosecutor* v. *Tadić* (Judgement)", *American Journal of International Law*, Vol. 94, July 2000, p. 576.

85 Byron, *op. cit.* (note 20), p. 88.

as wholly international or non international. The solution is thus to abandon the distinction rather than redefine the three-pronged test.

Military intervention

The second criterion the *Tadić Appeals Judgement* considered capable of rendering an internal armed conflict international occurs where "another State intervenes in that conflict through its troops."[86] In the *Blaškić Judgement*, the ICTY Trial Chamber seized on a range of factors in finding "ample proof to characterize the conflict as international" based on "Croatia's direct intervention in Bosnia-Herzegovina".[87] Although, like *Tadić*, the Chamber declined to articulate any particular standard for what degree of intervention would be sufficient to internationalize a pre-existing internal armed conflict, it was satisfied that that process had taken place by the presence of an estimated 3,000 to 5,000 regular Croatian Army personnel who were mostly stationed outside the area of conflict between the the Croatian Defence Council and the Bosnia Herzegovina Army.[88] Although the Chamber accepted evidence that the Croatian Army had had some presence in the area of conflict, the principal rationale for its decision was that the Croatian Army's hostilities:

> "in the areas outside the [conflict zone] inevitably also had an impact on the conduct of the conflict in that zone. By engaging the [Bosnia Herzegovina Army] in fighting outside the [conflict zone], the Croatian Army weakened the ability of the [Bosnia Herzegovina Army] to fight the [Croatian Defence Council] in central Bosnia."[89]

Consequently, the reasoning would seem to suggest that foreign military intervention that only indirectly affects an independent internal conflict is sufficient to render that conflict international. That supposition was subsequently confirmed by the *Kordić & Čerkez Judgement*, which found that the Croatian government's intervention in the conflict against Serb forces in Bosnia internationalized a separate conflict in which the Croatian government had no direct military involvement, namely the conflict between Bosnian Croats and Bosnian Muslims.[90] According to the Trial Chamber, it did this "by enabling the

86 *Tadić Appeal Judgement, op. cit.* (note 59), para. 84.

87 *The Blaškić Judgement, op. cit.* (note 79), paras. 75, 76 and 94.

88 The Trial Chamber went on to find that the Croatian Defence Council also acted as an agent of the Croatian government, but the analysis of military intervention was independent of that finding.

89 *The Blaškić Judgement, op. cit.* (note 79), para. 94.

90 *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001.

Bosnian Croats to deploy additional forces in their struggle against the Bosnian Muslims."[91] The decision also uses a range of evidence to reach its conclusion, but similarly fails to quantify the requisite extent of direct military force. The *Naletilić Judgement* followed suit, stating unhelpfully that:

> "There is no requirement to prove that [Army of the Republic of Croatia] troops were present in every single area where crimes were allegedly committed. On the contrary, the conflict between the [Armed Forces of the Government of Bosnia and Herzegovina] and the [Croatian Defence Council] must be looked upon as a whole and, if it is found to be international in character through the participation of the [Army of the Republic of Croatia] troops, then Article 2 of the Statute will apply to the entire territory of the conflict."[92]

In fact, a Trial Chamber's review of an indictment in *Prosecutor* v. *Rajić* is the only instance where the question is specifically addressed.[93] In that decision, the Chamber found that an internal armed conflict could be rendered international if troops intervene "significantly and continuously".[94] Unfortunately, significant and continuous intervention is hardly a term of precision. Moreover, the fact that the term is not mentioned in the *Kordić & Čerkez, Blaškić or Naletilić Judgements* raises the question of whether more minor military intervention could suffice. Certainly the Geneva Conventions apply in traditional inter-State armed conflicts "regardless of their level of intensity".[95]

91 *Ibid.*, para. 108(2).

92 *Prosecutor* v. *Naletilić et al*, *op. cit.* (note 69), para. 194.

93 *Prosecutor* v. *Rajić*, IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, 13 September 1996, para. 12 "The Appeals Chamber's decision on jurisdiction in the Tadić case did not, however, set out the quantum of involvement by a third State that is needed to convert a domestic conflict into an international one."

94 *Ibid.*, para. 21 "There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993."

95 See Baxter, *op. cit.* (note 29), p. 98: "The proper view would seem to be that 'any other armed conflict which may arise between two or more of the High Contracting Parties' should be taken as referring to any outbreak of violence between the armed forces of two states, regardless of the geographical extent and intensity of the force employed...". Fenrick argues that "the firing of weapons by soldiers of opposing sides across a contested border on the uninvited intervention of the armed forces of one State, even in small numbers, in the territory of another State may trigger the application of the Geneva Conventions in totality." M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, "Article 8, War Crimes", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes, Article by Article*, Nomos, Baden-Baden, 1999, p. 182, quoted in Byron, *op. cit.* (note 20), footnote 137. See also *Commentaries*, *op. cit.* (note 5): "It makes no difference how long the conflict lasts, or how much slaughter takes place."

There is no legal basis for treating internationalized armed conflicts any differently.

Yet allowing foreign military intervention of any intensity to internationalize all armed conflicts within a territory sits uncomfortably with the *Tadić Appeal Judgement's* initial statement on internationalized armed conflicts that presupposed that an armed conflict may "...depending upon the circumstances, be international in character alongside an internal armed conflict". Regrettably, the possibility of direct military intervention that only indirectly involves an internal armed conflict as in the *Blaškić* and *Kordić & Čerkez Judgements*, and the absence of any meaningful threshold test for what extent of direct military intervention will internationalize a conflict, suggests the absence of a principled basis for distinguishing internationalized armed conflicts from those "international in character alongside an internal armed conflict".

One explanation may be that only "direct military intervention which has the effect of supporting a campaign is enough to internationalize the conflict".[96] But as a matter of logic it is questionable whether a military intervention that does not involve insurgents acting on the intervening State's behalf could make that insurgent group qualify as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, *belonging* to a Party to the conflict and operating in or outside their own territory...",[97] with the result that it becomes meaningful to speak of "resort to armed force between States".[98] An intervening State's unintentional support of third parties does not make those parties its agents and if insurgents do not *belong* to a State for the purposes of the Geneva Conventions, their actions cannot constitute an international armed conflict.[99]

96 R. Cryer, "The fine art of friendship: *Jus in bello* in Afghanistan", *Journal of Conflict and Security Law*, Vol. 7, 2002, p. 42.

97 Third Geneva Convention, Art. 4(2) (emphasis added).

98 Common Art. 2 of the Geneva Conventions; See also *Kunarac Appeal Judgement*, *op. cit.* (note 80), para.56.

99 See for example Judge Shahabuddeen's declaration in the Blaškić Judgement where he states that "There is an armed conflict between a secessionist group and the government of the state. A foreign state intervenes militarily in support of the secessionist group and is resisted by the local state. The external military intervention clearly constitutes an armed conflict between states for the purpose of making the Fourth Geneva Convention applicable. But does the internal conflict itself become an armed conflict between states? The answer is in the affirmative if the foreign state assumes control over the secessionist group such that the use of force by the secessionist group becomes a use of force by the foreign state against the local state, thereby giving rise to an armed conflict between states within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention." *The Blaškić Judgement*, *op. cit.* (note 79), Declaration of Judge Shahabuddeen.

Even where support is an intentional consequence of intervention, the notion that mere support could internationalize an otherwise internal armed conflict would seem to contradict the "overall control" test for agency, which explicitly states that "it is not sufficient for the group to be financially or even militarily *assisted* by a State."[100] The argument that direct military intervention should be treated differently because it completely changes the course of the conflict[101] is also unconvincing, since provision of arms, financial aid and intelligence have similar effects despite being explicitly excluded by the same "overall control" test.

The more pertinent rationale for incorporating military intervention as a criterion for the internationalization of armed conflicts might be that for the purposes of the second paragraph of Article 2 common to the Geneva Conventions, such intervention qualifies as a partial occupation. That paragraph was "intended to fill the gap left by paragraph 1"[102] by stipulating that the entire Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[103] Even so, the application of the paragraph to foreign military intervention in civil conflicts poses several problems.

It is clear that the passage was adopted in order to extend the application of obligations of Occupying Powers under the Fourth Geneva Convention to *protected persons* in instances of occupation such as that which occurred when the German Reich invaded Czechoslovakia in 1939, where the latter simply capitulated without putting up armed resistance.[104] The paragraph's ability to internationalize a pre-existing and independent internal conflict is less clear, perhaps reflected by the absence of any reference to the provision in the *Blaškić, Kordić & Čerkez or Naletilić Judgements*. Moreover, while it is laudable to bring as much as possible of the humanitarian law applicable to international armed conflicts into operation, military presence need not amount to occupation and has no bearing on whether the

100 *Tadić Appeal Judgement, op. cit.* (note 59), para. 130 (emphasis added).

101 Aldrich, "The laws of war on land", *op. cit.* (note 1), p. 63. See also F. Kalshoven, *The Law of Warfare: A Summary of its Recent History and Trends in Development*, A.W. Sijthoff, Leiden, 1973, p. 15: "it seems justified for the purposes of the present subject to attribute the aforesaid internationalizing effect to intervention taking the form of direct and significant participation of foreign armed forces, as that will incontestably deprive the armed conflict of its original character as a purely intestine affair."

102 *Commentaries, op. cit.* (note 5), p. 22.

103 1949 Geneva Conventions, common Art. 2 .

104 Baxter, *op. cit.* (note 29), p. 95. See also *Commentaries, op. cit.* (note 5), p. 8.

conduct of insurgents qualifies as the use of armed force by one State against another. Allowing foreign military presence to internationalize all conflict within a territory is also inconsistent with the notion that an international armed conflict can exist "alongside an internal armed conflict," and directly contradicts the State Parties' rejection of the clause that would have allowed for the automatic application of the full body of international humanitarian law when a third State militarily intervenes.[105] In fact, the major concern behind the rejection of the suggested amendment based on direct military intervention was that it would create a massive incentive for insurgents to seek assistance from sympathetic foreign States, thereby rapidly escalating internal hostilities.[106] That concern persists in the jurisprudence identified.

Predictably, the lack of clarity in determining the circumstances in which military intervention will suffice to render an internal conflict international raises serious practical difficulties. For instance, the alleged participation of several senior Ugandan military personnel in the Rwandan Patriotic Front's war with the Forces Armées Rwandaises (FAR) between 1990 and 1994,[107] may have constituted "another State interven[ing] in that conflict through its troops."[108] That participation might have been sufficient to internationalize the conflict, contrary to the ICTR's findings that "it is a matter of common knowledge that the conflict in Rwanda was of an internal non-international character."[109] Yet even if the FAR could somehow determine the overall degree and significance of Ugandan military participation, it seems highly unlikely that it would re-question "common knowledge" in

105 See note 7.

106 D. Schindler, "The different types of armed conflicts according to the Geneva Conventions and Protocols", *Recueil des Cours*, Vol. II, 1979, p. 150.

107 "On 1 October 1990, the Ugandan army invaded Rwanda under the disguise of an internal rebellion by the Rwandese Patriotic Front (RPF) led by the Rwandan-born Ugandan General Fred Rwigema. At that time, General Paul Kagame was pursuing military studies in USA as an Ugandan military officer; in fact, he was the Deputy Chief of Military Intelligence in the Ugandan government's army (...). When Gen. Fred Rwigema died in the end of October 1990, Major Paul Kagame returned to Uganda and took charge of the RPF." Rally for the Return of Refugees and Democracy in Rwanda, "No Arms Nor Impunity For Suspected Rwandan War Criminals On Power," Press Release No. 4/2001 < http://www2.minorisa.es/inshuti/rdr26.htm> See also S. R. Shalom, "The Rwandan Genocide" <http://www.zmag.org/ZMag/articles/april96shalom.htm> "In October 1990, the Rwandan Patriotic Front, an organization of primarily Tutsi refugees from Uganda, invaded the country to obtain the right to return to Rwanda and to overthrow the dictatorial Habyarimana regime. Many of the RPF soldiers were veterans of civil war in Uganda, where they had fought for a non-ethnically based regime, some rising to high positions in the Ugandan military."

108 *Tadić Appeal Judgement*, *op. cit.* (note 59), para.84.

109 *Prosecutor* v. *Ntagerura* et al, ICTR-99-46-T, 4 July 2002, "Oral Decision", p. 9.

light of that information, to bind itself to a more rigorous body of humanitarian law on the basis of legal standards that lack any real clarity.

In sum, the inclusion of direct foreign military intervention *qua* foreign military intervention in the test for an internationalized armed conflict is at best confusing and at worst fundamentally incoherent. In either case, the implications for the principled observance of humanitarian norms are bleak.

The effect of internationalization

Even after an aspect of the test for internationalization is satisfied, the effect of that internationalization on other conflicts within the same territory and the extent to which international humanitarian law continues to apply after the end of international participation remain unclear.

"Global" versus "mixed" characterization

The position adopted by the ICTY relative to violence in the former Yugoslavia is that it can be characterized "at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict."[110] The predominance of that "mixed" approach is reflected in the inclusion of the phrase "depending upon the circumstances, [the conflict may] be international in character alongside an internal armed conflict" in the *Tadić Appeal Judgement's* original test for internationalization of internal conflict.[111] The rationale for the "mixed" approach is apparently that an act of internationalization only renders international the conflict between the parties *belonging* to States rather than all conflicts in the territory.[112] While the position is clearly justified on a strict reading of the Conventions, it is equally clear that it often involves artificially differentiating internal

110 "Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict." *Tadić Appeal Judgement, op. cit.* (note 59), para. 73.

111 See above note 59.

112 Greenwood also defends the "mixed" approach based on the danger of prejuding the status of the conflict given the marked difference between the criminal law applicable in the two circumstances; the apparent intention of the Security Council that both types of conflict occurred in the former Yugoslavia and the complexity of the conflicts in the area. C. Greenwood "International Humanitarian Law and the *Tadic* Case", *European Journal of International Law*, Vol. 7, No. 2, 1996, available at: <http://www.ejil.org/journal/Vol7/No2/art8-01.html#TopOfPage>.

aspects of armed conflicts from international, a process that has proved impractical, convoluted and imprecise. As McDonald observes:

> "[w]ith the increase in the number of internal and internationalized armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was...".[113]

In response, a number of authorities have preferred to apply the full body of international humanitarian law to an entire territory that contains multiple conflicts of international and internal origin. For instance, in the case of the former Yugoslavia, proponents of this "global view" of characterisation considered "... the situation to be an international armed conflict, arguing that to divide it into isolated segments to exclude the application of the rules of international armed conflict would be artificial."[114] The global view has considerable support: Judges Li[115] and Rodrigues,[116] the *Nikolić* and *Mladić Decisions*,[117] the United Nations Commission of Experts,[118] the United States government[119] and several academic scholars[120] have advocated or adopted a blanket classification of State territories containing international and internal armed conflicts. Even the normally reticent ICRC urged parties

113 A. McDonald, "The year in review", *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 121.

114 Meron, "Nicaragua's fallout", *op. cit.* (note 58), p. 238.

115 *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 17-18: "I am of the opinion that the submission of the Prosecution to view the conflict in the former Yugoslavia in its entirety and to consider it international in character is correct."

116 *Prosecutor* v. *Aleksovski*, Case No IT-95-14/1, Judgement, 25 June 1999, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, paras. 19 and 22: "[I]nternational humanitarian law applies throughout the territory in which an international conflict takes place (...) and for the entire duration of the hostilities, insofar as the conflict must be viewed as a whole" and "I support a global approach to the conflict in the former Yugoslavia."

117 Byron, *op. cit.* (note 20), p. 68.

118 "[T]he Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia." *Final Report of the Commission of Experts* S/1994/67, 4-27 May 1994, section II.A.

119 *Prosecutor* v. *Tadić*, IT-94-1-T, "Amicus Curiae Brief presented by the Government of the United States", 25 July 1995, cited in Meron, "Nicaragua's fallout", *op. cit.* (note 58), pp. 26-34, footnote 15.

120 Meron, "Nicaragua's fallout", *op. cit.* (note 58), p. 238. See also G. H. Aldrich, "Comment: Jurisdiction of the International Criminal Tribunal for the former Yugoslavia", *American Journal of International Law*, Vol. 90, 1996, p. 68: "In my view, this first decision by the appeals chamber is unfortunate in that it complicates unnecessarily the further work of the Tribunal by suggesting that each prosecution will have to involve arguments and decisions as to the characterization of the armed conflict in which the alleged offenses occurred...".

to the Vietnam War in 1965 to observe the full body of international humanitarian law throughout the territory, on the basis of the same reasoning.[121]

Although the global view is positive from a practical and humanitarian perspective, it is contradicted by the international community's rejection of the ICRC's attempt to adopt an explicit provision in Additional Protocol I making the whole body of international humanitarian law applicable to a civil war if foreign troops intervened[122] and by what is now the orthodox reference to "mixed" international and non-international armed conflicts in the jurisprudence of the ICTY.[123] The global approach would also seem to lead to the conclusion that a single international use of force in a foreign territory, direct or otherwise, would somehow suffice to render all internal armed conflict in that territory international irrespective of whether internal conflicts constitute a "resort to force between States" within the terms of the Geneva Conventions.

The tension between the two approaches to characterization is not likely to be easily resolved. As Meron laments:

> "the contradictory decisions rendered by the different ICTY chambers on the nature of the conflicts in the former Yugoslavia illustrate the difficulty of characterizing 'mixed' or 'internationalized' conflicts. There is no agreed-upon mechanism for definitively characterizing situations of violence."[124]

Worse, the relative strengths and weaknesses of the "mixed" and "global" views indicate that reaching any sort of agreement within the present framework will inevitably involve choosing between a theory that cannot work and a practice that is not justified. The challenge, therefore, is not so much to the merit of the two competing views as to the structure of international humanitarian law more generally.

Close of internationalized hostilities

Article 6 of the Fourth Geneva Convention defines the point at which the law applicable in international armed conflicts ceases to apply. The article stipulates that "[i]n the territory of Parties to the conflict, the application

121 "Respect for the rules of humanity in Vietnam", *International Review of the Red Cross*, No. 53, August 1965, p. 417.

122 See notes 7 and 90.

123 See *Tadić Appeal Judgement, op. cit.* (note 59), paras. 73 and 84; *The Blaškić Judgement, op. cit.* (note 79), Declaration of Judge Shahabuddeen.

124 T. Meron "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, 2000, (hereinafter "Humanization of Humanitarian Law"), p. 261.

of the present Convention shall cease on the general close of military operations."[125] The *Commentaries* on the Geneva Conventions afford the term "general close of military operations" a broad interpretation, indicating that it is equivalent to the point at which "the last shot has been fired,"[126] and "in most cases (...) the final end of all fighting between all those concerned."[127] Thus, in States that contain several warring factions of both international and internal origin, the *Commentaries* at least superficially suggest that international humanitarian law continues to apply until the end of all hostilities, domestic or otherwise. The competing view is that the term "close of military operations" implies only international military operations, allowing ongoing hostilities "not of an international character" to continue or recommence under the auspices of the law applicable to non-international armed conflict.

Somewhat ambiguously, the ICTY Appeals Chamber in the *Tadić Jurisdiction Appeal* addressed the issue by declaring that:

> "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there." [128]

While the statement is often cited to give international humanitarian law its widest possible application, it is far from clear that it represents an authority for the notion that the law applicable in international armed conflicts continues to apply to surviving internal conflict. The more plausible interpretation is that the Chamber's comments only contemplate ongoing obligations between warring parties *inter se*, in accordance with the more restrictive view of "close of military operations." That interpretation is supported by the same decision's creation of the "mixed" approach to characterization on the very basis that international and non-international armed conflicts can mutate and co-exist. The interpretation is also supported by the fact that both the *Čelebići and Tadić Trial Judgements* found that prior to the Yugoslav People's Army's formal withdrawal on 19 May 1992, the relevant

125 Fourth Geneva Convention, Art. 6.

126 *Commentaries, op. cit.* (note 5), Vol. IV, p. 62.

127 *Ibid.*

128 *Tadić Jurisdiction Appeal, op. cit.* (note 28), para. 70.

conflict was international in character, but that subsequently the Bosnian Serbs were not agents of the Federal Republic of Yugoslavia, and that the conflict was therefore internal.[129] The former judgement emphatically declared that:

> "It is evident that there was no general cessation of hostilities in Bosnia and Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Trial Chamber must, however, address the possibility that the nature of the armed conflict was changed by the withdrawal of the external forces involved, and hence the cessation of those hostilities, and the commencement of a distinct, self-contained, internal conflict between the Government of Bosnia and Herzegovina and organised armed groups within that State." [130]

Although the conclusions that the status of the conflict were both overturned on appeal because of factual findings concerning agency, in both cases the Appeals Chamber tacitly endorsed the notion that an international armed conflict can become internal[131] Moreover, the possibility of transition from international to internal armed conflict is not a mere function of international criminal prosecution: formal foreign recognition of the People's Republic of Kampuchea in 1980 sufficed to render an internationalized conflict internal despite ongoing hostilities in the territory.[132]

129 *Prosecutor* v. Tadić, IT-94-1-T, Judgement, 7 May 1997, para. 607.

130 *Čelebići Judgement, op. cit.* (note 46), para. 215.

131 The *Tadić Appeal Judgement* found that "[i]n the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces — in whose hands the Bosnian victims in this case found themselves — could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY." *Tadić Appeal Judgement, op. cit.* (note 59), para. 87 (footnote omitted). In *Čelebići*, the Appeals Chamber accepted that "[t]he issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992 the conflict continued to be international or instead became internal." *Čelebići Appeal Judgement, op. cit.* (note 69), para. 29.

132 Gasser, *op. cit.* (note 19), p. 155. In early 1978, the international armed conflict between Vietnamese armed forces and the Democratic Republic of Kampuchea, or the Khmer Rouge, culminated in the Vietnamese and Front Uni de Salut National du Kampuchéa armies taking the city of Phnom Penh on 7 January 1978, sending the established Khmer Rouge government into exile and installing another regime. For several years thereafter, the United Nations viewed the government in exile as the legitimate representative of Kampuchea, rendering ongoing conflicts between the Khmer Rouge and Vietnamese forces international in nature. According to Gasser, it was only when the majority of countries in the international community abandoned the exiled Khmer Rouge government and recognized the legitimacy of the new People's Republic of Kampuchea that the Vietnamese forces still in the area were no longer subject to the laws governing international armed warfare, since they were present in the country by the authority of the legitimate government.

The precedents' apparently more restrictive interpretation of "close of military operations" has clear appeal. Extending the application of international humanitarian law beyond the close of international hostilities to the end of even internal conflict could foreseeably involve applying the full body of international humanitarian law in circumstances falling below the threshold required for the application of even common Article 3, and could continue to do so several years after the end of international participation.[133] In addition, the wider interpretation would make it near impossible to distinguish the initiation of distinct internal conflicts from those that represent a continuation of international hostilities, since there are no means of determining how closely linked in time, territory, membership or motivation a preceding international armed conflict and subsequent civil war must be to justify the continued application of the more comprehensive body of law. In fact, the application of the law applicable in international armed conflicts in instances where the tests for internationalization are no longer met would undermine the tests themselves. In such instances, the "overall control" test would not involve "assessing all the elements of control taken as a whole,"[134] but rather determining whether forces *were ever* under the overall control of a foreign State. If Sassòli and Olson are correct in suggesting that "there is no reason to think that, during a conflict, one could convince a military commander to respect certain rules by arguing that he is an agent of a foreign country",[135] the chances of doing so several years later, on the basis that his group used to be an agent of a foreign State, are almost none. The more intellectually satisfying solution, apparently adopted by the ICTY in *Tadić* and *Čelebići*, is thus that the full body of international humanitarian law ceases to apply at the close of international hostilities. The only difficulty is that identifying the point at which international hostilities cease is impractical in many internationalized armed conflicts.

133 This would occur, for example, where "terrorist" activities that did not constitute protracted armed violence were continued by dissatisfied members of a formerly foreign-sponsored insurgent group against a State after the end of an internationalized armed conflict.

134 "The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control." *Aleksovski Appeal Judgement*, *op. cit.* (note 67), para. 145. See also *Prosecutor v. Naletilić* et al., *op. cit.* (note 69), para. 188: "With respect to the latter, it held that a group might be found to be acting on behalf of a State if it is, 'as a whole', under the overall control of that State."

135 Sassòli and Olson, *op. cit.* (note 84), p. 576.

Traditionally, the close of inter-State conflict requires the cessation of hostilities evidenced by armistice agreement and the subsequent establishment of peace, generally by the signing of a formal peace treaty.[136] Because internationalized conflict is rarely initiated by declaration and frequently involves covert rather than direct hostilities, formal events such as armistice, conclusion of treaties and public withdrawal of forces are rare. As Detter observes, "there is no need to acknowledge the end of something which allegedly never existed."[137] Therefore, the refrain that international humanitarian law "extends beyond the cessation of hostilities until a general conclusion of peace"[138] is often unhelpful in the context of internationalized armed conflicts since the latter is seldom formally achieved. Consequently, in many instances the close of internationalized military operations can only be determined by simple reference to the point at which actual hostilities cease on the ground.[139]

In practice, a clear decision about that point "may be difficult to make and subject to much controversy, especially when an armed conflict involves several or a multitude of States and when military operations close at different times within different regions involved in the conflict."[140] It is even more problematic when international conflict is carried out through domestic intermediaries on the basis of a relationship that "fluctuates greatly in its intensity, with periods of armed hostilities interspersed with perhaps lengthy periods in which no hostilities occur...".[141] The near Herculean challenge in internationalized conflict is thus to distinguish the actual close of hostilities from their mere suspension.[142]

For example, in applying the tests for internationalization to present-day hostilities in Afghanistan, Cryer cites a range of factors which in his estimation render a finding that the Northern Alliance is under the overall control of the Coalition forces "not totally perverse,"[143] but goes on to

136 See C. Rousseau, *Le Droit des Conflits Armés*, Édition A. Pedone, Paris, 1983, p. 188.

137 Detter, *op. cit.* (note 2), p. 344.

138 *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 70.

139 Detter, *op. cit.* (note 2), p. 344.

140 Major T. J. Murphy, "Sanctions and enforcement of the humanitarian law of the four Geneva Conventions of 1949 and Geneva Protocol I of 1977", *Military Law Review*, Winter, 1984, p. 53.

141 *Ibid.*

142 International humanitarian law continues to apply during the suspension of active hostilities. See Major S. R. Morris, "America's most recent prisoner of war: The Warrant Officer Bobby Hall incident", *Army Law*, Vol. 3, 1996, p. 17.

143 Cryer, *op. cit.* (note 96), p. 44.

conclude on balance that such control does not exist, predominantly because "the Northern Alliance was acting directly contrary to the clearly expressed wishes of the Coalition when it actually took the Afghan capital Kabul, and entered the city itself."[144] The assumption is, therefore, that the group was under the overall control of the Coalition prior to its taking of Kabul but not afterwards.

Accepting that hypothesis and on the basis that "close of military operations" relates only to international operations, the Northern Alliance's entry into Kabul terminated the relationship of overall control with Coalition Forces, potentially ending actual international hostilities and thus, at least on the orthodox "mixed" conflict approach, giving birth to an independent non-international armed conflict between the Northern Alliance and the Taliban. Subsequently, the Northern Alliance was bound by the law applicable in international armed conflict prior to its entry into Kabul but only by common Article 3 thereafter.[145]

That an insurgent force could avoid obligations contained in the full body of international humanitarian law simply by disagreeing with a foreign State is highly undesirable, to say nothing of the unrealistic obligations required of that force if its entry into Kabul is deemed a close of international hostilities.[146] The anomaly is particularly apparent in the context of a continuing internal armed conflict with the Taliban and the possibility that Northern Alliance and Coalition forces might collude on subsequent military operations. The overriding concern, aside from the possibility that the Northern Alliance could quite reasonably consider itself alternating between

144 *Ibid.*

145 Only by common Art. 3, since Afghanistan has not signed Additional Protocol II to the Geneva Conventions.

146 Under Art. 118 of the Third Geneva Convention, captured enemy combatants must be repatriated at the close of hostilities. Art. 17 of the First Geneva Convention requires States Parties to exchange lists showing the exact location and markings of graves "as soon as circumstances permit, and at latest at the end of hostilities"; Articles 67 and 68 of the Third Geneva Convention relate to compensation payable to detainees at the close of hostilities; Art. 46 of the Fourth Geneva Convention states that "in so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities"; Art. 130 of the Fourth Geneva Convention states that "[a]s soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees..."; Arts. 133 and 134 of the Fourth Geneva Convention require States "upon the close of hostilities (...) to ensure the return of all internees to their last place of residence, or to facilitate their repatriation"; and Art 33(1) of Additional Protocol I requires each party to the conflict to search "as soon as circumstances permit, and at the latest from the end of active hostilities" for persons reported missing by an adverse party.

internal and internationalized armed conflicts depending on its "overall" relationship with Coalition forces, is that it could justify any characterization it preferred.

On the other hand, the wider interpretation of "close of military operations" would allow the Coalition's relationship with the Northern Alliance to internationalize the armed conflict between the Taliban and the Northern Alliance until the close of all hostilities in Afghanistan, rendering the Northern Alliance's entry into Kabul irrelevant to the characterization of the conflict, contradicting Cryer's conclusion and promoting insurgent appeals for foreign intervention, a situation drafters of the Geneva Conventions clearly sought to avoid. Moreover, if previous experience in Afghanistan is any indicator, the more liberal view might continue the application of law applicable in international armed conflict to hostilities in some way linked to the present internationalized conflict decades after the end of Coalition participation.

In an apparent attempt to resolve this type of impasse, the Trial Chamber in the *Čelebići Judgement* creatively reasoned that:

> "the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts unrelated to the larger international armed conflict."[147]

The difficulty is that purporting to exclude "separate internal conflicts" that are "unrelated" begs the question of how to distinguish international and internal hostilities, which is the very essence of the complication. Furthermore, the presumption that all armed conflict in a specific territory is international was described by the Appeals Chamber as "unfortunate,"[148] presumably because the notion was unprecedented and cuts across the tests for internationalization.

The unavoidable conclusion is that the ambiguities in determining the close of internationalized hostilities, coupled with the opposing views about the possibility of mixed armed conflicts, suggest the absence of any coherent basis for determining the temporal or territorial scope of humanitarian law in territories containing conflicts of both international and internal origin. Much of that failing again stems from the uncomfortable relationship between the standards applicable in international and non-international armed conflict.

147 *Čelebići Judgement, op. cit.* (note 46). para. 209.
148 *Čelebići Appeal Judgement, op. cit.* (note 69), p. 46.

Political influence on characterization

The legal and political ramifications of one State's use of force against another create real incentives for States intervening in foreign civil unrest to deny that involvement. Similarly, States and non-state actors have proved equally willing to favour or fabricate accounts of foreign participation in internal conflicts for their own wider political gain. As a result, the characterization of armed conflicts involving international and internal elements, and the applicable law that flows from that characterization, are frequently "the subject of fierce controversy of a political nature."[149]

A prime example of that controversy occurs where an aggressive foreign State deposes an established government and installs a puppet leader to "invite" military intervention to suppress a pre-existing civil war. The challenge in determining the applicable law involves distinguishing between legitimate inter-governmental military assistance and covert means of obscuring the existence of a hostile invasion of a State by foreign forces.[150] That tension was demonstrated *par excellence* by the Soviet military intervention in Afghanistan in 1979, which, for the Soviets, was initiated on the basis of an invitation issued by the then newly appointed Prime Minister Babrak Karmal pursuant to a Soviet/Afghan treaty of co-operation.[151] The Soviets thus maintained that their presence in Afghanistan constituted bilateral relations between two countries linked by a treaty of friendship to fight an internal uprising[152] and that there was consequently no armed conflict between State Parties to the Conventions, nor a forced military occupation. Conversely, foreign sources considered that the Soviet forces had been implicated in assassinating Karmal's immediate predecessor, installing Karmal, an Afghani who had no official position in the government only days prior to their full military intervention, and issuing his alleged invitation by radio broadcast from within Soviet Central Asia.[153] If those assertions are true, characterizing a foreign State's military invasion of another as either a non-international armed conflict or no conflict at all certainly circumvents the function of the laws of war.[154] The well-founded concern is that in order to avoid internationalizing civil wars, any State could:

149 Gasser, *op. cit.* (note 19), p. 157.
150 Baxter, *op. cit.* (note 29), p. 96.
151 The Treaty of Friendship, Good Neighbourliness and Co-operation was signed on 5 December 1978.
152 Gasser, *op. cit.* (note 19), p. 149.
153 Reisman and Silk, *op. cit.* (note 4), pp. 472-474.
154 *Ibid.*

"maintain a stable of political would-bes and has-beens of varying national pedigrees then at the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary 'invitation'." [155]

Not only does the Afghan experience highlight the difficulty with determining whether invitations are legitimately issued; it demonstrates the frequent disagreement in the characterization of conflicts, particularly between parties to the conflict. As Gasser observes in relation to the same events:

"Given these different positions, it would be unrealistic to expect the three parties to the conflict to reach the same view of the legal aspects of the dispute. Furthermore, it is unlikely that they would agree to observe the complete set of rules of international humanitarian law and, thus, implicitly to recognize the international nature of the conflict."[156]

The problem is equally pronounced in relation to internal aspects of internationalized armed conflicts, which involve fundamental inequalities between the "legitimate" State acting in self-defence and the "criminal" insurgents.[157] Consequently, States involved will seek to deny the very existence of insurgent forces or the possibility that such forces have entitlements or liabilities,[158] thereby affecting the humanitarian law applicable between State and internationalized insurgent and, perhaps more importantly, the law protecting civilians in such circumstances. On that very basis, the Soviet and Afghan governments involved in hostilities in 1979 argued that the situation was not subject to the laws of armed conflict at all because the internal disturbance that the Soviet forces were invited to address did not constitute protracted armed conflict.[159] Similarly, during the Yemen conflict of 1962-70, political motivations led royalists to characterize the violence in two contradictory ways, claiming that the conflict was international in relation to Egyptian forces but internal in relation to the rebels.[160]

The views of outside observers as to the characterization of internationalized armed conflicts may also differ, giving rise to difficulties in foreign

155 *Ibid.*

156 Gasser, *op. cit.* (note 19), p. 149.

157 Kalshoven, *op. cit.* (note 101), p. 13.

158 H. McCoubrey and N. D. White, *International Organisations and Civil Wars*, Dartmouth, Brookfield, 1995, p. 61.

159 Gasser, *op. cit.* (note 19), p. 149.

160 K. Boals, "The relation of international law to the internal war in Yemen", in R. A. Falk *et al.* (ed.) *The International Law of Civil War*, John Hopkins, Baltimore, 1971, p. 306.

States observing their obligation "to respect and ensure respect for the Conventions in all circumstances."[161] During the Korean War, for example, the Soviet Union claimed there was an internal war since only one legitimate government was involved in hostilities, whereas Western powers advocated the application of the full law of international armed conflict.[162]

Under these circumstances, and in the absence of an impartial body charged with authoritatively determining the status of armed conflicts, it is fair to assume that parties will characterize conflicts in terms that best suit their own interests. The sheer complexity of attempting to artificially characterize internationalized armed conflict as either wholly international or non-international promotes that latitude. Therefore, while a single definition of armed conflict within the confines of a uniform body of humanitarian law would not prevent disagreements of fact, hostile covert takeovers or internationalized armed conflicts, it would prevent political agendas from so negatively affecting humanitarian principles applicable in those contexts.

Recommendation

> "...we would appear to be moving tentatively towards the position whereby the legal distinction between international and non-international armed conflict is becoming outmoded. What will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*."[163]

Commentators are unanimous in their disrespect for the strict dichotomy between international and non-international armed conflict, but few have attempted to tackle the concerns underpinning the political unwillingness to adopt a single law of armed conflict applicable in all situations. Traditionally, those concerns have been based on a fear of premature recognition of belligerence, the potential for promoting internal uprisings, a real reluctance to be prevented from dealing with individuals participating in such groups under domestic law and, in some instances, an uneasiness about applying the full body of international humanitarian law to internal conflicts.

The development of customary international law assimilating many of the rules applicable in internal and international armed conflict has come some way in dispelling uneasiness about applying international principles in

161 Geneva Conventions, common Art. 1.
162 Detter, *op. cit.* (note 2), p. 48.
163 Moir, *op. cit.* (note 18), p. 51.

civil warfare. Yet as has been shown, that process has "not taken place in the form of a full and mechanical transplant," resulting in "a crazy quilt of norms" applicable in instances of armed conflict. If anything, the promulgation of a single law of war applicable in all armed conflicts would thus present an opportunity to coherently codify and reconcile the rapid development of customary law applicable in internal conflicts. There is no doubt that that process requires a great deal more careful thought since "much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on notions of belligerent occupation of territory and enemy nationality, concepts that are alien to civil conflicts."[164] Nevertheless, those difficulties already arise in internationalized non-international armed conflicts.

A particular sticking point in developing a single law of armed conflict is defining a generic definition of the term in light of the different levels of intensity that trigger international and non-international armed conflicts at present. Specifically, a single definition of armed conflict will need to ensure that States continue to enjoy an ability to deal with internal disturbances under domestic law but that international conflicts of low intensity remain subject to international humanitarian protection. One possible solution is to adapt the approach proposed by the Brazilian government's experts in relation to the application of Additional Protocol II, which defined armed conflict as conflict between "organized armed forces or other organized armed groups under a responsible and identifiable authority, and clearly distinguished from the civilian population...".[165] The requirement that armed

164 R. Baxter, "Comments" in P. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience*, 1975, cited in Bierzanek, *op. cit.* (note 17), p. 288.

165 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Geneva (1974-1977) Vol IV, CDDH/I/79, p. 8. Other possibilities are numerous and complex, including adapting a draft of Additional Protocol II submitted by the ICRC that stipulated that the Protocol apply when "in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority," Draft Additional Protocol to Article 3 Common to the four Geneva Conventions of August 12, 1949, in Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Basic Texts, Documentary material submitted by the International Committee of the Red Cross, p.35; another definition included "opposition of armed forces capable of concerted military actions under responsible command." *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977) Vol VIII, CDDH/I/SR.22, p. 204. Yet another suggested the tests were too restrictive, preferring to define the threshold as simply "situations where both sides resort to collective armed force" Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vienna, 20 March – 24 March 1972, Report on the Work of the Conference, p. 52.

forces must be distinguished from the civilian population would provide a basic protection of a State's ability to deal with internal tensions under domestic law since those conflicts normally involve asymmetrical guerrilla warfare from within civilian populations as a result of the insurgents' military inferiority, limited weaponry, and lack of significant control over territory.[166] The Conference of Government Experts also felt that the requirement that armed forces be under responsible authority "implies that such armed forces are subject to a system of internal discipline which enables them to respect all or some of the law of armed conflicts."[167] All these factors are likely to exclude internal disturbances, riots and terrorist activities from the scope of a single body of international humanitarian law while still including low level conflict between international forces. The definition could be made more restrictive by adopting further criteria that might include an element of territorial control akin to Art. 1 of Additional Protocol II,[168] an intensity threshold similar to that adopted by the ICC Statute,[169] or a combination of thresholds triggering the same body of law. In addition, by dispensing with references to statehood, a definition could also apply international humanitarian law in conflicts that are trans-national in character[170] and in instances involving the disintegration of states and the establishment of new ones.[171]

This approach could also allow all combatants in armed conflicts to be entitled to prisoner-of-war status, while preserving the State's ability to maintain law and order during internal disturbances and tensions such as riots or isolated and sporadic acts of violence. While it is essential not to be

166 A. Eide "The New humanitarian law in non-international armed conflict" in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Napoli, 1979, p. 306

167 Commentary II, part 2, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Documentary material submitted by the International Committee of the Red Cross, p. 6.

168 The final version adopted the geo-military threshold in Art. 1(1) of Additional Protocol II which requires parties to "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...".

169 Art. 2(f) of the ICC Statute states that "... armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

170 According to Münkler, "[t]he term civil war is the symmetrical opposite of the term international war; the asymmetrical antonym is transnational war, i.e. one in which the boundaries drawn by the States no longer play a role. This type of war crosses national borders without being waged as a war between States, such as the wars in and around Angola, Zaire/Congo, Somalia and Afghanistan." H. Münkler "The wars of the 21st century", International Review of the Red Cross, Vol. 85, No. 849, March 2003 p. 16.

171 Meron, "Humanization of Humanitarian Law", *op. cit.* (note 124), p. 257.

politically naïve with regard to the very real concerns that governments cite against extending prisoner-of-war status to internal conflict or according combatants in such conflicts immunity for taking up arms,[172] there is very little other incentive for insurgent groups to comply with the laws of war if they are not able to claim those privileges.[173] Moreover, granting the privileges to insurgents might promote greater reciprocity on their part, particularly when they hold a significant number of State prisoners.[174] The adoption of Art. 4A(2) of the Third Geneva Convention would also require a certain number of criteria to be met for entitlement to prisoner-of-war status,[175] meaning that granting that status to parties engaged in internal armed conflicts will not necessarily impede the prosecution of all individuals for taking up arms, even within the context of hostilities that constitute armed conflict.[176] Furthermore, even prisoners of war can be prosecuted for aggression, crimes against humanity, war crimes and genocide, further countering the concern that affording such individuals prisoner-of-war status in internal armed conflicts will promote unmitigated internal revolt. Therefore, although the question warrants considerably more debate, amplification of prisoner-of-war status within the context of a single law of armed conflict would ensure a

172 "In international armed conflicts, prisoner-of-war status flows from the so-called combatants' privilege, which simply means that the members of the armed forces of a party to the conflict enjoy immunity for their warlike acts. In other words, the combatants' privilege is a license to kill, maim, or kidnap enemy combatants, destroy military objectives, and even cause unavoidable collateral civilian casualties. My government, as you know, presides over a new and unstable state. It is plagued with ideological and ethnic rivalries, aided and abetted by external states bent on destabilizing our infant democracy. Do you really think that we would concur in any treaty that would grant immunity from our treason laws to our domestic enemies, and by doing so grant them a license to attack the government's security personnel and property, subject only to honourable internment as prisoners of war for the duration of the conflict?" W. Solf, "Problems with the application of norms governing interstate armed conflict to non-international armed conflict", *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 291-292.

173 *Ibid.*, p. 292.

174 *Ibid.*, p. 293.

175 See Art. 4(A) of the Third Geneva Convention, in particular Art. 4(A)(2), which requires that individuals must be members of a militia that answers to a responsible command, has a fixed and distinctive sign, carries arms openly and conducts its operations in accordance with the laws and customs of war.

176 Article 25 of the ICRC's draft Additional Protocol II extended prisoner-of-war provisions to combatants in non-international armed conflicts on this very basis. That article reads: "Members of regular armed forces and members of those armed forces which have fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall receive, after having fallen into the power of the adversary, a treatment similar to that provided for prisoners of war in the said Convention." Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Commentary, Vol II, p. 49.

consistent respect for that status in internationalized conflicts, even when the circumstances of those conflicts are complex and dynamic.

Likewise, a single body of international humanitarian law applicable in all contexts would allay the concern that allowing foreign intervention to internationalize internal conflicts creates an incentive for insurgent groups to invite that intervention, thereby rapidly escalating hostilities. Any such incentive is based solely on the perceived incongruity between the law applicable in international and internal armed conflict, an incongruity that would be eliminated by a single definition of armed conflict incorporating both international and non-international elements. Similarly, the political reluctance to be candid about military interventions in foreign civil wars would not have such a heavy impact on the humanitarian laws applicable in such contexts if a single body of law applied regardless of whether a State acknowledged involvement.

Finally, it is clear that a major reservation in the development of international humanitarian law relating to internal armed conflicts has been the question of the recognition of belligerency. That recognition elevates a rebel movement to the status of a State and demands that other States remain neutral between the warring parties. Even though the doctrine has not been exercised since the American Civil War, giving rise to very reasonable claims that it no longer exists in international law,[177] the fear that application of the Geneva Conventions might lead to belligerent recognition is a matter of extreme political sensitivity.[178] Consequently, a single body of international humanitarian law would, like the ICC Statute and the Geneva Conventions, incorporate articles to reaffirm that the application of laws of war to internal armed conflicts "shall not affect the legal status of the Parties to the conflict."[179] In addition, because a single law of armed conflict could dispense with references to statehood altogether and potentially involve very

177 According to Doswald-Beck "[r]ecognition of belligerency has not, however, been given since the American Civil War and there must thus be serious doubts whether the notion has not fallen into desuetude. Textbooks regularly repeat this doctrine as part of the law, but the real test is whether States seriously view it as a legal reality in modern times, and its total non-use, although not conclusive evidence, must nevertheless be carefully assessed." L. Doswald-Beck, "The legal validity of military intervention by invitation of the government", *British Yearbook of International Law*, 1985, p. 197.

178 McCoubrey and White, *op. cit.* (note 158), p. 61.

179 Common Art. 3(3). Art. 8(3) of the ICC Statute provides that "Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

different thresholds than those relevant to determinations of belligerency, the change would hopefully improve the distinction between the doctrine and humanitarian protection, thereby prompting greater observance of international humanitarian law.

Conclusion

> "If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."[180]

The divergent standards applicable within the Geneva Conventions and their Additional Protocols have failed to adequately address the now prolific incidence of internationalized armed conflict. The law developed to bridge the distance between the instruments has created convoluted tests for agency of a State that in practice are near impossible to apply. Jurisprudence betrays an equally ambiguous and impractical test for direct military intervention sufficient to internationalize an otherwise internal conflict. Even once internationalized, it is difficult to determine the law applicable to internal armed conflicts as relationships and military presences change. Moreover, the international/non-international dichotomy in international humanitarian law has proved susceptible to incredible political manipulation, particularly when conflicts involve international and internal elements.

Further consideration of substantive aspects of a single law of armed conflict will therefore be essential in the development of greater humanitarian protection during internationalized armed conflict. This will inevitably require greater attempts at addressing the political concerns that were operative in the creation of the international/non-international dichotomy. Although overcoming those concerns may seem politically ambitious, it is important to maintain an historical perspective on the growth and development of international humanitarian law.[181] That history is ample proof that with critique, consideration and concern, the inconceivable can rapidly become reality.

180 *Tadić Jurisdiction Appeal, op. cit.* (note 28), para. 97.

181 De Schutter and Van De Wyngaert, *op. cit.* (note 15), p. 290.

Résumé

Vers une définition unique des conflits armés dans le droit international humanitaire : une critique des conflits armés internationalisés

James G. Stewart

La stricte division du droit international humanitaire en règles applicables dans le cadre de conflits armés internationaux et règles applicables aux conflits qui ne sont pas de caractère international est presque universellement critiquée. Des tentatives ont été faites, lors de la négociation des Conventions de Genève et de leurs Protocoles, d'abandonner cette distinction, mais les appels à la création d'un ensemble unique de règles de droit international humanitaire ont, depuis, sombré dans l'oubli. Cet article ravive ces appels en mettant en évidence les insuffisances du traitement dichotomique actuel des conflits armés internationalisés, c'est-à-dire les conflits armés présentant, tout à la fois, les caractéristiques d'un conflit interne et d'un conflit international.

L'article conclut que le droit élaboré pour définir cette «internationalisation» a institué des tests complexes qui, dans la pratique, sont quasiment irréalisables. Et même lorsqu'un conflit est internationalisé, il est difficile de déterminer quel droit est applicable, car les relations et les présences militaires changent. En outre, la dichotomie «international/non international» du droit humanitaire peut faire l'objet d'incroyables manipulations politiques, souvent au détriment de la protection humanitaire. Il est essentiel d'étudier plus en profondeur les aspects concrets d'un droit des conflits armés unique pour assurer une protection humanitaire accrue en cas de conflit armé internationalisé.

The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia

NATALIE WAGNER*

"The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of existing provisions of international customary law."[1]

There is a progressive tendency of the International Criminal Tribunal for the former Yugoslavia (ICTY)[2] to extend the applicability of international humanitarian law to meet the requirements of its Statute, most notably when giving effect to the drafters' intentions in establishing the Tribunal. In broadening the applicability of international humanitarian law, the Tribunal relies on existing rules of customary international law while adopting a purposive interpretation of the law of armed conflict. This methodology of decision-making adopted by the Tribunal has led to substantive developments of international humanitarian law since the 1999 *Tadic* Appeals Chamber Judgement,[3] the results of which include the extension of the nationality requirement of protected persons status and the broadening of individual criminal responsibility to include the common purpose doctrine.

The Tribunal provides an interpretive framework and forum for existing international humanitarian law and as such, is well suited to develop the

* B.A. (Queen's University, Canada), B.A. Hons (Queen's University, Canada), M.A. relations internationales (Université Laval, Canada), LL.M International Human Rights Law (National University of Ireland, Galway). The author is currently working in the International Organisations Division at the ICRC, Geneva. She would like to thank David Alonzo-Maizlish and Laura M. Olson for their comments on an earlier draft.

law in order to address new forms and permutations of grave violations of international humanitarian law. The teleological[4] approach adopted by the Tribunal thus provides both a persuasive authority and a necessary development in broadening individual criminal responsibility to respond to modern international inter-ethnic conflict such as that in the former Yugoslavia.

The scope of this article is limited in two important respects. First, in adjudicating on the nationality requirement and on the common purpose doctrine, the Tribunal has left unanswered a number of questions that arise from such extensions. In relation to the nationality requirement for example, the question arises regarding the ability of a State, a soldier, or of a humanitarian organization, to determine, during the conduct of international hostilities, whether or not a person or a group of persons maintains allegiance to the State, and whether that person or group is effectively protected by it. Second, from a criminal law perspective, the common purpose doctrine raises several issues concerning the rights of the accused and the notion of individual criminal responsibility.[5] The purpose of this article is to trace two

1 *Prosecutor* v. *Delalic et al. (Celebici Case), Judgement*, Case No. IT-96-21-T, T. Ch. IIqtr, 16 Nov. 1998, (hereinafter "*Celebici Case* 1998"), para. 170.

2 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993) (hereinafter ICTY or Tribunal).

3 *Prosecutor* v. *Tadic, Judgement*, Case No. IT-94-1-A, App. Ch., 15 July 1999 (hereinafter *Tadic* Appeals Chamber Judgement).

4 The teleological approach has been defined as follows: "[A]lso called the 'progressive' or 'extensive' approach of the civilian jurisprudence, [it] is in contrast with the legislative historical approach. The teleological approach plays the same role as the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation." *Celebici Case* 1998, *op. cit.* (note 1), para. 163.

5 For a discussion of issues raised concerning the extension of the nationality requirement of protected person status, see J-F. Quéguiner, "Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire", *International Review of the Red Cross*, this volume. See also M. Sassòli and L M. Olson: *International Decision: Prosecutor* v. *Tadic (Judgement). Case No. IT-94-1-A*,. 39 ILM 1518 (1999); "International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, July 15 1999", *American Journal of International Law*, Vol. 94, 2000, p. 571. For issues relating to the rights of the accused in extending individual criminal responsibility to include the common purpose doctrine, see the following analysis by Sassòli and Olson: *International Decision: Prosecutor* v. *Tadic (Judgement). Case No. IT-94-1-A*,. 39 ILM 1518 (1999); "International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, July 15 1999", *American Journal of International Law*, Vol. 94, 2000, p. 571; and "The judgment of the ICTY Appeals Chamber on the merits in the Tadic Case: New horizons for international humanitarian and criminal law?", *International Review of the Red Cross*, Vol. 839, 2000, p. 733.

key developments of international humanitarian law by the Tribunal, to examine arguments both for and against these developments, and to illustrate the need, given both the Tribunal's Statute and the new forms of violations of international humanitarian law, to develop the law of armed conflict.

Interpretation of the Statute by the International Criminal Tribunal for the former Yugoslavia

Security Council Resolution 827[6] mandates the International Criminal Tribunal for the former Yugoslavia "to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991."[7] The Statute of the Tribunal confers jurisdiction over violations of rules of international humanitarian law that are declaratory of customary law and that are applicable to international armed conflicts.[8] The subject-matter over which the Tribunal exercises jurisdiction includes grave breaches of the 1949 Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). In his commentary on the Statute given in his Report to the Security Council, the United Nations Secretary-General emphasized that the principle nullum crimen sine lege requires that the "international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[9]

6 SC Res. 827 (May 25, 1993), reprinted in 32 ILM 1203 (1993).

7 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, (hereinafter ICTY Statute or Statute). Security Council resolution 808 (1993) established the purposes of the Tribunal, which were later elaborated in Security Council resolution 827 (1993).

8 T. Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, 1995, p. 554 and p. 559.

9 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 37 (1993), reprinted in 32 ILM 1159, 1192 (1993). (Hereinafter Report of the Secretary-General or Secretary-General's Report). The principle *nullum crimen sine lege* is illustrative of the fact that the Tribunal was not empowered to "legislate" or to create new law in the field of international humanitarian law. Granting a law-making power to a United Nations body would in fact "... be contrary to the present configuration of the law-making process in international law." In establishing the Tribunal, the verbatim records of the discussions in the Security Council reveal that "... The Tribunal would not be empowered with (...) the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law." A. Cassese, "The International Criminal Tribunal for the former Yugoslavia and the implementation of international humanitarian law", in L. Condorelli *et al.* (ed.), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1995, p. 232 and footnote 1.

He also stated that the Geneva Conventions[10] are declaratory of customary law and constitute "the core of customary law applicable in international armed conflicts."[11]

The Tribunal's rulings thus both reflect[12] and contribute to the development of customary law governing armed conflicts. Moreover, the jurisprudence of the ICTY illustrates how conventional law contributes to the emergence of a contemporary interpretation of international humanitarian law. For example the Tribunal, through its ground-breaking decision in the *Tadic* case,[13] has developed customary norms[14] while relying on and preserving fundamental humanitarian protections of existing law.[15] The increasing frequency with which treaty-based and customary international law influence and reciprocate one another is unprecedented:

> "Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution."[16]

The Tribunal may interpret the Statute in either a broad or a narrow sense. Broadly speaking, judicial interpretation involves "... extending,

10 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Convention relative to the Treatment of Prisoners of War, 12 August 1949; Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Geneva Conventions or Conventions).

11 Report of the Secretary-General, *op. cit.* (note 8), p. 1192.

12 S. W. Tiefenbrun, "The paradox of international adjudication developments in the International Criminal Tribunals of the former Yugoslavia and Rwanda, the World Court, and the International Criminal Court", *NC Journal of International Law and Commercial Regulation*, Vol. 25, 2000, p. 572 and footnotes 143-144.

13 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3).

14 A. Carrillo-Suarez, "Hors de logique: Contemporary issues in international humanitarian law as applied to internal armed conflict", *American University International Law Review*, Vol. 15, 1999, p. 3 and footnote 5.

15 B. S. Brown, "Nationality and Internationality in International Humanitarian Law", *Stanford Journal of International Law*, Vol. 34, 1998, p. 348.

16 E. Greppi, "The evolution of individual criminal liability under international law", *International Review of the Red Cross*, No. 835, 1999, p. 541 and footnote 52.

restricting or modifying a rule of law contained in its statutory form" according to the particular facts of the case before it. Alternatively, the Tribunal can suggest the restrictive role of judges "...in explaining the meaning of words or phrases used in a statute."[17] Judicial "gap-filling," including the interpretive role of the judiciary is, according to the Tribunal, a means of securing and giving effect to the drafters' intentions.[18]

The decisions by the Tribunal nevertheless represent uncharted judicial territory, for the Geneva Conventions are to be applied as criminal law by the ICTY in a manner different from the way in which they were initially construed.[19] Modern conventional international humanitarian law has its origins in the nineteenth century,[20] a time governed by state-centric notions of international law and by the law of nations. Rights and duties were defined for States rather than for individuals. The law of armed conflict, as it first emerged, did not formally recognize or provide for the rights of individuals or for individual criminal responsibility for violations of international rules.[21] Moreover, at the time the 1949 Geneva Conventions were formulated the drafters did not envisage the present-day type of inter-ethnic conflict.[22] The law applied by the Tribunal must, however, correspond to the contemporary context in which serious violations of international humanitarian law took place in the former Yugoslavia.[23]

17 *Celebici Case* 1998, *op. cit.* (note 1), para. 158.

18 *Ibid.*, para. 165.

19 Brown, *op. cit.* (note 15), p. 347.

20 See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, International Committee of the Red Cross (ICRC), Geneva, 2001, Chapters I and II.

21 Brown, *op. cit.* (note 15), p. 347 and footnotes 2-3.

22 Deborah Ungar argues that "... since the Tadic decision was the first case to put international humanitarian law to the test, it cannot be ignored that the theatre of war between and within States has evolved. Because fifty years passed since the Nuremberg trials, the ICTY had to apply international humanitarian laws according to the standard of conventional wars. Today, few of the major conflicts 'are conventional wars — that is, wars that entail the direct, sustained confrontation of the military forces of two or more States within a defined space, usually occurring on the soil of one of the combatants'. After the fall of the Soviet Union, contemporary wars consist of 'nation-based violence'. As most evident in the former Yugoslavia, violence erupts between groups with differences grounded in ethnicity, religion, and history. Further, in contemporary wars, groups attempt to establish independence based on their national identities, such as the Serbs in creating the Republika Srpska." D. L. Ungar, "The Tadic war crimes trial: The first criminal conviction since Nuremberg exposes the need for a permanent war crimes tribunal", *Whittier Law Review*, Vol. 20, 1999, pp. 720-721.

23 According to the Tribunal in the *Celebici Case* 1998, *op. cit.* (note 1), "[t]he nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949."

In order to accomplish this, the ICTY bridges the gap between traditional State-centric notions of conventional humanitarian law and its own mandate to prosecute individuals for serious violations of international humanitarian law.[24] Because humanitarian legal norms have only recently become the object of international judicial interpretation and application,[25] an alternative theory and methodology of decision-making is needed. Judicial flexibility is also needed because the ICTY represents the first time that individual cases concerning the Geneva Conventions have been adjudicated by an International Tribunal.[26] As illustrated by the 1999 *Tadic* case, the Tribunal achieves this flexibility through a functional adaptation of existing international humanitarian norms,[27] resulting in the extension of provisions of international humanitarian law. The ICTY — in particular the interpretive role of the judiciary — is thus able to further the development of international humanitarian law in the *rapprochement* between the conventional and a more contemporary interpretation of the law of armed conflict.

Tadic, the grave breaches regime, and the common purpose doctrine

According to the Trial Chamber in the 1995 *Tadic* case,[28] the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Articles 2, 3 or 5 of the Statute. The Trial Chamber held that, despite its references to grave breaches of the Geneva Conventions, Article 2[29] of the Statute enabled the Tribunal to treat those provisions as declaratory of customary law, and to try persons committing the acts listed in the grave breaches provisions in internal armed conflict. Deeming Articles 2, 3, and 5 applicable, the Trial Chamber considered it unnecessary to deter-

24 Kalshoven and Zegveld note in relation to individual responsibility, the "... total silence on the possibility of international adjudication of violations of the Geneva Conventions, this notwithstanding the experience of the two International Military Tribunals, and in stark contrast with the position adopted by the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article VI of which expressly reserves the possibility of trial by a competent 'international tribunal'." Kalshoven and Zegveld, *op. cit.* (note 20), p. 81.

25 L. Boisson de Chazournes, "Les résolutions des organes des Nations Unies, et en particulier celles du Conseil de Sécurité, en tant que source de droit international humanitaire", in L. Condorelli *et al.* (eds), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1995, p. 169.

26 A. Cassese, *op. cit.* (note 9), p. 245.

27 Brown, *op. cit.* (note 15), p. 348.

28 *Prosecutor v. Tadic, Decision of the Defence Motion on Jurisdiction*, Case No. IT-94-1-T, T. Ch., 10 Aug. 1995 (hereinafter "*Tadic – 1995 Decision on Jurisdiction*").

29 According to Article 2 of the ICTY Statute, *op. cit.* (note 7), "[t]he International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva

mine the character of the armed conflict in Bosnia-Herzegovina.[30] However the Appeals Chamber reversed these findings in its 1995 *Tadic* ruling.[31] The Appeals Chamber held that there are two burdens of proof for Article 2 of the ICTY Statute to apply: first, a requirement that the armed conflict be international at all relevant times, and second, that the victims of the alleged grave breach fall within the definition of protected persons[32] as defined by the Geneva Conventions.[33] In contrast to the Trial Chamber, the Appeals Chamber considered at length whether there was an armed conflict taking place, and designated it as "mixed," involving both internal and international armed conflict.[34] A strict interpretation of Article 2 was therefore adopted by the Appeals Chamber *in lieu* of a progressive interpretation of the grave breaches system.

Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property; not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

30 *Tadic – 1995 Decision on Jurisdiction, op, cit.* (note 28), paras. 46-83.

31 *Ibid.*

32 Article 4 of the Fourth Geneva Convention, *op. cit.* (note 7), defines protected persons as follows: "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." In this regard see J. Pictet *et al.* (eds), *Commentary on the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1958,. 46-47.

33 In order for jurisdiction to be granted over grave breaches of the 1949 Geneva Conventions, other general requirements must be met, including the existence of an international armed conflict, a nexus between the armed conflict and the crime, and the requirement that the crime be committed against persons and property protected under the Conventions. See, for example, *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-AR72, App. Ch., 2 Oct. 1995 (hereinafter "*Tadic* – 1995 Appeal on Jurisdiction"), para. 67; see also *Prosecutor* v. *Tadic, Opinion and Judgement*, Case No. IT-94-1-Y, T. Ch. II, 7 May 1997, (hereinafter "*Tadic – 1997 Opinion and Judgement*"), para. 561 (quoting the *Tadic* – 1995 Decision on Jurisdiction). According to Judge Shahabuddeen, "[i]f the accused is charged with a grave breach, then, no matter what he has actually done and how outrageous it may be, he cannot be said to have engaged in the criminal conduct under that provision unless that element, concerning the status of the victim as a 'protected' person, is proved." *Prosecutor* v. *Jelisic, Judgement*, Case No. IT-95-10, App. Ch., 5 July 2001 (Partial Dissenting Opinion of Judge Shahabuddeen, para. 39).

34 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), paras. 71-78.

In particular, the concept of grave breaches under the Geneva Conventions was, according to the Appeals Chamber, indivisible from the notion of protected persons and property.[35] The definition of protected persons is itself narrow and both the Trial and the Appeals Chamber rejected a broader definition.[36] Moreover, neither the notion of protected persons nor that of protected property was included in common Article 3, the sole provision in the Conventions applicable to internal armed conflict.[37] Article 2 of the Statute was thus interpreted by the Tribunal as a provision that grants jurisdiction vis-à-vis grave breaches of the Convention rather than as a free-standing provision.[38] The conclusion that the grave breaches system applied only to violations committed in an international armed conflict defied recent trends in State practice illustrating a change in customary international law.[39]

Also indicative of a conventional interpretation of humanitarian provisions was the technical definition of protected persons and protected property as inseparable from the grave breaches regime.[40] Conventional interpretations of the law were thus very much at odds with developing customary norms, as evidenced by the fact that the Tribunal did not address:

> "... the possibility that, divorced from some of their conventional and formal aspects, the core offences listed in the grave breaches provisions may have an independent existence as a customary norm applicable also to violations of at least common Article 3."[41]

35 *Ibid.*, para. 81.

36 According to this strict interpretation by the Appeals Chamber of Article 4 of the Fourth Geneva Convention, grave breaches occur solely when victims and perpetrators differ in terms of nationality, and the Bosnian-Muslim victims of Dusko Tadic were not protected persons, for they were not in the hands of a party to the conflict of which they were not nationals. Rather, they were in the hands of Bosnian Serbs, including Tadic, who were of the same nationality as their victims. Sassòli and Olson, "The judgment of the ICTY", *op. cit.* (note 5), pp. 733 and 738 and footnotes 30-31.

37 Tadic – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), para. 81.

38 C. Greenwood, "International humanitarian law and the *Tadic* case", *European Journal of International Law*, Vol. 7, 1996, p. 273.

39 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), paras. 83-84.

40 T. Meron, "The continuing role of custom in the formation of international humanitarian law", *American Journal of International Law*, Vol. 90, 1996, p. 238 and p. 243.

41 In his separate opinion, Judge Abi-Saab stated that "[a]s a matter of treaty interpretation — and assuming that the traditional reading of 'grave breaches' has been correct — it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the 'subsequent practice' and opinio juris of the States parties: a teleological interpretation of the Conventions in light of their object and purpose to the effect of including internal conflicts within the regime of 'grave breaches.'"

Tadic – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), (Separate Opinion of Judge Abi-Saab).

Refraining from judicial flexibility, the majority adopted a narrow interpretation by applying traditional notions of international humanitarian law, the result of which was a finding of guilt solely under Articles 3 and 5 of the Statute.

Formalistic approaches to the issues of both nationality and internationality were also adopted by the Trial Chamber II in the 1997 *Tadic* case.[42] The strict test of agency[43] applied by the Tribunal led it to conclude that the victims could not be considered civilians in the hands of a Party or Occupying Power of which they were not nationals and that after 19 May 1992[44] the conflict was no longer international in character.[45] Consequently, the grave breaches provisions did not apply. In referring to the *Nicaragua* case[46] and in applying the concept of effective control[47] to the case before it, the Trial Chamber II adopted a restrictive approach in interpreting international humanitarian law. The Trial and Appeals Chamber rulings in 1995 and the 1997 judgement of the Trial Chamber II were not to be characterized by definitions of nationality and internationality other than what had traditionally been conceived. In his separate opinion, Judge Abi-Saab noted that:

> "[T]he ICTY is (...) afforded a unique opportunity to assume the responsibility for the further rationalization of these categories [of international crimes under the Statute] at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order."[48]

42 *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33).

43 Brown, *op. cit.* (note 15), p. 379.

44 The date is of significant importance, for the question arose as to whether the acts committed by Tadic were perpetrated in the context of an international armed conflict. A. de Hoogh, "Commentary" in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 1993-1998*, Intersentia, Antwerp, Vol. I, 1999, p. 468.

45 *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), paras. 607-608.

46 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14.

47 In her dissent, Judge McDonald suggested that there had been a grave misreading of the *Nicaragua* case. In disagreeing with the majority, she espoused the concept of dependency and control. Having adopted this lower standard vis-à-vis the threshold of agency control, Judge McDonald concluded that the armed conflict was international in character, that the victims were protected persons and that the grave breaches regime was in fact applicable in relation to the specific indictments. See *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33) (Separate Opinion of Judge McDonald).

48 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), (Separate Opinion of Judge Abi-Saab).

Although desirable and indeed inevitable, progressive legal developments were not going to be achieved through a "quasi-legislative judicial process",[49] according to the majority of the Appeals Chamber in 1995.[50]

Technical interpretations of the grave breaches regime were superseded only recently by the Tribunal in the 1999 *Tadic* Appeals Chamber case.[51] The Tribunal adopted a functional approach to nationality,[52] effectively broadening the concept of protected persons under the Fourth Geneva Convention, and allowing a guilty finding of grave breaches. The Appeals Chamber achieved this in part by revisiting the applicability of the grave breaches regime and in particular, the threshold of agency control[53] in overturning the 1997 Trial Chamber II findings and qualifying the conflict as international.[54] The Appeals Chamber abandoned the literal interpretation of protected persons following both the cross-appeal by the Prosecution and suggestions to adapt the definition of protected persons "to the principal challenges of contemporary conflicts."[55] The substance of relations or alternatively, factors of allegiance and effective protection, become the controlling factors rather than nationality. In referring to the concept of a party "of which they are not nationals", the Tribunal held that:

> "a legal approach, hinging on substantial relations more so than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for the allegiance (...). Article 4 of Geneva Convention IV, if interpreted in light of its object and

49 Brown, *op. cit.* (note 15), p. 403 and footnote 244.

50 *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 Oct. 1995, para. 84.

51 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3).

52 Brown, *op. cit.* (note 15), p. 380 and footnote 161, p. 398 and footnote 227.

53 In addressing the subject of responsibility for a military organization, the Tribunal held that international humanitarian law was applicable to international armed conflict when *overall* control by a foreign State over that organization could be established. This would in turn render the foreign State responsible for all acts committed by the organization. See *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 115-162. The threshold of agency control held by the majority reflects the dissenting opinion of Judge McDonald in *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33). See note 62.

54 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 162.

55 Sassòli and Olson, "The judgment of the ICTY", *op. cit.* (note 5), p. 733 and p. 738, footnote 32.

purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Geneva Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting protection Article 4 intends to look to the substance of relations, not to their legal characterisation as such."[56]

The justification for reconceptualization was provided for in terms of the lack of adequate protection afforded by the nationality criterion, and the need to apply international humanitarian law to substantive rather than to legal bonds. Given the realities of present-day armed conflict, conventional doctrines of international humanitarian law failed to account, much less provide, for the protection of civilians caught up in international inter-ethnic conflict.[57]

Also of significance in the development of international humanitarian law by the 1999 *Tadic* case is the common purpose doctrine. The conventional basis for this doctrine is the Geneva Convention system, which in the

56 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 166 and 168.

57 Since, for example, "... it cannot be contended that the Bosnian Serbs constitute a State, arguably, the classification [of the conflict as exclusively international] would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as 'grave breaches', because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as 'protected persons' under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as 'grave breaches', because such civilians would be 'protected persons' under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis central authorities of Bosnia-Herzegovina." *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 Oct 1995, para. 76. The Appeals Chamber held, in *Prosecutor* v. *Delalic et al.* that "[t]he Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law." *Prosecutor* v. *Delalic et al. (Celebici Case), Judgement*, Case No. IT-96-21, App. Ch., 20 Feb. 2001, (hereinafter *Celebici Case* 2001), para. 58 (quoting the *Aleksovski* Appeals Judgement: *Prosecutor v. Aleksovski, Judgement*, Case No. IT-95-14/1, App. Ch., 24 March 2000, para. 79).

context of individual criminal responsibility[58] represents fundamental institutional changes vis-à-vis international legal norms.[59] Common design first appeared in 1997,[60] although Dusko *Tadic* was found not guilty of wilful killing under Article 2(a) of the Statute.[61] The Appeals Chamber overturned this on cross-appeal by the Prosecution on the basis of facts established by the Trial Chamber and on law, whereby co-perpetrators are criminally responsible for acts committed by others.[62] Under the common purpose doctrine, a defendant could be held responsible for killings committed by other members of his group, even if the killings were not necessarily a part of the common plan.[63]

58 Individual criminal responsibility is defined in Article 7 of the ICTY Statute. The relevant provision in the *Tadic* case is Article 7(1), which reads as follows: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." ICTY Statute, *op. cit.* (note 7), Art. 7.

59 L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 53.

60 The common purpose doctrine was identified by the Trial Chamber as a form of participation within the context of direct criminal responsibility. In determining the required extent of participation, the Trial Chamber held that criminal responsibility is incurred "[i]f people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law (...). Thus not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced." *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), paras. 685, 687 (quoting the *Almelo* case: *The Almelo Trial*, Case No. 3, *Law Reports of War Criminals*, United Nations War Crimes Commission, Vol. 1, HMSO, London, 1949, p. 40).

61 The Trial Chamber was not satisfied with regard to the evidence that the accused had any part in the killing of the five men. It considered that the killing of five men in the village of Sivci "may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible." *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), esp. para. 373.

62 Sassòli and Olson, "The judgment of the ICTY", *op. cit.* (note 5), p. 740. The Appeals Chamber identified three distinct categories in which the notion of common purpose leads to collective criminality, the third of which is common purposes cases. The common purpose doctrine "... concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region to effect 'ethnic cleansing' with the consequence that, in the course of doing so, one or more of the victims is shot and killed." The other two categories identified by the Appeals Chamber in which common purpose leads to collective criminality are cases of co-perpetration and concentration cases. *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 204.

63 According to the Appeals Chamber, "[t]here is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 227.

According to the Appeals Chamber, responsibility was incurred when a predictable consequence of the common plan was the risk of death, and *Tadic* willingly took that risk:

> "The Appellant actively took part [in the attack on Jaskici on 14 June 1992], rounding up and severely beating some of the men from Jaskici (...). Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prjedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless took that risk."[64]

Awareness of risk and in particular, awareness that other members of the group may possibly commit a crime, becomes a basis of criminal liability, henceforth widening the concept of *mens rea* vis-à-vis individual criminal responsibility.

The Chamber based its conclusion on analysis of precedents and national legal systems rather than on a provision in the Statute or on a rule of international humanitarian law.[65] Although there is no general principle of law recognized by nations in the field of common purpose,[66] the Appeals Chamber concluded that "[the] case law [supporting the Appeals Chamber's approach] reflects customary rules of international law."[67] Common design as a form of accomplice liability is firmly established in customary international

64 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 232.

65 Sassòli and Olson., *International Decision*, *op. cit.* (note 5), p. 1518; Sassòli and Olson, "International Criminal Tribunal", *op. cit.* (note 5), p. 571 and p. 573.

66 Sassòli and Olson, "International Criminal Tribunal", *op. cit.* (note 5), p. 573. The Appeals Chamber referred to Article 25 (paragraph 3(d)) of the Rome Statute of the International Criminal Court as justification for recognizing common purpose liability. The legal weight attributed to the Rome Statute was set out by the Tribunal in *Prosecutor* v. *Furundzija*, wherein it held that the Statute "... possesses significant legal value. (...) The text (...) may be taken to express the legal position i.e. *opinio juris* of [the overwhelming majority of States attending the Rome Diplomatic Conference]." *Prosecutor* v. *Furundzija*, *Judgement*, Case No. IT-95-14/1-T, T. Ch. II, 10 Dec. 1998. According to the Appeals Chamber in the *Tadic* case, "[t]his is consistent with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 204 and 223 (quoting the *Furundzija* Judgement, para. 227). Given the legal weight attributed to the Rome Statute and the Tribunal's reliance on a principle of law contained therein, it can be argued that a general principle of law recognized by nations in the field of common purpose does in fact exist.

67 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 226.

law and is upheld implicitly in Article 7 of the Statute, according to the Appeals Chamber.[68] The Tribunal cited the Secretary-General's Report, stressing the belief that "... *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[69] Reference was also made in the Judgment to the language of Article 2, with particular emphasis on the term *ordering* grave breaches of the Geneva Conventions to be committed.[70] The Tribunal held that personal jurisdiction of its Statute is no longer limited to "... providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution."[71] The Statute "... does not stop there",[72] given the need to uphold individual criminal responsibility for serious violations of international humanitarian law, most notably when attributing liability via participation in a joint criminal enterprise.

Application of the *Tadic* Appeals Judgement principles

The principles advanced by the Appeals Chamber in the 1999 *Tadic* Judgement serve as the authoritative basis on which subsequent interpretations of Articles 2 and 7(1) of the Statute are founded. The Tribunal adopts a consistent legal pattern in relation to the grave breaches regime in part by adopting a teleological interpretation of Article 4 of the Fourth Geneva Convention. It also achieves a direct line of rulings on the nationality requirement following an examination of the object and purpose of international humanitarian law, which is to protect civilians during armed conflict to the maximum extent possible. Similar linear developments regarding individual criminal responsibility are based on an expansive interpretation of criminal liability to include inactive participation via a joint criminal enterprise. The Tribunal distinguishes between active and inactive participation in the commission of a crime, and reveals the possible equal attribution of criminal liability to both modes of participation. Such developments are based on the notion of objective foresight in the possible commission of a crime and are consistently adhered to by the Tribunal in its jurisprudence subsequent to the 1999 *Tadic* Appeals Chamber decision.

68 *Prosecutor* v. *Krstic, Judgement*, Case No. IT-98-33, T. Ch. I, 2 Aug. 2001, para. 601.

69 *Ibid.* at para. 190 & n. 222. Emphasis in original.

70 Tadic Appeals Chamber Judgement, *op. cit.* (note 3), para. 189. Emphasis in original.

71 *Ibid.*, para. 190.

72 *Ibid.*

Protected person status

In Prosecutor v. *Blaskic*,[73] the Trial Chamber confirmed the principle advanced by the Prosecution and followed the conclusion adopted by the *Tadic* Appeals Judgement.[74] According to the Trial Chamber, ethnicity becomes the decisive factor in determining to which nation one pledges one's allegiance, which can in turn establish protected person status.[75] The Appeals Chamber in *Prosecutor* v. *Aleksovski*[76] found that the Trial Chamber had applied the wrong test in determining the applicability of Article 2 of the Statute,[77] and confirmed the *Tadic* Appeals Judgement, endorsing a "wider construction"[78] through an "extended application"[79] of Article 4 of the Fourth Geneva Convention. According to Judge Hunt, this conceptual adaptation raises a tension between the need for certainty in international criminal law and that of flexibility, where adhering to a previous ruling will create an injustice.[80] In order for the Appeals Chamber to respond to this tension, departures from previous decisions should be made cautiously and should constitute the exception rather than the rule.[81] The need for certainty may be reconciled by the consistency with which the Tribunal is bound to Appeals Chamber decisions.[82] Similarly, the need for flexibility may also be resolved by the teleological approach adopted by the Tribunal in interpreting modern inter-ethnic armed conflict. Thus inherent in the decisions granting protected persons status is the application of principles enunciated in the 1999 *Tadic* Appeals Chamber case, and the decision by the Tribunal, "see[ing] no cogent reasons in the interests of justice, to depart from the *Tadic* Appeal Judgement."[83]

73 *Prosecutor* v. *Blaskic, Judgement*, Case No. IT-95-14, T Ch. I, 3 March 2000.

74 *Ibid.*, para. 126.

75 *Ibid.*, para. 127.

76 *Aleksovski* Appeals Judgement, *op. cit.* (note 57).

77 *Ibid.*, para. 153.

78 *Celebici Case* 2001, *op. cit.* (note 57), para. 58 (quoting the *Aleksovski* Appeals Judgement, para. 151).

79 In referring to the teleological approach by the 1999 *Tadic* Appeals Chamber Judgement (*op. cit.*, note 3) in interpreting Article 4 of the Fourth Geneva Convention, the Appeals Chamber held that "this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts." *Aleksovski* Appeals Judgement, *op. cit.* (note 57), para. 152.

80 *Ibid.*, (Declaration of Judge Hunt, para. 4).

81 *Ibid.* (Declaration of Judge Hunt, paras. 8-9).

82 *Ibid.* (Declaration of Judge Hunt, para. 10).

83 *Celebici Case* 2001, *op. cit.* (note 57), para. 84 (quoting the application of the teleological approach enunciated in the *Aleksovski* Appeals Judgement, *op. cit.* (note 57)).

In *Prosecutor* v. *Delalic*[84] for example, the Appeals Chamber examined the interpretative approach of nationality in the Fourth Geneva Convention and in particular, the rules of treaty interpretation established by the 1969 Vienna Convention on the Law of Treaties.[85] Rejecting the Defence submission that "traditional rules of treaty interpretation" mandate a strict interpretation of nationality,[86] the Appeals Chamber held that a teleological approach was consistent in light of the object and purpose of the Fourth Geneva Convention.[87] According to the Appeals Chamber,[88] the *Tadic* Appeals Judgement constituted neither a rewriting nor a recreation of the law of that Convention in having relied on the *travaux préparatoires* for the purpose of "... reinforc[ing] its conclusions reached upon an examination of the overall context of the Geneva Conventions."[89] The *Celebici* Appeals Chamber held that the object and purpose of international humanitarian law is "directed to the protection of civilians to the maximum extent possible",[90] and concluded that the nationality requirement in Article 4 should be construed within this context.[91]

Hence the "more purposive and realistic approach"[92] adopted by the Appeals Chamber in the *Celebici* case, which upheld the Trial Chamber's conclusions based on legal reasoning consistent with the *Tadic* Appeals Judgement.[93] Judicial interpretation was thus broad in requiring that the law

84 *Ibid.*

85 Vienna Convention on the Law of Treaties, 23 May 1969. Article 31 states that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32, entitled "Supplementary means of interpretation" states that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous and obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

86 *Celebici Case* 2001, *op. cit.* (note 57), paras. 59 and 65.

87 *Ibid.*, para. 73.

88 The Appeals Chamber in the *Tadic* case held that Articles 4(1) and 4(2) of the Fourth Geneva Convention, in addition to the preparatory work, illustrate that "... already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 164-165.

89 *Celebici Case* 2001, *op. cit.* (note 57), para. 73.

90 *Ibid.*, para. 168.

91 *Ibid.*, para. 73.

92 *Ibid.*, para. 81.

93 *Ibid.*, para. 86.

"be applied to the reality of the situation"[94] whilst "emphasi[zing] the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner".[95] Legal prerequisites such as the internationality of the armed conflict and protected persons status continue to provide the *context* in which alleged offences take place;[96] these controlling factors have, however, entailed a conceptual adaptation:

> "[I]t would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4, that was apparently inserted to prevent interferences in a State's relations with its own nationals. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach taken here. As was recently stated by [Theodor] Meron, in interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals."[97]

A linear pattern of judicial reasoning has emerged and the Tribunal in *Prosecutor* v. *Kordic and Cerkez* has ruled out deviation from this reasoning.[98] The consistency with which the allegiance rather than the nationality determinant is applied was guaranteed by the Trial Chamber in the Kordic case, which held that "[t]hose decisions [by the Aleksovski and Celebici cases] are binding on this Chamber".[99] Interpretive flexibility was also confirmed by the Trial Chamber in the *Kordic* case, wherein it adopted a teleological approach "[b]y parity of reasoning" with the *Aleksovski* and *Tadic* Appeals Judgements.[100] The Tribunal consistently abides by its jurisprudence on this issue, as confirmed by *Prosecutor* v. *Naletilic and Martinovic*, for the Tribunal "... will review, on a case by case basis, the effective allegiance of the victims rather than their formal nationality".[101] The linear trend adopted by the

94 *Ibid.*, para. 87 (quoting the *Celebici Case* 1998, *op. cit.* (note 1), para. 264).

95 *Ibid.*, para. 86 (quoting the *Celebici Case* 1998, *op. cit.* (note 1), para. 263).

96 *Ibid.*, para. 26 (Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna).

97 *Celebici Case* 1998, *op. cit.* (note 1), para. 266 (quoting Theodor Meron).

98 *Prosecutor* v. *Kordic and Cerkez, Judgement*, Case No. IT-95-14/2, T. Ch. II, 26 Feb. 2001 (hereinafter *Kordic and Cerkez Judgement*).

99 *Ibid.*, para. 148.

100 *Ibid.*, para. 150.

101 *Prosecutor* v. *Naletilic and Martinovic, Judgement*, Case No. IT-98-34-T, 31 March 2003, para. 207.

Tribunal since the 1999 *Tadic* Appeals Chamber Judgement can thus be characterized as persuasive precedent[102] regarding protected persons status.

Common criminal enterprise

The general principle of criminal law that an individual is responsible for his acts or omissions is given effect by Article 7 of the Statute.[103] However neither in Article 7(1) nor elsewhere does the Statute specify the necessary degree of participation by the individual in the crime.[104] According to the 1997 *Tadic* Judgment and subsequent case law, criminal liability under Article 7(1) entails participation via "complicitous conduct".[105] A distinction can thus be made between conventional doctrines of active participation in the sense of having personally physically committed the crime, and "inactive participation"[106] in the sense of having "participated" in a common criminal enterprise.[107] There is a "basic understanding", according to the Trial Chamber in the *Celebici* case, that jurisdiction over the principles of individual criminal responsibility under Article 7(1) "is not limited to persons who directly commit the crimes in question".[108] The word participation is therefore construed in such a way as to encompass "all forms of responsibility which are included within Article 7(1)", notwithstanding the fact that some forms are more direct than others, according to the *Celebici* Appeals Judgement.[109]

In the *Kordic* case[110] for example, the Prosecution submitted that the responsibility of the accused entailed their "active participation" in the

102 For the use of persuasive precedent, see *Prosecutor* v. *Bagambiki et al. Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-(I), T. Ch. II, 24 Sept. 1998, para. 7. See also *Prosecutor* v. *Kupreskic et al., Judgement*, Case No. IT-95-16, 14 Jan. 2001, para. 540

103 *Kordic and Cerkez Judgement, op. cit.* (note 98), para. 364.

104 *Ibid.*, para. 374.

105 *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), para. 674.

106 K. Askin, "Developments in international criminal law: Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunal: Current status", *American Journal of International Law*, Vol. 93, 1999, pp. 97, 103 and 104.

107 See for example, *Prosecutor* v. *Mucic et al., Judgement on Sentence Appeal*, Case No. IT-96-21, 8 April 2003, para. 40. For a detailed discussion of joint criminal enterprise liability, see *Prosecutor* v. *Radoslav Brdanin and Momir Talic, Decision on Form Further Amended Indictment and Prosecution Application to Amended Indictment and Prosecution Application to Amend*, Case No. IT-99-36-PT, 26 June 2001.

108 *Blaskic Judgement, op. cit.* (note 73), para. 263 (quoting the *Celebici Case* 1998, *op. cit.* (note 1), para. 319).

109 *Celebici Case* 2001, *op. cit.* (note 57), para. 355.

110 *Kordic and Cerkez Judgement, op. cit.* (note 98).

crimes charged in the Indictment.[111] In citing the *Tadic* Appeals Chamber decision, the Trial Chamber found that Article 7(1) comprises two distinct categories of criminal responsibility, divided between principal perpetrators and accomplices.[112] An individual's "participation in the commission of a crime other than through direct commission",[113] or indirect liability, is within the scope of Article 7(1), according to the Trial Chamber.[114] Primary and secondary forms of participation, although not explicit within the Statute, have nevertheless been qualified as the responsibility of direct or principal perpetrators and accomplice liability, respectively.[115]

Moreover, the Trial Chamber in *Prosecutor* v. *Kvocka et al.*[116] held that lack of participatory specification in the Indictment would not prevent the Chamber from taking into consideration all possible modes of participation, including the common purpose doctrine.[117] Given the different primary and

111 *Ibid.*, para. 372. Quotation marks in original.

112 *Ibid.*, para. 373 (quoting the *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 186).

113 *Ibid.*, para. 385.

114 This reflects the finding in the *Tadic* Appeals Chamber Judgement that allows the Prosecution to plead Article 7(1) in its entirety vis-à-vis the accused's participation in a joint criminal enterprise: "... Although only some members of the group may physically perpetrate the criminal act, (...) the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrator of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminality." *Prosecutor* v *Krnojelac, Judgement*, Case No. IT-97-25, T. Ch. II, 15 March 2002 (hereinafter *Krnojelac Judgement*), para. 73 (quoting the *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 191-192.

115 *Krstic Judgement, op. cit.* (note 68), para. 643.

116 *Prosecutor* v. *Kvocka et al., Judgement*, Case No. IT-98-30/1, T. Ch. I, 2 Nov. 2001 (hereinafter *Kvocka Judgement*).

117 The Trial Chamber held that "... though the Prosecutor did not expressly refer to the common purpose in the indictment, indeed far from it, nothing prohibits the Chamber from taking into consideration the theory which, after all, constitutes only one of the many forms of participation covered by the Statute." Press Release, Trial Chamber, *Judgement in the Case of the Prosecutor against Miroslav Kvocka, Milojica Kos, Mlado Radi, Zoran Zigic and Dragoljub Prac: Omarska/Keraterm/Trnopolje*, 2 November 2001, CC/P.I.S./631e (on file with author). See also *Krstic Judgement, op. cit.* (note 68), para. 602. However, in *Prosecutor* v. *Krnojelac* the Trial Chamber held that "... in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon [an] extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly." *Krnojelac Judgement, op. cit.* (note 114), para. 86.

secondary degrees of participation since the 1999 *Tadic* Appeals Judgement, discretionary powers fall within the jurisdiction of the Tribunal in order to "...characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate...".[118] Theories of responsibility include a twofold distinction between what is stated explicitly in Article 7(1) and what is implicitly upheld therein, according to the Trial Chamber in the *Kvocka* case.[119] A linear pattern of judicial interpretation has since the *Tadic* Appeals Judgment revealed that common design constitutes "a mode of participation in the wider sense under Article 7(1)"[120] and falls within a broad interpretive scope of the Statute.

This extension of Article 7(1) was not initially referred to in *Prosecutor* v. *Milosevic et al.*; rather, each of the accused was deemed "... individually responsible for the crimes alleged against him in [the] Indictment, pursuant to Article 7(1) of the Tribunal Statute."[121] Criminal culpability was construed in the Indictment in terms of the exact language of Article 7(1), namely through "committing, planning, instigating, ordering or aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute."[122] Clarification was made in the Amended Indictment in relation to the word "committed", for the Prosecutor did not intend to suggest that any of the accused personally and physically perpetrated any of the crimes charged.[123] Clarification was again made in relation to the word "committing," in turn specifying the degree of criminal culpability: "[c]ommitting in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator."[124]

118 *Kvocka Judgement, op. cit.* (note 116), para. 248 (referring to the *Furundzija Judgement, op. cit.* (note 66), para. 189; *Kupreskic Judgement, op. cit.* (note 102), para. 388).

119 *Kvocka Judgement, op. cit.* (note 116), para. 297 (citing *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 229).

120 *Kupreskic Judgement, op. cit.* (note 102), para. 772.

121 *Prosecutor* v. *Milosevic et al.*, Indictment, Case No. IT-02-54, 24 May 1999, para. 83.

122 *Ibid.*, para. 83.

123 *Prosecutor* v. *Milosevic et al., Amended Indictment*, Case No. IT-99-37-I, 29 June 2001, para. 16. See also *Prosecutor* v. *Milosevic, Indictment*, Case No. IT-01-51-I, 22 Nov. 2001 (hereinafter *Milosevic Indictment*), para. 5; and *Prosecutor* v. *Stanisic and Simatovic, Indictment*, Case No. IT-03-69, 1 May 2003, paras. 8-14.

124 *Prosecutor* v. *Milosevic et al., Indictment*, Case No. IT-01-50-I, 8 Oct. 2001, para. 5. See also *Milosevic Indictment, op. cit.* (note 123), para. 5. This is suggestive of an approach more similar to the finding of the Trial Chamber in *Prosecutor* v. *Krnojelac* than to the *Celebici* Appeals Chamber and *Prosecutor* v. *Kvocka et al.* Judgements. Interestingly the Tribunal, in citing the *Tadic* Appeals Chamber Judgement, held in *Prosecutor* v. *Naletilic and Martinovic* that "[c]ommitting means physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law", without actually stating as it did in the *Tadic*

The date on which the joint criminal enterprise materialized, including its duration, was identified in the Second Amended Indictment, as well as the underlying purpose for which the alleged crimes took place.[125] According to the Tribunal:

> "In order for the joint criminal enterprise to succeed in its objective, Slobodan Milosevic worked in concert with or through other individuals in the joint criminal enterprise. Each participant or co-perpetrator within the joint criminal enterprise, sharing the intent to contribute to the enterprise, played his or her own role or roles that significantly contributed to achieving the objective of the enterprise."[126]

Article 7(1) was thus extended in the Second Amended Indictment to include both the *mens rea* and *actus reus* of common design.[127]

Arguments for and against extending the grave breaches regime[128] and individual criminal responsibility

Those who support the extension of the grave breaches regime and individual criminal responsibility refer to the importance of reinforcing the strength of grave breaches provisions and the need for substantive clarification of the Tribunal's Statute. The teleological approach justifies these extensions, particularly when giving effect to the object and purpose of international humanitarian law. Authors who are against such extensions cite arguments relating to nationality and sovereignty, retroactivity and the principle of legality, and the collectivization of responsibility. Accordingly, the Tribunal should exercise greater restraint when both interpreting and applying the law of armed conflict. Upon closer examination of selected jurisprudence however, the Tribunal offers persuasive evidence in favour of extend-

Appeals Chamber Judgement, *op. cit.* (note 3) that "... the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose." See *Naletilic and Martinovic Judgement, op. cit.* (note 101), para. 62. See also *Prosecutor* v. *Krstic*, wherein the Prosecutor refers to joint criminal enterprise liability as "co-perpetration" and considers "co-perpetration" to be a form of "committing". *Krstic Judgement, op. cit.* (note 68), para. 601. (Quotation marks in original)

125 *Prosecutor* v. *Milosevic et al., Second Amended Indictment*, Case No. IT-99-37-PT, 29 Oct. 2001, paras. 16-17. See also *Milosevic Indictment, op. cit.* (note 123), paras. 6-7.

126 There were a number of ways in which Slobodan Milosevic, acting alone and in concert with other members of the joint criminal enterprise, participated in the common plan. See *Milosevic Indictment, op. cit.* (note 123), paras. 9 and 25.

127 *Prosecutor* v. *Milosevic et al., Second Amended Indictment*, Case No. IT-99-37-PT, 29 Oct. 2001, para. 18.

128 Brown, *op. cit.* (note 15), pp. 352, 387 and 394.

ing both the grave breaches regime and individual criminal responsibility when adopting a purposive interpretation of international humanitarian law.

Reinforcing the grave breaches regime

The teleological approach is the basis on which the argument in favour of extending the grave breaches regime is founded. Judicial "gap-filling" vis-à-vis grave breaches enables the Tribunal to give effect to the drafters' intentions; that is, to the object and purpose of the Geneva Conventions.[129] According to Georges Abi-Saab:

> "If the special legal characteristics of the Geneva Conventions and Protocols ultimately derive from their object and purposes, they in turn command the teleological interpretation of those instruments in the light of their object and purpose; an interpretation which provides the thrust and continuous drive towards perfecting the content and expanding the ambit of humanitarian protection."[130]

A narrow interpretation of grave breaches limits the scope under which alleged perpetrators could be held criminally liable for violations of international humanitarian law. This was illustrated by the 1995 *Tadic* Appeals Chamber ruling, which found the defendant guilty solely under Articles 3 and 5 of the Statute, and by the *Tadic* Trial Chamber II in 1997, which ruled that the grave breaches provisions did not apply. Moreover, the threshold required to charge an accused is much higher for alternative charges under the Statute than that required for grave breaches.

This regime, referred to as the "... nexus between international humanitarian law and international criminal law", loses credence when interpreted narrowly, as it was by the Appeals Chamber in the 1995 *Tadic* case:

> "The restrictive approach taken by the majority in the *Tadic* case handicaps the ICTY by effectively depriving it of the ability to convict for 'grave breaches of the Geneva Conventions', an especially serious and

129 In its ruling in *Prosecutor* v. *Kupreskic*, the Tribunal referred to the "... progressive trend towards the so-called 'humanisation' of international legal obligations..." and in particular, to the Martens Clause, which, as a minimum, enjoins reference to the "principles of humanity" and "the dictates of public conscience (...) and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates." *Kupreskic Judgement, op. cit.* (note 102), paras. 518 and 525.

130 G. Abi-Saab, "The specificities of humanitarian law," in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984, p. 273.

enforceable category of offence under international humanitarian law. If followed, it will leave the ICTY with an even narrower range of crimes within its jurisdiction than those available to the International Tribunal for Rwanda."[131]

The argument for extending the grave breaches regime is thus underscored by the importance of the regime itself and in particular, of the only partial compensation offered by alternative charges if Article 2 of the Tribunal's Statute is not applied.[132] The limited scope in applying two of the three crime categories other than grave breaches is a result of the required proof of special elements.[133] The grave breaches regime is a category of crimes whose potential application is much broader, requiring only the material elements of an international armed conflict and the victims' status as protected persons.[134] Furthermore, grave breaches are subject to a more developed international enforcement regime and as such, benefit from a superior normative status under international humanitarian law than do, for example, violations of the customs of war.[135] The proscribed acts listed in Article 2 of

131 "From the outset", Brown continues, "the situation in Rwanda was seen as an internal armed conflict. Therefore, the Rwandan Tribunal's Statute does not include 'grave breaches of the Geneva Conventions' as crimes within its jurisdiction. Unlike the ICTR, the ICTY was granted jurisdiction over grave breaches under Article 2 of its Statute, and it would be unfortunate if any unduly narrow application of that article were to neutralize this central aspect of its intended jurisdiction." Brown, *op. cit.* (note 15), pp. 394, 381 and footnotes 162-164. See International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994).

132 The alternative charges available include crimes against humanity, violations of the laws and customs of war, and genocide. Only partial compensation is due to three factors, according to Brown: "difficulties in proving the elements of some alternative categories of crimes, the relatively weak normative status of others, and the lack of an international enforcement regime applicable to most of them." Brown, *op. cit.* (note 15), p. 391.

133 Brown notes that the possibility to convict for crimes against humanity requires proof of "widespread or systematic acts against a group based on race, sex, language, or religion." "Similarly", he continues, "without proof that the accused had the specific intent to destroy a racial, ethnic, or religious group in whole or in part, it will be impossible to convict for genocide." Of all crimes, violations of the laws and customs of war are the easiest to prove, for they are not subject to any of the above-mentioned requirements. *Ibid.*, p. 391 and footnotes 199-200.

134 Article 2 differs from Article 3 of the Statute in that it "requires a materially distinct element, namely that the victim was a 'protected person', in accordance with the 1949 Geneva Conventions." *Jelisic, op. cit.* (note 33), (Partial Dissenting Opinion of Judge Wald, para. 13).

135 Brown, *op. cit.* (note 15), pp. 391-393.

the Statute should therefore be applied as widely as possible in order to best serve the purposes of international humanitarian law.[136]

Nationality and sovereignty

The extension of the grave breaches regime runs counter to those who argue against a wider application thereof, on the grounds of upholding national sovereignty. The doctrine of domestic jurisdiction long precluded judicial scrutiny of States' conduct vis-à-vis their own citizens.[137] Nationality has traditionally been a matter entirely within the domestic jurisdiction of States and its extension would by definition encroach upon and compromise State sovereignty. With the advent of international humanitarian, criminal and human rights law, however, abuses committed within national borders are no longer confined therein. For example, the doctrine of domestic jurisdiction eventually yielded, albeit reluctantly, to the demands of international human rights law.[138] States can therefore no longer shield themselves behind traditional theories of nationality, according to the way in which the concept of sovereignty has itself evolved:

> "The sovereignty of states remains an important international value, but the prerogatives it entails have been limited and redefined to accommodate the newly recognized values of international human rights. In this day and age, insistence upon a traditional concept of state sovereignty is anachronistic, especially in a humanitarian context. Viewed from this perspective, a modest extension of the grave breaches can indeed be justified."[139]

State-centric notions of both nationality and sovereignty have been surpassed by a number of international legal developments, including the more functional approach by the Tribunal to the nationality requirement. Sovereignty arguments thus offer little persuasive force against the extension

136 *Ibid.*, p. 394.

137 A. Bianchi, "Denying State immunity to violators of human rights", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 195 and 221.

138 *Ibid.*

139 Brown also argues that "[t]he notion of moving beyond state-centricism is implicit in the idea of an international law of human rights, since the rights with which this law is concerned are those of individuals, or groups of individuals, rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty. While traditional state-centric approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion, international humanitarian law requires some encroachment on sovereignty." Brown, *op. cit.* (note 15), p. 395 and footnote 219, p. 353.

of the grave breaches regime, most notably when the Tribunal itself refuses to be guided by the dictates of citizenship status under domestic law.[140]

Retroactivity and the principle of legality

Arguments may be brought concerning the ability of the ICTY— or of any other criminal court — to reinterpret retroactively the nationality requirement of Article 4 of the Fourth Geneva Convention, a key element necessary for finding criminal liability. The reinterpretation of the common purpose doctrine may similarly constitute a questionable development under the principle *nullum crimen sine lege*.[141] Recognizing the traditional way in which customary law develops, particularly its evolution in adapting to changing social needs, Marco Sassòli and Laura M. Olson argue that:

> "Many legal observers, (...) — especially from the Continental tradition — would have expected a criminal tribunal, because of the principle nullum crimen sine lege, to exercise particular restraint in extending the law, especially in sentencing and in applying legal theories that were not in place when the acts were committed. The innovative and imaginative solutions applied by the ICTY Appeals Chamber to several issues were certainly not necessary to punish Tadic for the acts he had committed. In this respect, one has the impression that the ICTY often rushes ahead to clarify every legal issue that it can, whereas other courts decide only the issues that they must, thereby building up their jurisprudence step by step and producing more careful and reliable results."[142]

Prohibitions against the non-retroactive application of criminal sanctions and against *ex post facto* criminal laws are fundamental principles of legality.[143] According to the Trial Chamber in the *Celebici* case, "[t]hese considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised."[144] The disintegration of the former Yugoslavia demonstrates, however, that the realities of contemporary inter-ethnic

140 *Celebici Case* 2001, *op. cit.* (note 57), para. 46 (quoting the Trial Judgement, *op. cit.* (note 1), paras. 275- 276).

141 Sassòli and Olson, *International Decision*, *op. cit.* (note 5), p. 577.

142 *Ibid.*, pp. 577-578.

143 *Celebici Case* 1998, *op. cit.* (note 1), para. 402.

144 *Ibid.*, para. 402.

conflict require a more purposive approach to the nationality requirement in establishing protected persons status.

For example, the Tribunal is bound both by the principles of legality and by the need to fulfil its mandate, and had to reconcile the non-retroactivity of criminal legislation with the object and purpose of the Geneva Conventions. It did so in light of the fact that there was no jurisprudence on this particular question when reaching its compromise conclusions. Specifically, in interpreting Article 4 of the Fourth Geneva Convention, the Tribunal sought guidance in the Commentary to that Convention when the Appeals Chamber held in the *Celebici* case that:

> "The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected person status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that 'the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests' and thus it is in the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security (...), or the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law."[145]

The concept of nationality has thus been neither retroactively reinterpreted nor manipulated by the Tribunal; rather, it has been applied in light of the object and purpose of international humanitarian law, which is to protect civilians to the maximum extent possible.

Furthermore, the legal test ascertaining nationality is limited in context and in purpose, the latter relating to the specific application of the Fourth Geneva Convention to cases before the Tribunal: "[the nationality requirement] would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose."[146] Strict adherence to conventional nationality requirements undermines protection afforded by the

145 *Celebici Case* 2001, *op. cit.* (note 57), para. 46 (quoting the 1998 Trial Judgement, *op. cit.* (note 1), paras. 275-276).

146 *Ibid.*, para. 49 (quoting the 1998 Trial Judgement, *op. cit.* (note 1), para. 259.

Geneva Conventions in modern inter-ethnic conflict. Jurisprudence relating to Article 4 of the Fourth Geneva Convention thus exemplifies a persuasive extension of the grave breaches regime, rather than a power *contra legum* of the United Nations to legislate.

Arguments concerning the reinterpretation of individual criminal responsibility can also be countered by referring to the principle of legality. This principle dictates that the Tribunal "... has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed."[147] The requirement of specificity in criminal legislation is associated with the principles *nullum crimen sine lege*, *nulla poena sine lege*, the prohibition against *ex post facto* criminal laws, and the non-retroactive application of criminal laws and criminal sanctions.[148] The Secretary-General emphasized in his commentary on the Statute that the International Tribunal should apply rules of international humanitarian law that have attained the status of customary international law. The requirements of both specificity and non-ambiguity are met regarding the subject-matter over which the Tribunal exercises jurisdiction, for Article 2 of the Statute has been identified as declaratory of customary international law.[149] Arguments against the extension of Article 7(1) to include the common purpose doctrine, and in particular the question of whether common purpose represents a sound development of international criminal law under the principle *nullum crimen sine lege*,[150] can be countered by citing the explicit and prior criminalization by the Geneva

147 *Prosecutor* v. *Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT, T. Ch. III, 2 March 1999, para. 20.

148 *Celebici Case* 1998, *op. cit.* (note 1), para. 402.

149 See the decision by the Trial Chamber in the 1995 *Tadic* case, which stated that: "[t]he Report of the Secretary-General (...) makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied should be 'beyond any doubt part of customary law', so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute." *Tadic – 1995 Decision on Jurisdiction, op. cit.* (note 28), para. 51.

150 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), pp. 733, 742 and footnote 65, p. 748.

Conventions of the offences committed by the accused.[151] For example, the Tribunal held in the 1997 *Tadic* Opinion and Judgment that "[i]mplicit in the [1995] *Appeals Chamber Decision* is the conclusion that the Geneva Conventions are a part of customary international law, and as such their application in the present case does not violate the principle of *nullum crimen sine lege*."[152] More importantly:

> "the principle of *nullum crimen* does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only in respect of whether it constituted a crime under a particular system."[153]

The development by the Tribunal of the common purpose doctrine and the ensuing expansion of individual criminal responsibility for violations of international humanitarian law may thus be said to satisfy the principle of legality.

The collectivization of responsibility

Criticism regarding the extension of the common purpose doctrine is advanced in relation to the collectivization of responsibility as a result of simple membership in, and knowledge of, the policy of the group.[154] Certain authors express concern that the development of the common purpose doctrine recollectivizes criminal responsibility[155] by undermining the basic norm that criminal culpability resides in the acts of the individual.[156] Accordingly, the Tribunal should exercise greater restraint when ruling on the applicability of both grave breaches and individual criminal responsibility.[157]

151 It is understood that the term "committed" refers to the traditional physical perpetration of a crime and inactive participation in the sense of having "committed" a crime via a common criminal enterprise.

152 *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), para. 577 (quoting the *Tadic* Jurisdiction Decision of the Appeals Chamber).

153 C. Greenwood, "The development of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, pp. 132-133.

154 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), p. 743.

155 *Ibid.*, pp. 743 and 748.

156 *Ibid.*, p. 743.

157 *Ibid.*, pp. 748 and 749.

The Tribunal has however, in ruling on the matter, adopted a high level of participation for co-perpetrator liability, excluding marginal participation by the accused.[158] Any notion of "recollectivization of responsibility" is also challenged by the judgement of *Prosecutor* v. *Kvocka et al.*, wherein the Trial Chamber stressed in relation to co-responsibility that "... this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise."[159] According to the Tribunal, participation must be significant and must entail an act or an omission that contributes to the efficiency or effectiveness of an enterprise.[160] Furthermore, participation would in general require assessment on a "case by case basis", most notably for those who do not physically perpetrate the crimes.[161] Thus irrespective of the nature of the joint criminal enterprise — whether broadly defined or temporally and geographically limited — a person incurs criminal liability solely when that person's participation makes a substantial contribution to the functioning or endeavours of the enterprise.[162]

Moreover, the Trial Chamber held that a more substantial level of mid- or low-level participation is required in a joint criminal enterprise during periods of war or mass violence than when following orders and carrying out a low-level function on a single occasion in a criminal endeavour.[163] Both the significance and the level of participation depend on a number of

158 In *Prosecutor* v. *Furundzija*, the Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law — co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other." It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim of a third person)." It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake in the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person." *Furundzija, Judgement, op. cit.* (note 66), paras. 231, 118, 216, 253, and 257. Emphasis in original.

159 *Kvocka Judgement, op. cit.* (note 116), para. 309.

160 As an example, the Trial Chamber cited "a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution." *Ibid.*, para. 309.

161 *Ibid.*

162 *Ibid.*, para. 310.

163 *Ibid.*

factors,[164] according to the Trial Chamber, the most important of which includes the role played by the accused in terms of the gravity and scope of the crimes committed.[165] *Individual* criminal responsibility is thus preserved by the Tribunal with regard to the accused's participation in the joint criminal enterprise:

> "In sum, an accused must have carried out acts that substantially assisted in or significantly affected the furtherance of the goals of the enterprise, with the knowledge that his acts or omission facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning."[166]

The Tribunal has thus effectively distinguished between collective and individual criminal responsibility.[167] Murder as a result of simple looting, an

164 The variety of factors includes "... the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavour, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of the crime." *Kvocka Judgement, op. cit.* (note 116), para. 311.

165 For example, "even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape." *Ibid.*, para. 311.

166 *Ibid.*, para. 312.

167 In the *Krstic Judgement, op. cit.* (note 68), the Trial Chamber held that "... it is essential to make a distinction between what might be collective responsibility and individual responsibility. The Tribunal has not been established to deal with the possibility of collective responsibility. What is of interest (...) in each of the trials (...) in this court is to verify whether the evidence presented before it makes it possible to find an accused guilty. [It] seeks to judge an accused [and not] a people." Press Release, Trial Chamber, "Radislav Krstic becomes the first person to be convicted of genocide at the ICTY and is sentenced to 46 years imprisonment", 2 August 2001, OF/P.I.S./609e (on file with author).

example to which Marco Sassòli and Laura M. Olson attribute the collectivization of responsibility through the common purpose doctrine,[168] would therefore seem unlikely in view of the high level of participation[169] required by the Tribunal to establish criminal liability through participation in a joint criminal enterprise.

The need for substantive clarification

The extension of the grave breaches regime and of individual criminal responsibility reveals the need for substantive clarification of the rules of international humanitarian law contained in the Tribunal's Statute. According to the Tribunal in the *Celebici* case, the ICTY "... provides a forum and framework for the enforcement of existing international humanitarian law."[170] Although the Statute clearly defines the Tribunal's subject-matter jurisdiction, the Tribunal must develop its own approach to define the constituent elements of serious violations of international humanitarian law.[171] For example, Tribunal judges are tasked with the responsibility to redefine and adjust individual criminal responsibility within the confines of international humanitarian law.[172] International humanitarian law similarly requires further refinement when developing individual criminal responsibility[173] for violations of the law of armed conflict. Substantive developments when interpreting provisions of the Geneva Conventions, and the nationality requirement in particular, thus lead to an extended scope of charging practices for atrocities committed in the course of international inter-ethnic conflict. These developments have led the Tribunal to espouse "normative fluidity" vis-à-vis its functional view of nationality.[174]

Interestingly, the teleological approach adopted by the Tribunal allows for it not only to circumvent a strict application of Article 4 of the Fourth Geneva Convention but also to do so whilst drawing on both human rights and humanitarian law. A *rapprochement* of these two bodies of law was alluded to in the *Celebici* case, wherein the Tribunal held that "it would be

168 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), p. 743.
169 *Kvocka Judgement*, *op. cit.* (note 116), para. 289.
170 *Celebici Case* 1998, *op. cit.* (note 1), paras. 415-417.
171 Brown, *op. cit.* (note 15), p. 356 and footnote 40.
172 *Ibid.*, p. 404.
173 *Ibid.*, p. 357 and footnotes 44-45.
174 *Ibid.*, p. 404 and p. 396.

incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4."[175] Thus in adopting a strict interpretation of the nationality requirement, a twofold paralysis of existing protective mechanisms ensues: both of the concept of human rights and of humanitarian legal instruments.

Conclusion

The twofold extension of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia has given rise to a contemporary understanding of Articles 2 and 7(1) of the Tribunal's Statute. Conventional law has not been negated in this process of substantive clarification; rather, interpretive gap-filling has allowed the Tribunal to further the development, rather than the redefinition, of these two aspects of international humanitarian law. Functional adaptations[176] of the grave breaches regime and the extension of individual criminal responsibility to include the common purpose doctrine have significantly expanded the means to interpret the Tribunal's Statute, including violations thereof.[177]

By adopting a teleological approach in its purposive interpretation of the law of armed conflict, the International Criminal Tribunal for the former Yugoslavia offers a convincing basis for extending grave breaches and individual criminal responsibility. In so doing, the Tribunal avoids the paralysis of protective mechanisms and reinforces the objectives of international humanitarian law by affording protection to civilians to the maximum extent possible.

175 *Celebici Case* 1998, *op. cit.* (note 1), para. 266. See also *Prosecutor* v. *Kupreskic*, wherein the Tribunal held that "[i]t is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred." *Kupreskic Judgement*, *op. cit.* (note 102), para. 529.

176 Brown, *op. cit.* (note 15), p. 348.

177 Certain authors view the ICTY's judgements (most notably the *Tadic* 1999 Appeals Chamber Judgement) as judicial lawmaking, rather than as representing a progressive interpretation of existing law. For example, William A. Schabas notes that: "[i]n the future, judges will have greater difficulty undertaking the kind of judicial lawmaking that the *ad hoc* Tribunal for Yugoslavia performed in the [1999 Appeals Chamber] *Tadic* case, and this will make it harder for justice to keep up with the imagination and inventiveness of war criminals. Indeed, the Tadic Appeals Chamber may well have frightened States with its bold judicial lawmaking, who then resolved that they would leave far less room for such developments in any statute of an international criminal court." W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 42.

Résumé

Le développement du régime des infractions graves et de la responsabilité pénale individuelle par le Tribunal pénal international pour l'ex-Yougoslavie

Natalie Wagner

Cet article analyse deux faits nouveaux essentiels dans le droit international humanitaire, attribuables au Tribunal pénal international pour l'ex-Yougoslavie. Il se concentre sur l'interprétation progressive, par le Tribunal, du régime des infractions graves et sur la doctrine dite de l'intérêt commun, actuellement utilisée pour poursuivre Slobodan Milosevic. À cette fin, l'article décrit la jurisprudence pertinente depuis l'Arrêt de la Chambre d'appel du Tribunal dans l'affaire Tadic *(1999). Cette jurisprudence démontre qu'en adoptant une approche fonctionnelle de la nationalité, le Tribunal a élargi le régime traditionnel des infractions graves. En outre, le Tribunal a reconceptualisé le droit de la responsabilité pénale individuelle de façon à y intégrer la doctrine dite de l'intérêt commun.*

Toutefois, ces développements ne recueillent pas un soutien unanime dans les publications. Une école de pensée se prononce en faveur d'une approche du droit international humanitaire strictement fondée sur les Conventions, tandis qu'une autre apporte son soutien à une interprétation et une application téléologiques de celles-ci. Par contraste avec l'opinion de la première, l'auteur discerne un schéma juridique cohérent dans la jurisprudence récente du Tribunal à l'égard du régime des infractions graves et de la doctrine dite de l'intérêt commun.

Affaires courantes et commentaires
Current issues and comments

The implementation of international humanitarian law in the Russian Federation

BAKHTIYAR TUZMUKHAMEDOV*

The object of this article is to identify several issues pertinent to implementation of international humanitarian law in the Russian Federation. It first examines the relevant provisions of the Russian Constitution of 1993 and discusses the extent to which they provide for the incorporation of international norms. An overview of current Russian legislation is then given, focusing on some specific examples of legislative incorporation of international humanitarian law. That overview will not be confined to laws adopted solely by the Russian parliament. References to international law and more specifically to international humanitarian law can also be found in military field manuals that are binding on the Russian armed forces and other uniformed armed services. Finally, a notable case decided by the Russian Constitutional Court in 1995 with regard to the implementation of international humanitarian law is discussed. In its decision, the supreme body of judicial review in the Russian Federation made remarkable references to the Additional Protocol II of 1977 to the Geneva Conventions of 1949.[1]

The Russian Constitution of 1993

The Russian Constitution of 1993 states in paragraph 4 of Article 15 that "generally accepted principles and rules of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes rules, other than provided for by the law, the rules of the international treaty shall be applied."[2] The Constitution stops short of declaring that international law forms an integral part of Russian legislation. It refers instead to the

* Associate Professor of International Law, Diplomatic Academy of the Russian Ministry of Foreign Affairs, Rapporteur of the Committee on Arms Control and Disarmament Law of the International Law Association. Views expressed herein are those of the author and should not be attributed to persons or institutions with which he may be associated.

rather vague term "legal system". The use of this term has prompted some commentators to suggest that in order to divine its exact meaning "the law-applying authorities should apparently be guided by theoretical postulates and treat it as objective law, that is, as a conglomerate of laws, the practice of application of legal norms, as well as legal ideology".[3] Assuming that the framers of the current Russian Constitution considered the term "legal system" in a conscious and enlightened manner, it might be interpreted as reflecting a transition from the cautious approach to the incorporation of international law into domestic law, which was characteristic of former Soviet doctrine and practice, to a new willingness to apply international norms more directly. The general referral to international law in Article 15(4) of the Russian Constitution is supplemented by subject-specific references in other current legislation. These include numerous laws adopted in Russia following the entry into force of the Constitution of 1993.

It may be noted that the introduction of Article 15(4) gave rise to a sense of euphoria in some Russian students of international law. Those members of the Russian international legal community seemed to conclude that international law was about to permeate the fabric of Russian law and that all courts, from the lowest to the highest, would be applying rules enshrined in international treaties along with domestic statutes. However, in this author's opinion the Constitutional Court, when employing international law in the exercise of its powers, is properly applying that law only if it views particular questions of law brought before it through the prism of the letter and spirit of international legal decisions and if, in doing so, it analyses and interprets a norm of international law. But the Russian Constitutional Court is not authorized by the Constitution and implementing statute to do this. A mere reference to an international treaty or decision in an opinion of a domestic judicial authority does not amount to the application of international law.

The proponents of the extreme internationalist view seem to overlook paragraph 1 of the said Article 15, which clearly states that "the Constitution

1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

2 An English-language version of the Constitution of the Russian Federation is available on the website of the Constitutional Court at http://ks.rfnet.ru/english/rus_eng.htm.

3 *Kommentariy k Konstitutsii Rossiyskoy Federatsii* (*Commentary to the Constitution of the Russian Federation*), Moscow, 1996, p. 80.

of the Russian Federation shall have the supreme legal force (...). Laws and other enactments adopted in the Russian Federation shall not contravene the Constitution".[4] A reader familiar with the Constitution of the United States may discover some similarities between this provision of the Russian Constitution and the supremacy clause of the US Constitution.[5]

Furthermore, Article 15(4) of the Russian Constitution implies that in the event of a conflict between a domestic law and an international treaty obligation the latter does not necessarily repeal the former. Rather, the treaty regulates a specific situation to which both the treaty and the law may apply. The domestic law remains valid and may be applied under different circumstances in which there are no applicable international treaty rules. As for "generally accepted principles and rules of international law", there are no provisions in the Constitution that could be construed as affording them a legal force superior to that of domestic laws. On the other hand the Law on International Treaties that was enacted in 1995 does state in its preamble that "the Russian Federation adheres to strict observance of conventional and customary norms".[6] However, the very fact that customary norms are referred to only in the preamble to that law, and that it provides no further guidance as to how these norms are incorporated into Russian law, may serve as evidence of a reluctant attitude towards the integration of uncodified custom into domestic law.

In a perceived effort to make the life of courts of general jurisdiction easier, the Plenary Conference of the Russian Supreme Court in 1995 passed a resolution offering courts some guidelines for application of the Constitution. While the resolution is non-binding, the well-established pattern of the relationship between the Supreme Court and lower courts strongly suggests that the latter will follow the advice given. With regard to Article 15(4) of the Constitution, the resolution of the Russian Supreme Court suggested that courts should look for the "generally accepted principles and rules of international law" in international

4 Constitution of the Russian Federation, Art. 15(1), *op. cit.* (note 3).

5 Art. VI(2) of the Constitution of the United States reads as follows: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

6 Sobraniye Zakonodatelstva Rossiyskoy Federatsii (Collection of Legislation of the Russian Federation), hereinafter SZ RF, 17 July 1995, No. 29, Art. 2757.

documents, primarily in treaties, but also in other sources, such as the Universal Declaration of Human Rights.[7] As for international treaties, the resolution advised lower courts of general jurisdiction that only those treaties that have been incorporated into a federal law should take precedence over national legislation.

That Supreme Court resolution in effect relieved courts of the task of identifying international customary norms that have not been codified. In this respect, if a Russian court were to look for an applicable norm in the corpus of international humanitarian law, it is likely first to search for such a rule in a codified national law, and then in international treaties to which Russia is a party. Incidentally, the said resolution in a certain sense amounted to an interpretation of the Constitution, a task which is normally the exclusive prerogative of the Constitutional Court. This observation notwithstanding, the resolution has been referred to and supported by the latter on several occasions.[8]

Incorporation of international humanitarian law into Russian legislation[9]

Russia is a party to all four Geneva Conventions of 1949, as well as to the two Additional Protocols of 1977. It is also a party to other major relevant treaties, including the Biological Weapons Convention of 1972,[10] the Environmental Modification Convention of 1976,[11] the Conventional Weapons Convention of 1980[12] and its four protocols and the Chemical Weapons Convention of 1993.[13] It has signed but, at the time this article is being written,

7 Byulleten' Verkhovnogo Suda Rossiyskoy Federatsii (Bulletin of the Supreme Court of the Russian Federation), No.1, 1996.

8 See, most recently: Ruling of the Constitutional Court of the Russian Federation No. 290-O of 21 December 2000, in SZ RF, *op. cit.* (note 6), No. 11, 12 March 2001, Art. 1069.

9 For a general discussion of the subject in Russian, see V.A. Batyr, "Aktual'niye Problemy Implementatsii Norm MGP v Zakonodatel'stve Rossiyskoy Federatsii" ("Current issues of the implementation of the norms of international humanitarian law in the legislation of the Russian Federation") *Moscow Journal of International Law*, 1999, special issue to celebrate the fiftieth anniversary of the Geneva Conventions, pp. 193-209.

10 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972.

11 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, 10 December 1976.

12 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

13 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993.

has not ratified the 1998 Rome Statute of the International Criminal Court.[14] Russia is not a party to the Anti-personnel Mines Convention of 1997.[15]

It may be recalled that the Geneva Conventions of 1949 lay down several requirements with regard to national legislation. There is a general obligation "to respect and to ensure respect" for their provisions, as stated in Article 1 common to all four Geneva Conventions and Article 1(1) of Additional Protocol I. Apart from this general requirement, all these treaties oblige the High Contracting Powers to adopt laws and regulations to ensure their application. More specifically, they impose on parties to them an obligation to enact "legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions and the Protocol (respectively Articles 49, 50, 129, 146 and 85.1). The First and Second Geneva Conventions require that the High Contracting Powers, "if their legislation is not already adequate, take necessary measures for the prevention and repression" of misuse of the Red Cross emblem.

The Soviet Union ratified the four Geneva Conventions of 1949 in 1954. The Criminal Code that was adopted in 1960 and remained on the books until 1996 transformed several fundamental international humanitarian law obligations into domestic law.[16] For example, inhumane treatment of prisoners of war was punishable by a prison term of up to three years (Article 268 of the 1960 Criminal Code). Pillage or despoiling of the battlefield, as well as violence against civilians committed in the zone of military operations, could result in a prison term of three to ten years or even capital punishment (Articles 266 and 267 respectively of the 1960 Criminal Code. The crime of misuse of the red cross emblem could be punishable by a prison term of up to one year (1960 Criminal Code, Article 202).

The current Criminal Code of 1996[17] defines in its Article 356(1) "inhumane treatment of prisoners of war or of civilian population, deportation

14 Rome Statute of the International Criminal Court, 17 July 1998.

15 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997.

16 The original version of the 1960 Criminal Code was published in: Vedomosti Verkhovnogo Sovieta Rossiyskoy Sovietskoy Federativnoy Respubliki (The Official Gazette of the Supreme Soviet of the Russian Socialist Federal Republic), No. 40, 1960, Art. 591. The final consolidated version incorporating all numerous amendments is available from the ConsultantPlus© commercial database.

17 The original version of the 1966 Criminal Code was published in: SZ RF, *op. cit.* (note 6), No. 25, 17 June 1996, Art. 2954. The current consolidated version incorporating amendments is available from the ConsultantPlus© commercial database. The translation cited above is by the author.

of civilian population, pillage of national property on the occupied territory, the use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation" as a crime punishable by a prison term of up to twenty years. That provision is part of a section of the Code entitled "Crimes against peace and security of humanity". The Code envisages four degrees of gravity of a criminal offence, and the offences listed in Article 356(1) belong to the most serious category.

The same article also defines as a criminal offence "the use of a weapon of mass destruction which is prohibited by an international treaty to which the Russian Federation is a party". Other related offences under the 1966 Criminal Code include "planning, preparation, unleashing or waging of a war of aggression" (Article 353), "public appeals to unleashing a war of aggression" (Article 354), "production or proliferation of weapons of mass destruction" (Article 355), "genocide" (Article 357), "ecocide" (Article 358), "hiring, training, financial or other material support of a mercenary" (Article 359), and "attack on a person or an institution that enjoys international protection" (Article 360). With regard to the latter, it should be noted that such an attack falls under provisions of the Criminal Code only if it is committed "with a purpose of provoking a war or an aggravation of international relations". The term "a person or an institution that enjoys international protection" might be misleading, but it definitely implies envoys of foreign States or officials of international organizations that enjoy such protection. However, there is no clear indication that Article 360 is applicable in time of war. It would appear from the foregoing provisions that the Russian legislator, in incorporating international humanitarian law into domestic legislation:

- firstly, squeezed the whole body of international humanitarian law into a single sentence (Article 356);
- secondly, merged together the "Geneva" and "Hague" branches of the law of armed conflict;
- thirdly, referred only to international treaty law, and only to codified "Hague" law, rather than to both treaty and custom;
- fourthly, omitted a provision on misuse of the red cross emblem.

The legislation does not make any general reference to international treaties as a source of definitions of other offences, nor does it reproduce in the Criminal Code, in contrast to other laws, the relevant provisions of the Constitution that establish the prevalence of an international treaty over a

domestic law.[18] Even if the Russian Constitution's prevalence clause were to be reproduced in the legislation, because of the only partial incorporation of humanitarian law into domestic law a court would be confronted with a gap in the law, rather than with a conflict between a domestic law and an international treaty. Of course an enlightened judge, having encountered such a lacuna, could turn for example to Additional Protocol I and qualify an offence as a "war crime". But when it comes to choosing the penalty, the Protocol would be of little help.

It might seem that the easiest way of rectifying the situation would be to introduce an amendment into the Criminal Code that would refer courts to relevant international treaties in order to find elements of a war crime. Having identified an offence in that way, the court could then refer back to the Code to decide upon a penalty. Eventually, when and if Russia ratifies the Statute of the International Criminal Court, such an amendment could serve as an efficient method of incorporating elements of crimes listed in the Statute into Russian legislation.

Rome Statute of the International Criminal Court

At the time of writing this article, the President has not yet submitted the Statute to the State Duma, the law-making chamber of the Russian Federal Assembly. While the present author would rather not speculate about the reasons for such a delay in the initiation of ratification procedures, it is worthwhile, on the other hand, to discuss potential domestic constitutional repercussions of that treaty.[19] Even a superficial comparative review of the Statute and the Russian Constitution reveals certain inconsistencies between the two texts. For example, under Article 50(3) of the Constitution

18 Occasionally the Russian legislators seem to be stretching the prevalence clause of the Russian Constitution a bit too far. Consider, for example, the Federal Law on Pedigree Cattle-Breeding which states in its Article 3 that "generally recognized principles and norms of international law and international treaties of the Russian Federation relative to pedigree cattle-breeding shall be, in accordance with the Constitution of the Russian Federation, a component part of its juridical system. If an international treaty of the Russian Federation provides for rules other than stipulated by a law relative to pedigree cattle-breeding, the rules of the international treaty shall be applied" (SZ RF - *op. cit.* (note 6), No. 32, 7 August 1995, Art. 3199). Author's translation.

19 For a more detailed discussion see B. Tuzmukhamedov, "Rimskiy Statut Mezhdunarodnogo Ugolovnogo Suda: Vozmozhniye Voprosy Konstitutsionnosti" ("The Rome Statute of the International Criminal Court: Possible issues of constitutionality"), *Moscow Journal of International Law*, No. 2, 2002, pp. 165-173.

every person convicted of a crime has the right to seek a pardon. The Constitution also provides for the possibility of enacting amnesties. If a grant of pardon or decree of amnesty under the Russian Constitution is considered as an indication of an inability or unwillingness to prosecute a person in the Russian courts, that person may be tried before the International Criminal Court. At the domestic level, this means that the said person's constitutional rights may be infringed upon. From the point of view of the Russian Federation, granting pardon is an exclusive power of the President. Likewise, declaring amnesty is an exclusive power of the State Duma. In essence, this means that the Rome Statute may potentially limit powers of the President and a chamber of the national legislature.

Apart from this possibility, for the International Criminal Court to act in lieu of the national judiciary the latter would have to be totally corrupt (which in the Statute's Article 17(2) is described as "unwillingness"), or to have become unworkable (to which Article 17(3) attributes the term "inability"). It would be hard to believe that German or French legislators were motivated by such gloomy prospects when they voted to amend the constitutions of their respective countries prior to ratification of the Rome Statute.[20] Similarly, it is hard to imagine that the criminal judiciary in Russia will ever need to be replaced by an international authority.

Nevertheless, a debate on the feasibility of legislative or even constitutional amendments in order to take advantage of the principle of complementarity in the Rome Statute is highly desirable. The problem is that the Russian Constitution sets out a very elaborate, if not cumbersome, procedure for its own amendment. In particular, there is no simple procedure for amending Chapter 2 of the Constitution that provides for human rights and liberties. If the Constitutional Assembly were to vote in favour of amending that specific chapter, then it would have to draft a new Constitution and submit it to a referendum.

A more practicable and less painful way of reconciling the Constitution and the Statute would be to amend the Concluding and

20 To incorporate the obligations under the Rome Statute, the French Constitution was amended by means of Art. 53-2, which stated: "La République peut reconnaître la juridiction de la Cour pénale internationale dans les conditions prévues par le traité signé le 18 juillet 1998". In Germany, the absolute prohibition on extraditing a German anywhere outside Germany, contained in Art. 16(2) of the Basic Law (embodying the federal constitution), was qualified by adding the following: "Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind".

Interim Provisions of the Constitution. That part of the Constitution was designed to accommodate the transition from a previous constitution to the current one, and to incorporate into it the numerous laws that were leftovers from the previous system. Introduction of a new text similar to the one France inserted in its Constitution before ratifying the Rome Statute could enable the Russian juridical system to be consistent with the Statute's provisions. Eventually that temporary measure could translate into a permanent arrangement when and if Russia decides upon a new Constitution. The main constraint here is that the Constitution does not envision any procedure for amendment of the Concluding and Interim Provisions. Is this a lacuna or an implicit prohibition? In the present author's opinion, a possible way of addressing the issue could be to petition the Constitutional Court of the Russian Federation to interpret the Constitution with regard to a possible mode of amendment of those provisions.

Obligations of international humanitarian law in other legislative acts

Besides provisions in the 1966 Criminal Code, other items of current Russian legislation oblige members of the armed forces and other uniformed and armed services, such as the Federal Border Service or the Internal Forces of the Ministry of Internal Affairs, to abide by international law. In particular, the Law on the Status of Military Service Personnel of 1998, as amended, makes it a soldier's duty "to observe the generally recognized principles and norms of international law and international treaties of the Russian Federation" (Article 26).[21]

The Service Regulations of the Armed Forces of the Russian Federation, which were promulgated by presidential decree in 1993, make that duty more specific. They state in Paragraph 19 that "every member of the armed forces must know and strictly observe the international rules governing the conduct of military operations and the treatment of the wounded, sick and shipwrecked, of the civilian population in the zone of military operations, and of prisoners of war".[22] To ensure that military personnel are aware of the rules of international humanitarian law the Minister of Defence issued Order No. 333 of 29 May 1999 "On Legal

21 SZ RF, *op. cit.* (note 6), No. 22, 1 June 1998, Art. 2331.

22 Ustav Vnutrenney Sluzhby Vooruzhennykh Sil Rossiyskoy Federatsii (The Service Regulations of the Armed Forces of the Russian Federation), Military Publishing House, Moscow, 1994.

Training in the Armed Forces of the Russian Federation".[23] The order referred to legal training and instruction in the rules of international humanitarian law as "an integral part of combat training, a most essential means of enhancing law and order within the armed forces of the Russian Federation." In particular it provided that officers and NCOs, prior to their promotion, should pass tests to prove their legal awareness. Failure to pass a test would result in suspension of a promotion.

The armed forces of the Russian Federation continue to be bound by USSR Minister of Defence Order No. 75 of 1990, which promulgated the Geneva Conventions of 1949 and the two Additional Protocols of 1977 together with Guidelines for the Application of International Humanitarian Law.[24] The said order implemented the provision of the Decree of the Supreme Soviet of the USSR by which the legislative body ratified both Protocols additional to the Geneva Conventions. The decree instructed the Council of Ministers "to draft and to present to the Supreme Soviet of the USSR, within six months, proposals for the introduction of amendments to the Soviet legislation to reflect the participation of the Soviet Union in (...) the Additional Protocols."[25] However, the guidelines offered only limited instructions with regard to the application of codified rules of international humanitarian law.[26]

It was not until 2002 that the Ministry of Defence issued a new Manual of International Humanitarian Law.[27] It is a concise overview of major treaties that make up the body of international humanitarian law, from the St Petersburg Declaration of 29 November 1868 to the Chemical Weapons Convention of 1993. In drafting the manual, the Legal Service of the Armed Forces reviewed similar foreign manuals.[28] Thus the legal framework is there.

23 Published by the Central Printing Office of the Russian Federation's Ministry of Defence.

24 Prikaz Ministra Oborony SSSR No. 75 16 fevralya 1990 goda ob ob'yavlenii Zhenevskikh konventsiy o zaschite zhertv voiny ot 12 avgusta 1949 goda i Dopolnitelnikh protokolov k nim (USSR Minister of Defence Order No. 75 of 16 February 1990 promulgating the Geneva Conventions on the Protection of Victims of War of 12 August 1949 and Additional Protocols), Moscow, 1990, p. 317.

25 Vedomosti S'yezda Narodnykh Deputatov i Verkhovnogo Sovieta SSSR (The Official Gazette of the Congress of Peoples' Deputies and of the Supreme Soviet of the USSR), No. 9, 9 August 1989, Art. 225.

26 The Guidelines amounted to a mere eight pages of the entire 317-page volume.

27 Nastavleniye po mezhdunarodnomu gumanitarnomu pravu dlya Vooruzhennikh Sil Rossiyskoy Federatsii (Manual of International Humanitarian Law for the Armed Forces of the Russian Federation), Moscow, 2002, p. 88.

28 Among others, *Humanitarian Law in Armed Conflicts: Manual*, edited by the Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, p. 154.

All members of the armed forces are aware that they are bound by international humanitarian law and that violators will be punished. They are under orders to study international humanitarian law and their knowledge is tested periodically. Promotion within the armed forces could depend in part on the results of those tests. What is not so clear is how that law would be enforced, should the need arise.

International humanitarian law in the Russian courts

So far the only notable court decision invoking the principal sources of international humanitarian law was the decision of the Russian Constitutional Court in July 1995. Earlier that year members of both houses of the Russian parliament requested the Court to review the constitutionality of several presidential decrees and a government resolution that authorized the use of the armed forces to quell the insurgency in Chechnya. In particular, petitioners claimed that the use of excessive military force led to numerous civilian casualties. In their legal arguments they drew heavily on 1977 Additional Protocol II to the Geneva Conventions.[29]

The Constitutional Court is not bound by arguments brought before it by petitioners. Nor is it bound by a source of law other than the Constitution. It may review, subject to certain conditions, the constitutionality of a treaty. In its ruling[30] the Constitutional Court made only general references to Additional Protocol II rather than to particular provisions thereof. It first stated, drawing on the Protocol and on the prevalence clause of the Constitution, that a State may use its armed forces to defend its "national unity and territorial integrity". It also stated that it lacked authority to review specific acts committed by parties to the non-international armed conflict in Chechnya. Nevertheless, the Court strongly criticized the legislator for not taking due account of Additional Protocol II when passing laws that govern the armed forces. Obviously it was referring to instances when the armed forces were to be used in domestic emergency situations. The Court explicitly instructed lawmakers to bring the relevant legislation into conformity with international legal obligations, in particular Additional Protocol II. Those instructions have not yet been carried out.

29 Unpublished, on file with the author.

30 SZ RF, *op. cit.* (note 6), No. 33, 14 August 1995, Art. 3424.

Conclusion

On balance it can be said that the Russian Constitution of 1993, by virtue of its prevalence clause, has created a legal environment which is fairly conducive to the incorporation of international humanitarian law, primarily that part of it which is embodied in treaties, into the Russian juridical system. Russian laws oblige the military to observe international law, albeit in general terms. The Criminal Code treats as the gravest crimes several offences that are deemed "war crimes" under international humanitarian law. But the list of those crimes in the Criminal Code is far too limited. The situation may, or in fact will, have to change when and if Russia ratifies the Statute of the International Criminal Court. If it decides to go ahead with the ratification, it might well have to amend the current legislation and perhaps even the text of the Constitution.

The review of weapons in accordance with Article 36 of Additional Protocol I

JUSTIN MCCLELLAND*

This article explores the process of the "study, development, acquisition or adoption of a new weapon, means or method of warfare" under Article 36 of 1977 Additional Protocol I to the Geneva Conventions of 1949.[1] It then considers the manner in which the legal review of weapons can take place in practice, including an examination of the evidence that will be available on which to base legal assessments.

Background

In considering the requirement to conduct legal reviews of weapons and methods or means of warfare, there is benefit in exploring briefly the genesis of such an obligation. Historically the approach to the regulation or control of conventional weapons has been "two-pronged". On the one hand it attempts to control the manner in which weapons are used; on the other it addresses particular types of weapons. These methods have been developed in parallel, as they both possess certain flaws. States seeking to circumvent prohibitions against the methods of use of weapons could develop new weapons with different capabilities, thus necessitating new prohibitions. Similarly, it would be possible for States to interpret the characteristics of a weapon in such a way as to exclude it from the definition in a particular treaty.

In the run-up to the negotiations on the Additional Protocols particular types of conventional weapons were discussed, the recent use of which

* Lt. Col. Justin McClelland, MBE, is a solicitor-advocate and serving officer in the British Army Legal Services. His current appointment involves the conduct of legal reviews in accordance with the provisions of Art. 36 for all land-based equipment within the British Armed Forces. Comments in the present article are those of the author alone. It does not necessarily reflect the views of the United Kingdom government or armed forces. Nor does it necessarily reflect the types of weapons in the UK's inventory, either currently or intended.

had caused some international disquiet.[2] The work of the Ad Hoc Committee of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH), created to explore the area of weapons law, was supplemented by two ICRC-organized conferences at Lugano (1974) and Lucerne (1976).

Whilst it was possible to create laws prohibiting or restricting particular effects or types of weapons, without a mechanism to monitor which weapons had developed such law was unlikely to have the impact desired. The proposal that led to Article 36[3] offered a solution: a State would monitor the development of weapons by reference to its obligations under international humanitarian law.

However, there was a feeling that the Additional Protocol had not gone far enough in responding to some concerns about particular weapons. A resolution of the CDDH[4] paved the way for negotiations that eventually led to the adoption of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW).[5] So by 1981 there existed both a mechanism for monitoring the legality of weapons and a framework convention to address weapons of particular concern to the international community.

What was lacking was any widespread adherence to either.[6] Some form of impetus was needed to resurrect them. For the CCW that impetus came

1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter Additional Protocol I).

2 ICRC Conference, Tehran, Resolution 88(UK)-0-11, 12 November 1973.

3 Draft Art. 86.

4 The discussions leading to the adoption of the Additional Protocols had resulted in Resolution 22 of 9 June 1977 (Fourth Session of the CDDH), which recommended that a Conference of Governments be convened to reach agreements on prohibitions or restrictions on the use of specific conventional weapons (para. 3).

5 UNGA A/Conf.95/15, 27 October 1980. Background information on the conference is given in UNGA A/AC.206/10, 16 June 1981 and in Y. Sandoz, "Prohibitions or restrictions on the use of certain conventional weapons: Final Act of the Conference", *International Review of the Red Cross*, January-February 1981, pp. 3-33.

6 See R. J. Mathews, "The 1980 Convention on Certain Conventional Weapons: A useful framework despite earlier disappointments", paper presented at the Australian Defence Force Conference held at Melbourne University ("Pushing the Envelope: The ADF Contribution to International & Operations Law" held from 20-22 February 2002). With regard to the number of weapons review processes, see I. Daoust, R. Coupland and R. Ishoey "New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare", *International Review of the Red Cross*, June 2002, Vol. 84, p. 354.

from the landmines issue, which dominated the First Review Conference.[7] The result was Amended Protocol II, followed relatively quickly thereafter by the Ottawa Convention.[8] Current developments within the CCW have seen the continuation of discussions on mines, as well as the emergence of the issue of explosive remnants of war.[9]

As regards the review of weapons, reinvigoration of the process was provided by the ICRC's SIrUS Project.[10]

The SIrUS Project

An ICRC symposium on "The Medical Profession and the Effects of Weapons" held in Montreux in March 1996, recorded a finding that it was important to define in objective terms which weapons were inherently abhorrent and which weapons caused superfluous injury or unnecessary suffering. The symposium was to be the catalyst for the setting up of the SIrUS Project.[11] The name of the project was derived from the prohibition on employing "weapons, projectiles and material and methods of warfare of a nature to cause Superfluous Injury or Unnecessary Suffering".[12]

In essence, the SIrUS Project approached the issue of weapons from the perspective that some effects of weapons are design-dependent and therefore foreseeable. It sought to consider these effects as paramount, taking

7 The First Review Conference took place some 15 years after the adoption of the CCW, indicating the level of priority that the international community had accorded it.

8 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

9 A mandate was agreed at the December 2002 Meeting of Governmental Experts to negotiate an 'instrument' regarding aspects of explosive remnants of war and to explore issues regarding mines other than anti-personnel mines (CCW/MSP/2002/CRP.1 paras 21 & 22).

10 At the 27th International Conference of the Red Cross and Red Crescent (Geneva, 31 October – 6 November 1999), under Final Goal 1.5, States were encouraged to develop weapons review processes and to engage with the SIrUS Project to assist them. Conference Plan of Action (2000-2003), p. 12, para. 21.

11 R. Coupland, *The SIrUS Project: Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering*, ICRC pamphlet 1997. See also *The SIrUS Project and reviewing the legality of new weapons*, ICRC, January 2000.

12 Art. 35(2) of Additional Protocol I (capitalization added). This is derived from Art. 23(e) of the Regulations respecting the Laws and Customs of War on Land, Annex to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907. The English translation of Art. 23(e) of the authentic French text uses the term, "calculated to cause unnecessary suffering". The wording in Art. 35(2) of Additional Protocol I, which includes "superfluous injury", is considered to be a better rendering of the French text ("propres à causer des maux superflus").

precedence over the nature, type or technology of the weapon. From an analysis of the data collected by the ICRC from its hospitals it proposed four criteria to determine whether the design-dependent effects of a weapon would be of a nature to cause superfluous injury or unnecessary suffering, i.e. when they resulted in:

a. a specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement; or
b. field mortality of more than 25% or a hospital mortality of more than 5%; or
c. Grade 3 wounds as measured by the Red Cross wound classification scale; or
d. effects for which there is no well-recognized and proved treatment.

There were several flaws in the solely scientific approach of the proposals. At a meeting of government experts in Jongny-sur-Vevey, Switzerland,[13] criticism ranged from the medical[14] to the legal.[15] The legal concern caused the greatest unease. The proposal in the SIrUS Project ignored the requirement to balance such medical factors as those contained in the criteria above against the military necessity to use a particular weapon. Without determining what is militarily necessary it will not be possible to establish whether injuries are superfluous or the suffering unnecessary. It therefore provided only half the equation.

There was a general view, however, that the initiative was broadly welcomed as focusing attention on the need to consider the legality of weapons and on the importance of factoring into that consideration the available scientific evidence. This provided the impetus needed to bring about closer consideration of the issue of weapons reviews and the mechanisms under Article 36.

13 Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, Jongny-sur-Vevey, Switzerland (29-31 January 2001).

14 There was criticism of the Red Cross wound classification on the basis of the data within the SIrUS Project.

15 Some of the legal criticism of the SIrUS Project is well summarized by A. Koch in his article "Should war be hell?", *Jane's Defence Weekly,* May 2000, p. 23. For an ICRC perspective on the meeting see I. Daoust, "ICRC Expert Meeting on Legal Reviews of Weapons and the SIrUS Project" *International Review of the Red Cross*, No. 842, June 2001, pp. 539-542.

The process of acquiring[16] weapons

Before examining the manner in which legal reviews can be conducted it is first important to understand the process by which weapons are acquired. If the legal review of a new weapon is to have any impact on the acquisition process of that weapon, then it must not only be cognizant of the process of acquiring it, but also be a part of that process. The acquisition process is complex but can be broken down generically into several distinct phases:

a. *Concept*: The system will first assess what the "capability gap" is that they wish to fill, i.e. what it is that the military wants to do that its current equipment does not allow it to do. Thereafter a concept for the weapon, weapons system, platform or equipment will be developed. The acquisition process will deal with the whole spectrum of equipment to be acquired for military use, from beds to sophisticated weaponry.[17]
b. *Assessment*: After the concept has been developed, it is further refined and its characteristics delineated. If the equipment being acquired is being purchased "off the shelf", it may be possible to seek data on its performance from the manufacturer.
c. *Demonstration*: The refined concept will be tested. Once initial testing has proved the concept to be viable, further more rigorous and extensive testing will take place.
d. *Manufacture*: Production of the successful equipment will follow, but always with further testing being conducted as new "batches" of the equipment are produced.
e. *In-service*: During the service life of the equipment monitoring of its effectiveness will take place.
f. *Disposal*: At the end of its service life the equipment will be disposed of.

It is important to note that this is not a legal process. Decisions will be taken throughout the acquisition process on the basis of military requirements

16 Although Art. 36 uses the terms "study, development, acquisition or adoption", in the present article the term "acquisition" will be used to reflect all four terms unless otherwise stated.

17 The extent of the requirement for legal review under Article 36 is considered below. However, to avoid confusion the term "equipment" will be used to cover the acquisition of all types of weapons and weapon systems.

and commercial prudence. The development and acquisition of weapons is a costly exercise and it will therefore be closely managed. In addition, in accordance with project management tenets there will be points during the acquisition system at which key decisions will be taken regarding the future development or purchase of the equipment.

These decision points represent important stages for the input of formal legal advice. Whilst it is clearly advantageous for legal opinion to be sought as early as possible (i.e. on the development of the concept of the equipment), it is important that the provision of formal written legal advice be synchronized with the acquisition process. If it is not, then there is a real danger that the legal advice will not be considered adequately in key decisions regarding the future acquisition of the equipment.

Furthermore, it is important that legal advice be provided at each of the key decision points. The development of the equipment itself may require that initial legal advice is given and then refined as the actual capabilities of the equipment become more apparent following testing. Yet even if the legal advice remains unchanged, there is still benefit in legal advice being provided so that it can form a part of the decision process.

The time scale for the acquisition process may be years or months, depending on the nature of the equipment and the imminence of the identified capability gap that the equipment will fill. It will be important, however, to ensure that no matter what the time scale legal advice is sought and evidence upon which that advice can be based is provided.

Legal advice will always need to be sought by those acquiring the equipment. It therefore necessarily follows that they will need to be aware of the requirement to seek legal advice. Advertisement of the requirement for legal review within the acquisition process is essential, in particular when initially developing a system of legal reviews. Moreover, the advertisement needs to be repeated regularly, as within the system there may be project managers who, as either military officers or civilians, are posted on a 2-3 yearly cycle. The advertisement will consequently need to take this into account to ensure that newly posted officers are aware of the need to seek legal advice. The insertion of a note on the requirement for legal reviews into any standard manual will also aid widespread awareness.

Different systems of weapons review[18]

It is acknowledged that the manner in which legal advice can be provided within the acquisition process can differ. While it is not proposed to consider the processes of different States in any detail here, certain aspects of the types of approaches will be briefly considered in light of the process described above:

Committee:[19] The review of weapons by committee has the advantage of ensuring that several experts from different fields are present to assess a weapon. However, the higher the level of representation on the committee, the less likely it is that it will be able to meet frequently. In circumstances in which additional evidence may be required this relative inflexibility may entail a considerable delay in the acquisition of equipment.

Individual "reviewer":[20] The use of a specific individual to conduct legal reviews can give rise to delay depending on the number of weapons that he is required to review. However, it does retain the flexibility to allow for ad hoc meetings with experts to discuss issues concerning the weapon's performance or use. Ensuring that the "reviewers" from each of the armed services are co-located allows for the evolution of uniform approaches to dealing with emerging technologies.

Executive power versus advice: It will be noted that the term used above has been "legal advice". In some legal review processes, those conducting the legal review possess an effective veto.[21] The possession or otherwise of such a veto will be heavily influenced by the manner in which legal issues are incorporated into executive decisions within the military in a particular country.

18 For a detailed summary of the various approaches of States see the Report of the Danish Red Cross, *Reviewing the Legality of New Weapons*, December 2000. This is expanded upon slightly in Daoust, Coupland, Ishoey, *op cit.* (note 6).

19 For example, Sweden's Delegation for International Humanitarian Law Monitoring or Arms Projects and Norway's Department of Defence's Committee. These are discussed in the Report of the Danish Red Cross, *op cit.* (note 18), paras 6.2 and 6.3. It was proposed by some delegates to the CDDH that an international committee to assess the legality of weapons be set up by the Protocol itself. See Y. Sandoz, C. Swinariski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva, 1987 (hereinafter *Commentary on the Additional Protocols of 8 June 1977*), p. 422, para. 1463, esp. footnote 3.

20 For example, the United States of America. See Report of the Danish Red Cross, *op cit.* (note 18), para. 6.4. See also Paper presented by W. Hays Parks, Special Assistant to the Judge Advocate General of the Army, Washington DC, USA, to an informal technical meeting hosted by the Government of Switzerland, Darlingen, Switzerland, 12-14 June 2002.

21 Parks, *op. cit.* (note 20).

What must be reviewed?

The requirement in Article 36 of Protocol I is that "new weapons, methods or means of warfare" be reviewed. Whether the weapon is *new* will be determined by two factors. Firstly, by reference to the State intending to use it. The fact that a weapon has been in service with one State for some time before being sold to another State would not prevent the receiving State from considering the weapon as "new" for the purposes of Article 36. Secondly, new weapons are determined by reference to the date upon which the weapon came into service. On ratification by a State of Additional Protocol I, those weapons already in service could not be considered "new" within the terms of Article 36. It may be prudent for a State to conduct a review of those weapons which are subject to international scrutiny so as to be able to defend its possession and use of them more robustly, but this is not a requirement under Article 36.[22]

However, a weapon may well be subjected to an upgrade throughout its life. Whether this was a planned upgrade or an upgrade to exploit new technology, it may render the weapon "new" in terms of its particular characteristics.[23] But the impact upon the capabilities of the weapon would need to be determined. If, for instance, the upgrade's sole purpose was to reduce the weight of the weapon to allow for easier mobility and this did not affect the weapon's capability, then it could not reasonably be considered "new" within the meaning of that term in Article 36.

The term "weapon, means or method of warfare" is not defined. A reasonable interpretation has therefore to be applied. Deciding whether an item of equipment is a weapon will be a relatively straightforward process. The term connotes an offensive capability that can be applied to a military object or enemy combatant. Where greater difficulty arises is in defining the term "means or method of warfare".[24] It has been suggested that "method of warfare" is usually understood to mean the way in which weapons are used".[25] It has

22 This interpretation is consistent with the comments in the *Commentary on the Additional Protocols of 8 June 1977*, *op. cit.* (note 19), para. 1472, which states "[w]ithout necessarily being 'new' in a technical sense, (...) arms are new for the State which is intending to acquire them after becoming a Party to the Protocol".

23 See Daoust, Coupland, Ishoey, *op. cit.* (note 6), p. 352.

24 See H. Meyrowitz, "The principle of superfluous injury and unnecessary suffering", *International Review of the Red Cross*, March-April 1994, p. 103.

25 Daoust, Coupland, Ishoey, *op. cit.* (note 6), p. 352.

been further stated that "it is unclear how the term 'weapon' differs from 'means of warfare'".[26] It is submitted that the terms, "means" and "methods of warfare" can, in practice, be read together. In that way they will include those items of equipment which, whilst they do not constitute a weapon as such, nonetheless have a direct impact on the offensive capability of the force to which they belong. An example would be a mine clearance vehicle. Its characteristics may be uncontroversial from a legal perspective, but it would reasonably fall within the scope of the term "means or methods of warfare" as providing a direct contribution to the offensive capability of a military force.

It is important to distinguish, however, between equipment and its use and the tactics, techniques and procedures adopted by armed forces. Such aspects cover a wide range of areas not all concerned with the employment of weapons or methods or means of warfare. Indeed, they provide a framework within which to conduct operations tailored to the myriad circumstances facing "troops on the ground". These aspects do not fall within the scope of Article 36. Similarly, the control exercised over the use of a weapon by way of Rules of Engagement (ROE) will form no part of the legal review process. ROE are necessarily operation-specific and cannot be anticipated in the preparation of a legal review of a weapon, means or method of warfare.[27]

Communications provide a good example of the manner in which the terms in Article 36 can be applied in the face of emerging technologies. There can be no doubt that communications systems are becoming ever more complex. Not only do they pass information, they have the capacity to collate, analyse, disseminate, store, retrieve and display information produced in preparation for and in the prosecution of military operations. The digitization of the battle space will further enhance the networked capability that such technology allows for. In deciding upon the application of Article 36 it is necessary to understand how the communications systems actually work. This involves not just an understanding of the science but of the military use of that science. Only then will it be possible to establish whether the system possesses an offensive capability and, if so, the manner in which it is intended to be used. Will the system for instance be used to analyse target data and then provide a target solution or profile? If so, the role of the

26 *Ibid.*, footnote 19.

27 It will always be possible, however, in the preparation of a legal review to make comments regarding future ROE to cover the weapon if the characteristics warrant it.

system would reasonably fall within the meaning of "means or method of warfare" as it would be providing an integral part of the targeting decision process. However, if it simply collates data in such a way as to configure a graphic representation of the locations of military formations without altering the nature or content of the data, or if it simply passes the data from one location to another, then it would not be considered as falling within the scope of "means or methods of warfare".[28]

Review criteria

In considering the compliance of the weapons, methods or means of warfare with a State's legal obligations under international law, five areas need to be considered.[29] By way of preface it is important to acknowledge the balance that must be ensured between military necessity on the one hand and the level of suffering on the other. This is generally referred to as the principle of proportionality.[30] In considering the criteria this balance is paramount. It will impact upon the types of evidence required to conduct a legal review.

Treaty obligations

The present article will not consider in any detail the types of treaties that could be appropriate for consideration. What is required is an assessment of the compliance of the weapon system with the terms of the treaty, taking into account any reservations that the State may have entered upon ratification of the treaty. It will necessarily involve an assessment of the restrictions that a treaty may place on types of weapons, as well as prohibitions. The imposition of restrictions will make legal advice necessary on how they might affect the legality of the weapon *per se* or its intended employment. In such a case the earlier the involvement of lawyers in the acquisition process, the sooner such potentially costly alterations can be factored into the process.

28 There are also issues concerning the use of communications equipment with encryption devices vis-à-vis hospital ships. See Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, Art. 34.

29 The first four to be discussed are also referred to in Daoust, Coupland, Ishoey, *op. cit.* (note 6), pp. 347-350.

30 The principle of proportionality requires belligerents to refrain from an attack on a legitimate military target if it is expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated from that attack.

Prohibition on the employment of weapons of a nature to cause superfluous injury or unnecessary suffering[31]

The principle that a combatant may not use weapons of a nature to cause unnecessary suffering or superfluous injury is well established in international law.[32] Attention has already been drawn to this within the context of the SIrUS Project. The prohibition clearly accepts that some level of suffering and injury in conflict is inevitable. The issue is finding the point at which the amount of suffering and injury inflicted is considered to exceed that necessary to achieve the military objective.

There are two aspects to the level of suffering or injury: qualitative, and quantitative. The first, or qualitative, aspect relates to the nature of the suffering itself, i.e., does the method of injury that the weapon uses increase the level of suffering caused to the individual. In the development of a new type of weapon such information may be difficult to assess. However, in the development of any system it is often prudent to consider the potential impact of the use of such systems on one's own forces. Thus there may be some data available from studies undertaken that will indicate anticipated levels of suffering.

The second, or quantitative, aspect relates to the scale of the suffering, i.e., will there be greater numbers of victims injured by the weapon. This latter aspect is clearly related to the issue of distinction considered below. To some extent this illustrates the inter-relationship of the criteria. The analysis of the legality of a weapon, means or method of warfare will involve consideration of all the criteria, weighed against the military advantage to be gained from its employment

The test requires consideration of whether the weapon is *of a nature* to cause superfluous injury or unnecessary suffering. Most weapons could be misused in such a way as to cause unnecessary suffering. What is needed is an assessment of whether, in the normal intended use of a weapon, it would be of a nature to cause such injury or suffering. How the weapon will be used is therefore also important to establish, as this will indicate whether it will be used in an anti-material or anti-personnel capacity.

31 See Meyrowitz, *op. cit.* (note 24), for an examination of this principle.

32 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations respecting the Laws and Customs of War on Land, 18 October 1907, Art. 23 (e); Additional Protocol I, Art. 35; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, Preamble, para. 3.

Capability of distinction

It is well recognized that international humanitarian law[33] seeks to provide protection from attack for the civilian population during times of conflict by requiring that those engaging in attacks choose their methods in such a way as to take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life or damage to civilian objects. When conducting a review, the issue in respect of distinction is whether the weapon is capable of being used in a manner in which it can be directed against military objectives, i.e. which is not indiscriminate.

The judgment as to whether it possesses this capability clearly centres in the first place on its accuracy. The accuracy of a weapon will be central to its concept. After all, it is militarily pointless to purchase a weapon at great expense if it is unable to hit the targets at which it is fired. There is here, as in other areas of international humanitarian law, a correspondence of military and humanitarian objectives.

However, the accuracy will be dependent on the purpose of a weapon. For instance, the same pinpoint accuracy required of a sniper rifle could not reasonably be expected of an artillery shell. Indeed, the "killing range" of an artillery shell is significantly greater than a sniper's round. Accordingly the type of weapon is an important consideration. The balance therefore must be found between the military necessity of using the particular type of weapon and the latter's ability to be directed against military and not civilian objects. The availability of suitable alternative weapons will also need to be considered. The intended use of the weapon will be a key factor. The artillery shell, for instance, will be used in a different manner from the sniper's round and the use will account for their different effects. The manner of use of a weapon could well minimize any potential for that weapon to cause damage to civilian objects, etc.

One area that will need careful consideration is the application of the criteria of distinction to the employment of "autonomous" weapons. Such weapons have the capability, to varying degrees, to make decisions without any human involvement on the identification and attack of targets. This absence of what is called a "man in the loop" does not necessarily mean that the weapon is incapable of being used in a manner consistent with the principle of distinction. The target detection, identification and recognition

33 See in particular 1977 Additional Protocol I, Articles 51 and 57.

phases may rely on sensors that have the ability to distinguish between military and non-military targets. By combining several sensors the discriminatory ability of the weapon is greatly enhanced.

In addition to such technological and integral safeguards, the methods laid down for the use of the weapon may provide further safeguards regarding its use with due discrimination. The weapon may be "overwatched" and controlled remotely, thereby allowing for it to be switched off if considered potentially dangerous to non-military objects. Further, the release of such a weapon may only be authorized under ROE when clear of non-military objects.

Environmental considerations[34]

The impact of environmental standards on developing military equipment is now considerable. The criterion applied within the legal review process is whether the weapon is likely to have a long-term, widespread or severe impact on the natural environment.[35] With the interpretation of "long-term" being measured in years rather than months and the greater levels of distinction being expected of modern weaponry, the main concern is likely to be that of toxic components of weapons.

Future legal issues

As mentioned above, the acquisition process may take decades from the concept of a new weapon to its final disposal.[36] Whilst it is therefore important to assess the compliance of the new weapon with the State's current international humanitarian legal obligations, it would be folly to omit consideration of possible future trends in the law.

As with all assessments of the future, consideration of the past is important. Of similar import is the involvement of those conducting the weapons reviews on ongoing treaty negotiations. This ensures both a contemporary understanding in respect of developments and a feel for possible issues of the future.

34 For an examination of the legal framework regarding environmental aspects of conflict see A. Bouvier, "Protection of the natural environment in time of armed conflict", *International Review of the Red Cross*, November-December 1991, No. 285, pp. 567-578.

35 Article 35(3) of 1977 Additional Protocol I.

36 One example is that of the B52 bomber which is still in service. See for example the discussion of the continued use of the B52 in Afghanistan in *Jane's Defence Weekly*, Vol. 37, No.1, p. 27.

Some issues will be driven by technology as it advances. The Blinding Laser Weapons Protocol is an example of such an issue. Nonetheless, despite the inherent flexibility of the UN Convention on Conventional Weapons[37] the law tends to react to developments rather than pre-empt them. The weapons review process provides an opportunity for States to anticipate legal challenges based on the core principles of international humanitarian law and to take them into account in the development of characteristics of new weapons and military equipment.

Review procedure

As mentioned above, it is essential that the requirement for a legal review of weapons be incorporated into the system of acquiring or procuring weapons. Without such integration there is a danger that it will be overlooked in the pressures that the weapons project teams will be under. In addition, by incorporating a legal review into the weapons acquisition system, the review will be able to make use of the evidence, documentation and data produced by that system. A wide range of information is assembled during the acquisition process of an item of equipment.

Operational analysis

In the era of tightening military budgets, the decision to purchase new equipment is rigorously scrutinized. The improvement that an item of equipment represents over that which it will replace will be investigated in detail. An effective way to assess the level of advantage that the new equipment represents is operational analysis. In this process the new equipment is modelled on a computer and tested in a series of scenarios to assess its effect on the battle when compared to the equipment it will replace. The number of scenarios will vary with the type of equipment, but it is possible to model several different scenarios across different terrains.

The validity of the operational analysis will depend on the nature of the computer modelling. Care should be taken to ensure that the model draws upon validated data and uses current tactics of one's own forces and those of potential adversaries. From a legal perspective this is important as it provides an indication of the military utility of the equipment, i.e. how great an impact the equipment will have on the battle. This impact will be weighed against any increase in the levels of injury that could be caused.

37 CCW 1980.

Concept of use

Closely linked to any operational analysis conducted on the weapon will be its "concept of use", i.e. the declared manner in which the weapon will be incorporated into the battlefield "toolset" available to a commander. The "concept of use" will draw upon the operational analysis in order to maximize the weapon's utility whilst catering for any perceived vulnerability. Furthermore, by using studies on the nature of future conflicts the concept of use can most effectively integrate the equipment into the future battlefield.

Close inspection of the concept of use for the equipment will disclose the safeguards in its use that will demonstrate, for instance, that it can be used in a manner consistent with the test of distinction. It may lay down the manner in which targeting information can be utilized by an artillery system or how integrated obstacle plans can be optimized by "overwatch".

Manufacturer's documentation

The documentation produced by weapons manufacturers inevitably concentrates on the positive aspects of a weapon system. It may well make impressive assertions concerning accuracy, effect or even legality of a weapon. As discussed, the obligation to review the legality of a weapon rests with the State seeking to "study, develop, acquire or adopt" the weapon. Accordingly, claims by a manufacturer that a particular weapon is "legal" must be separately ascertained by the interested State.

Scientific reports

In the case of a weapon being developed by the State conducting the legal review, a number of scientific reports dating from the earliest stages of concept and development of the weapon will probably exist. The evolution of the weapon's technology can give an indication of the likely performance of a weapon, as it will disclose the parameters of the weapon's potential. More up-to-date reports on the testing of the weapon in its final configuration will be essential to demonstrate that the predicted performance is matched by the results of tests.

However, where a weapon is being purchased from another State, for understandable reasons[38] the same amount of scientific documentation may

38 For example, the need to protect intellectual property and reasons of national security may prevent a State from making a full scientific disclosure.

not be available. Nonetheless, commercial prudence will require that some testing of the claims of the manufacturer is undertaken. Some scientific reports will therefore be available, although they too are likely to concentrate on the positive characteristics of a weapon. Such reports will be sufficient basis for a legal review, provided they take the criteria discussed above into account.

A further constraint on the testing of weapons is the cost. Where the testing of the effectiveness of a weapon will require testing its ability to cause some destruction, cost may become an inhibiting factor. In such a case computer modelling can assist. By entering the expected characteristics of the weapon into a computer program and subjecting them to computer-generated "field conditions", the anticipated performance of the weapon can be predicted.

Whatever the source of the scientific material available, a meeting will generally have to take place at some stage between the legal reviewer and the scientists concerned. This exchange can have several benefits, not least of which is the avoidance of any misinterpretation of legal and scientific "jargon". It may also result in the production of further scientific reports as a basis for the legal review. Also, having scientists check the interpretation of scientific data in a draft legal review avoids inaccuracy and misunderstanding.

Medical reports

The causing of injuries by fragmentation has long been an acknowledged method of warfare.[39] But as new methods of injuring combatants are investigated, close consideration of the test regarding superfluous injury or unnecessary suffering will be required. The difficulty in conducting the legal review when a new method of injury is being assessed will be the absence of any medical evidence upon which to make an assessment of the balance between the military utility and the nature and amount of suffering expected to be caused. It is likely, though, that the military developing a new method of warfare will have explored ways of protecting their own personnel from the effects of such weapons. This study will have involved some medical research, which could form part of the legal analysis.

39 The nature of the fragment has been the source of some debate; see for example the Protocol on Non-Detectable Fragments (Protocol I) of 10 October 1980 annexed to the CCW, *op. cit.* (note 31). However, the method of using fragments to kill or injure has been uncontroversial.

Alternatively, if such technology is available in other countries then some evidence of its effects may be obtainable from those sources. Either way, some evidence regarding the nature and extent of the expected injury will be required. Also important will be information on the treatment available for such injuries.

Reviewing the review

With the acquisition process ordinarily being measured in terms of years rather than months, any legal review provided at the earliest stages will need to be revisited. Not only may the legal position have altered in the course of time,[40] but the legality of the weapon itself may have changed significantly. The review is therefore iterative in nature. The key decision-making junctures in the acquisition process will necessitate a legal review, but that does not preclude additional legal advice being sought in the interim.

Once the equipment is in service legal reviews may be deemed appropriate. Such reviews would normally be prompted by a change in the law. Since some weapons systems remain in service for more than 15-20 years, changes in legal obligations under treaty or customary international humanitarian law may well affect some of the older systems. Continued legal monitoring therefore needs to be instituted.

Effectiveness of the legal review process

The effectiveness of a legal review process is dependent on several key factors:

1. incorporation of legal reviews into the acquisition system process at key decision points;
2. an understanding of current and possible future trends in international humanitarian law by those conducting the reviews;
3. the availability of documentation on all aspects of the equipment to be procured which covers its military utility, its concept of use, capabilities and medical impact on the victim;
4. the possibility for updating the legal review as the information on the equipment develops.

40 The purpose of having future legal issues as one of the criteria is to avoid being taken by surprise by international legal developments.

Self-regulation

In the negotiation of the Additional Protocols to the Geneva Conventions of 1949 there was much discussion on the creation of a central agency to conduct the legal reviews envisaged under what became Article 36 of Additional Protocol I. Such an approach has been widely viewed as flawed.[41] However, the proposal has not completely disappeared.[42] It is submitted that such an approach would undermine the effectiveness of those legal review processes currently being operated. It has been shown that the manner in which countries approach their obligations under Article 36 differs markedly. In this sense, each State is able to determine how such a process can best be integrated into its own weapons acquisition process. To impose a uniform system would undermine the value of State-specific integration processes, often a key factor for the successful implementation of Article 36.

A further and more obvious problem with a central reviewing agency is that of security. At a strategic level the development of new weapons, means or methods of warfare is inextricably linked to future armed forces' structures and capabilities. Such information is closely guarded by States as being vital for the effectiveness of its fighting forces. At the operational and tactical levels the performance of weapons at the disposal of commanders is similarly sensitive, as it discloses the limitations on "reach" which in turn can reveal options and restrictions in carrying out armed operations. For legal reviews to be conducted by an international agency, information of a highly sensitive nature would therefore need to be disclosed. In short, such disclosure at an international level simply will not happen, so the information upon which to conduct any assessment of the compliance of the equipment with the legal obligations of a State would be incomplete.

Once any legal review has been conducted it may remain subject to a security classification. If the legal review has properly examined all the

41 See *Commentary on the Additional Protocols of 8 June 1977, op. cit.* (note 19), para. 1470, which states: "[h]owever, it should be added that a State which respects the obligation provided for in Article 36, and determines that a new weapon is prohibited, is not automatically obliged to make public its finding. This reservation is quite understandable, as modern strategy very often relies not on deployment of military means in the traditional ways, but on new possibilities resulting from research and which consists of creating an imbalance of military strengths vis-à-vis the enemy precisely by means of superior technology in the form of new weapons".

42 Report of the Danish Red Cross, *op. cit.*, (note 18), para. 5.1 (regarding a clearing house) and para. 5.2 (regarding a depository).

available evidence, applied the criteria to it and reached a conclusion, it will contain details of exactly the type of sensitive information that has been discussed above. Thus the same problems would stand in the way of its release. The alternative would be to produce such a sanitized version of the review that it would be worthless in terms of providing an audit of the legal review process, because the information required to assess the rigour of the process would have been omitted for security reasons.

Conclusion

Article 36 is one of the few mechanisms in international humanitarian law that allows for the regular assessment of the equipment of the military with regard to the legal regime within which it has to operate. This assessment is best conducted in a rigorous manner which examines all available evidence from a variety of sources. For security reasons, such a thorough process necessarily precludes its being completely transparent. Nonetheless, for those countries conducting it, its impact is keenly felt and this must be considered a measure of its success.

The answer to the need to widen implementation of the legal review process is not the creation of an international agency to conduct or monitor such reviews, but the strict adherence of States to the obligation imposed under Article 36.

IRAK / IRAQ

30/04/2003 © CICR/DE SURY, François

Bagdad. Patientes dans la cour intérieure de l'hôpital psychiatrique Al Rashad.
Baghdad. Patients in the courtyard of Al Rashad psychiatric hospital.

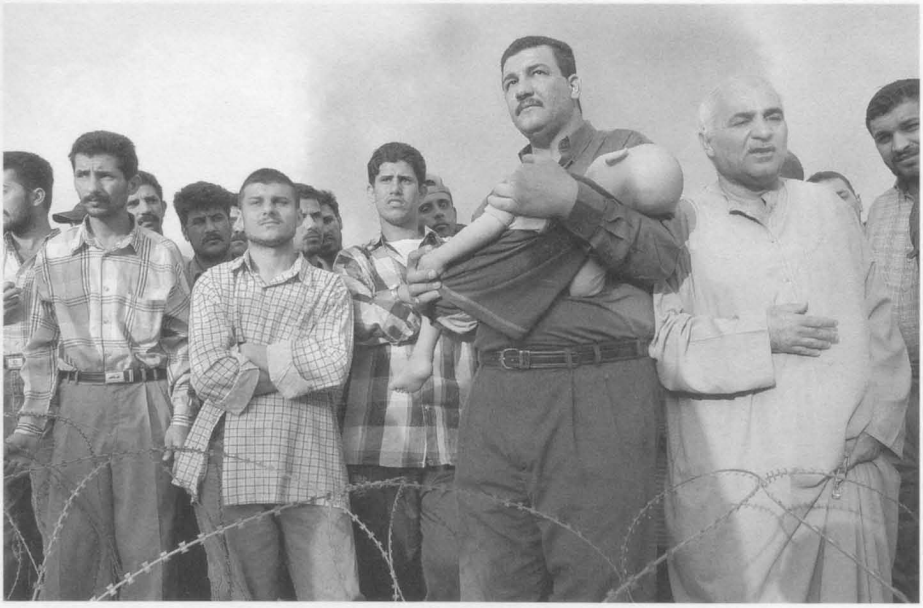
05/05/2003 © CICR/GASSMANN, Thierry

Bagdad. L'hôpital psychiatrique Al Rashad a été pillé pendant le conflit.
Baghdad. Al Rashad psychiatric hospital was looted during the conflict.

IRAK / IRAQ

04/2003 © CICR/SCHAEFFER, Benoît

Bagdad, hôpital de chirurgie plastique. Un blessé dans l'entrée de l'hôpital, transformée en salle d'urgence.
Baghdad, plastic surgery hospital. A wounded man in the entrance of the hospital, now used as an emergency room.



09/04/2003 © CICR/SCHAEFFER, Benoît

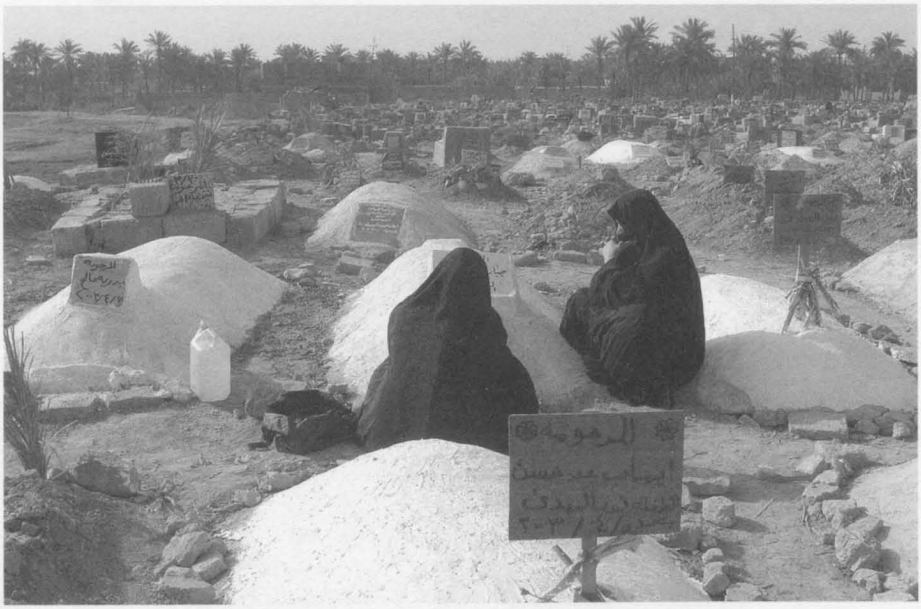
Bagdad. Civils venant demander de l'aide aux forces coalisées.
Baghdad. Civilians coming to ask coalition forces for help.

IRAK / IRAQ

30/04/2003 © CICR/DE SURY, François

Basrah. Des milliers d'obus non explosés abandonnés par les troupes irakiennes, près du terrain de football très fréquenté.

Basra. Thousands of unexploded shells left behind by Iraqi troops near a popular football field.

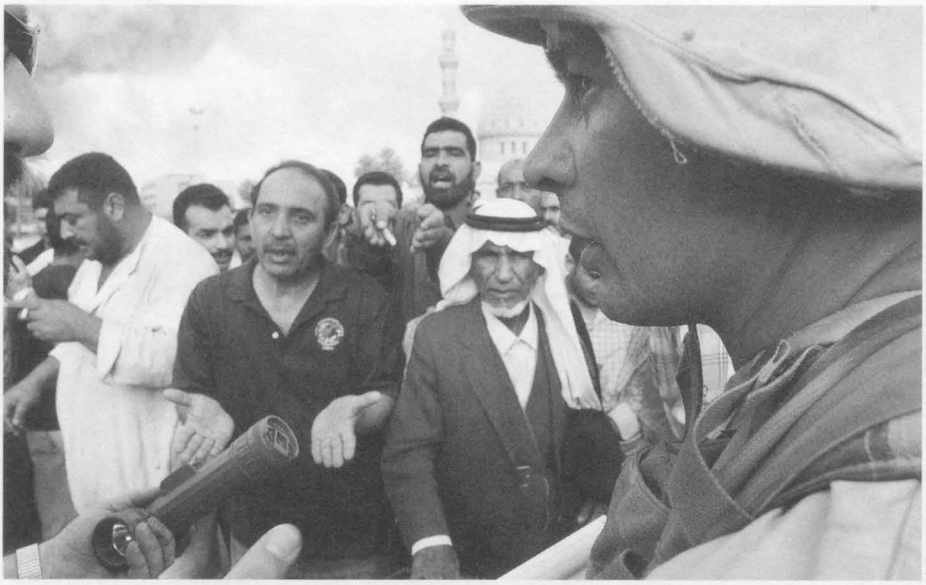


13/05/2003 © CICR/GASSMANN, Thierry

Basrah, cimetière provisoire dans le centre-ville. Familles pleurant leurs parents morts.

Basra, emergency cemetery in town. Families mourning for their relatives.

IRAK / IRAQ



09/04/2003 © CICR/SCHAEFFER, Benoît

Bagdad. Civils demandant de l'aide ou proposant leur service aux forces coalisées.

Baghdad. Civilians asking for help or offering their services to the coalition forces.

IRAN / IRAK

12/05/2003 © CICR/GASSMANN, Thierry

Khorramshar. Opération de rapatriement des dépouilles mortelles de deux soldats irakiens de la guerre Iran-Irak, sous les auspices du CICR.

Khorramshar. Repatriation operation of the mortal remains of two Iraqi soldiers of the Iran-Iraq war, under the aegis of the ICRC.

Faits et documents
Reports and documents

War in Iraq: the ICRC President calls for respect for international humanitarian law

Declaration by the ICRC President Jakob Kellenberger to the media on 20 March 2003

I note with sadness that it has not been possible to find a peaceful solution to the Iraq crisis.

The impact of war is always dramatic, in particular on civilians. The ICRC is very concerned.

The priority now must be given to protect the lives and dignity of the victims of this war, wherever they may be.

The ICRC has reminded the governments of Iraq, the United Kingdom and the United States of their obligations under the Geneva Conventions which they have all signed, to protect lives and preserve human dignity at a time when it is at greatest risk. To this end, formal representations have been made last week.

The ICRC is present in Iraq and intends to stay and to continue providing its humanitarian services. It will do so as an independent organisation that does not take sides. The belligerents must do everything possible to facilitate the work of the ICRC and other humanitarian organisations.

The ICRC is leading the efforts of the Red Cross and Red Crescent in Iraq, including the Iraqi Red Crescent Society. Red Cross and Red Crescent emblems and those working under them must be protected.

The ICRC is committed to pursuing its humanitarian activities elsewhere in the world.

The ICRC solemnly and strongly appeals to all belligerents to fully respect international humanitarian law. There are limits to warfare. The civilian population must be respected and protected. It is prohibited to direct attacks against the civilian population and belligerents must take every precaution in their military operations to spare the civilian population.

Indiscriminate attacks are prohibited, as are threats or acts of violence, the primary purpose of which is to spread terror among the civilian population.

The wounded and sick must be protected and cared for. Combatants who fall into the power of the adverse party must be respected and protected and treated as prisoners of war.

The right to choose methods or means of warfare is not unlimited. Weapons having indiscriminate effects and/or are causing superfluous injury or unnecessary suffering are forbidden by international humanitarian law, as are chemical and biological weapons. The ICRC also calls upon the warring parties not to use nuclear weapons.

The ICRC has decided to remain in Iraq with two core teams in Baghdad and the north of Iraq. 10 expatriates will work alongside with Iraqi national ICRC staff for immediate interventions.

The team's main tasks include:

- to immediately support Iraqi hospitals with surgical supplies to care for seriously injured, hospitalised and operated war wounded;
- to carry out emergency interventions on water and sanitation installations;
- if needed, to provide food for particularly vulnerable persons such as hospital patients;
- to visit possible prisoners of war.

The ICRC has established, during the last months, logistic centres around Iraq. Additional expatriate staff has been transferred to the region over the recent weeks such as drivers, logisticians, medical and relief delegates. More staff will be transferred. Teams of ICRC delegates and interpreters have been trained and are on standby for rapid deployment to register and interview prisoners of war and other persons deprived of their freedom.

Present capacities include:

- medical material to cover basic health needs of 180,000 people and surgical supplies for war wounded;
- food and non-food items for up to 150,000 displaced persons. Within a brief period capacity can be increased up to 500,000 persons;
- support to existing water and sanitation structure for up to 6 million persons.

To conclude, again: the ICRC solemnly and strongly appeals to all concerned to abide by the rules of international humanitarian law, which sets limits to violence. There are limits to warfare. Even in wars, people have rights that must be protected.

Conflict in Iraq : Memorandum to the belligerents

Observing with great concern the highly sensitive and tense situation prevailing in the Gulf, the International Committee of the Red Cross sent in March 2003 a *note verbale* and a memorandum to the potential belligerents, in particular, the United States of America, the United Kingdom of Great Britain, Australia and Iraq. It reminded them that the rules of international humanitarian law must be respected by all the States involved in military operations should the increasing crisis lead to renewed armed hostilities.

The memorandum is printed in full below:

MEMORANDUM

ON THE RULES OF INTERNATIONAL HUMANITARIAN LAW TO BE RESPECTED BY THE STATES INVOLVED IN MILITARY HOSTILITIES

I. PROTECTION OF PERSONS NOT TAKING OR NO LONGER TAKING PART IN THE HOSTILITIES

Persons not taking or no longer taking part in the hostilities, such as sick, wounded, shipwrecked persons, prisoners of war and civilians, must be respected and protected in all circumstances:

- All sick, wounded and shipwrecked persons must be collected and cared for, without any discrimination and in accordance with the relevant fundamental provisions of international humanitarian law, in particular the First, Second and Fourth Geneva Conventions;
- The sick, the wounded and the dead of the adverse party must be registered and notified to the ICRC;
- Civilians must be respected and treated humanely; the following in particular are prohibited: attacks on their lives, physical integrity or personal dignity, deportation or forced displacements not justified by imperative reasons of security, hostage-taking, sentences and executions not respecting the rule of law and necessary judicial guarantees; civilians

who do take a direct part in hostilities lose their protection against attacks only for the limited time of this direct participation;

- Civilian internees and detainees are entitled to the same fundamental guarantees and must be treated in accordance with the Fourth Geneva Convention; in particular, they must be registered and notified without delay to the ICRC; the ICRC's right of access to them and their right to receive ICRC visits under Article 143 of the Fourth Geneva Convention must be respected and guaranteed;
- Captured combatants must be given prisoner-of-war status and treated in accordance with the provisions of the Third Geneva Convention; in particular:
  – their capture and detention must be notified without delay to the party on which they depend and to the ICRC's Central Tracing Agency;
  – they must be held in places where their security is assured and which offer satisfactory material conditions in terms of hygiene, food and quarters;
  – any form of torture and ill-treatment is strictly prohibited;
  – the ICRC's right to visit prisoners of war, under Article 126 of the Third Geneva Convention, must be respected and guaranteed;
  – should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories entitled to prisoner-of-war status, such persons shall enjoy the protection of the Third Convention until such time as their status has been determined by a competent tribunal;
  – in the event of death, the place, date and cause of death, the place and date of burial and all necessary information to identify the grave sites must be specified in certificates or lists;
  – any person captured in relation with the hostilities must be treated with humanity; he must be handed over to a higher military authority and, in particular, may be neither killed nor ill-treated.

II. CONDUCT OF MILITARY OPERATIONS

The Parties to an armed conflict are not entitled to an unlimited choice of methods and means of combat and must therefore observe a number of rules on the conduct of hostilities. These rules are laid down in the Hague Conventions of 1899 and 1907, and have been reaffirmed — and in some cases supplemented — in the 1977 Protocol I Additional to the Geneva Conventions.

The following general rules have become part of customary law and, as such, are recognised as binding on any Party to an armed conflict:

- A clear distinction must be drawn in all circumstances between combatants and civilians on the one hand, and between military objectives and civilian objects on the other;
- It is forbidden to attack civilian persons or objects or to launch attacks of a nature to strike military objectives and civilian persons or objects in an indiscriminate manner. Indiscriminate attacks are those which are not directed at a specific military objective, those which employ a method or means of combat which cannot be directed at a specific military objective and those which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;
- Acts and threats of violence aimed at spreading terror among the civilian population are prohibited;
- Attacks on military objectives which may be expected to cause incidental loss of life or injury among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated are also prohibited;
- All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- Each party to the conflict must also take feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks;
- It is prohibited to use civilians and combatants *hors de combat* to shield military operations;
- Works and installations containing dangerous forces and other installations located at or in their vicinity must not be attacked, if such an attack causes the release of dangerous forces and consequent disproportionate collateral losses among the civilian population;
- Cultural property and places of worship may not be made the object of attack, unless they have become military objectives;
- It is prohibited to attack or destroy objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock and drinking water installations and supplies, or to render them useless with the purpose of denying their sustenance value to the civilian population;
- Due regard must be had for the general requirement to respect the environment, in particular that of other States and of areas outside national jurisdiction. Destruction of the environment may not be used as a weapon. It is prohibited to seek to inflict widespread, long-term and severe damage to the environment;

- It is prohibited to have recourse to means and methods of warfare which pointlessly aggravate the suffering of combatants *hors de combat* or which make their death inevitable;
- It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict constitute perfidy;
- Reprisals against protected persons and objects are prohibited;
- It is prohibited to order that there shall be no survivors and to make persons *hors de combat* the object of attack;
- The following rules apply to the use of certain weapons in the event of armed conflict:
  - It is prohibited to use asphyxiating, poisonous or other gases and to use chemical or biological weapons (1925 Geneva Protocol);
  - It is prohibited to develop, produce and stockpile bacteriological and toxin weapons (1972 Convention);
  - It is prohibited to use bullets which expand or flatten easily in the human body (1899 Hague Declaration), or certain explosive projectiles (1868 St. Petersburg Declaration);
  - The use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects is prohibited or restricted.
- The principles and rules of international humanitarian law — in particular the principles of distinction and proportionality and the prohibition of superfluous injury or unnecessary suffering — apply to the use of nuclear weapons. As the international Court of Justice has stated in its Advisory Opinion of 8 July 1996, the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.

III. PREVENTION OF PERSONS BECOMING UNACCOUNTED FOR AND CLARIFICATION OF THE FATE OF THOSE WHO HAVE BECOME UNACCOUNTED FOR

- Armed forces and auxiliary personal must have means of personal identification;
- An Information Bureau and a Grave Registration Service must be set up;

- Human remains must be properly handled without adverse distinction, including the collection of the human remains and of information on the human remains in order to allow (future) identification;
- Inquiries about persons unaccounted for due to the conflict must be responded to. Information on these persons must be transmitted to the appropriate authorities, through the intermediary of the Protecting Powers and likewise of the ICRC Central Tracing Agency.

IV. RESPECT FOR THE RED CROSS AND RED CRESCENT EMBLEMS AND FOR MEDICAL ACTIVITIES

Medical and religious personnel, hospitals, ambulances and other units and means of medical transport must be protected, respected and facilitated. The emblem of the red cross and the emblem of the red crescent, the symbols of that protection, must be respected in all circumstances:

- The freedom of movement necessary for all Red Cross/Red Crescent personnel and medical staff providing assistance for the civilian population and persons *hors de combat* must be ensured and their safety guaranteed;
- Any misuse of the red cross or red crescent emblem is prohibited and must be punished.

The Authorities must ensure that the use of the emblem is made according to the rules of international humanitarian law and take measures to ensure its respect.

V. RELIEF OPERATIONS

The parties to the conflict have the obligation to ensure the supply of items indispensable to the survival of the civilian population of the territory controlled by them and to allow the passage of essential relief supplies intended for the civilian population:

- When the civilian population lacks supplies, relief operations that are exclusively humanitarian and impartial in nature and conducted without any adverse distinction must be authorised, facilitated and respected;

VI. DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW

It is extremely important for the combatants involved in the military operations to be aware of their obligations under international humanitarian law. Proper instructions must be issued to this effect. The teaching of the law to the combatants is, moreover, an obligation expressly stipulated by the Geneva Conventions.

VII. ROLE OF THE ICRC

The ICRC, whose primary mandate is to ensure the faithful application of international humanitarian law and to protect and assist victims of armed conflicts, will be for its part ready to perform the tasks entrusted to it by the Geneva Conventions of 12 August 1949 and by the Statutes of the International Red Cross and Red Crescent Movement. As a specifically neutral and independent institution, the ICRC may also act as a neutral intermediary.

Therefore, the ICRC will request the Parties to allow its delegates to have access to all places where protected persons may be and, should the case arise, to be able to visit all prisoners of war and protected internees or detainees in their power.

With the agreement of the Parties concerned, the ICRC will be also prepared to carry out humanitarian activities in order to provide protection and assistance to the victims — whether civilian or not — of the conflict.

In particular, the ICRC will be prepared :

- To deploy its medical teams to assist wounded civilians and combatants.
- To take any action required to ensure the protection of the civilian population and to provide assistance to people affected by the conflict.
- To come to the aid of refugees and internally displaced persons, as far as its means permit.
- To make arrangements for the exchange of family messages.
- Visit persons protected by the Third or the Fourth Geneva Convention deprived of their liberty.

Geneva, March 2003

United Nations Security Council
4762nd meeting
Response to the humanitarian situation in Iraq

Speaking notes for an address
by Mr. Jakob Kellenberger, President
International Committee of the Red Cross (ICRC), Geneva
New York, 22 May 2003

I should like to start by highlighting two factors which played a defining role in shaping the ICRC's response to the recent conflict in Iraq.

First is that the Committee has been active in Iraq without interruption since 1980, with bases in Baghdad, Basra and the north where it has pursued both protection and assistance activities. Concretely, protection work has meant visits to and repatriation of prisoners of war from the Iraq-Iran conflict as well as search for information on people unaccounted for from the 1990-91 Gulf War. In terms of assistance, it is particularly relevant to note that support to medical structures, both hospitals and health care centres has been at the forefront of our priorities for the past few years, and the same applies to water and sanitation projects.

The Committee was therefore familiar with the country's health and water adduction and processing systems well before the 20th of March 2003.

Second, in October of last year, our Institution had decided to increase its response capabilities in and around Iraq. The decision of principle had also been taken to keep a core team of expatriate and Iraqi national staff in the country in the event of a war. Moreover, a careful review process has led us to the conclusion that, regardless of military developments, deficiencies in the health delivery and water adduction systems were likely to be critical issues of concern for the civilian population. In addition, it was evident that the outbreak of a full-fledged conflict would require the ICRC to step up its protection work, notably by visiting POWs and civilian internees. In other words, we concluded that the existent operational priorities were likely to keep, if not increase their relevance.

The course of events validated our choices.

During the war, the Committee supported hospitals and health centres, and effected emergency repairs on the water supply systems. Protection-wise, ICRC delegates have so far visited over 7000 POWs and civilian internees. Over 6000 have been released in the meantime. Efforts to gain access to all other interned persons are ongoing.

There were also limits to the activities carried out by the ICRC during the phase of most intense fighting, both security- and staff-related: whereas the ICRC could carry out emergency work in Baghdad, the Basra region and in the north during the phase of intense fighting, it had no access during this phase to major cities between Basra and Baghdad, such as Nasirya, Karbala and Najaf.

The ICRC's present and future activities include:

- visits to all persons deprived of their liberty
- protection of vulnerable groups such as
  - separated and unaccompanied children
  - sick and wounded
  - internally displaced persons (IDPs)
  - minority groups
- re-establishment of family links
- prevention and resolution of issues of persons unaccounted for in relation to the present and past conflicts and violence
- emergency repair and rehabilitation of vital structures (such as water, health facilities, sewage)
- provision of medical emergency consumables and equipment
- assistance and support to public health structures
- emergency food and non-food assistance to vulnerable populations
- awareness-raising activities related to explosive remnants of war and landmines.

And the ICRC has fielded nearly 100 international and 450 Iraqi staff to implement this program.

The ICRC is, as lead agency of the International Red Cross and Red Crescent Movement in Iraq, also coordinating the activities of the National Red Cross and Red Crescent Societies in Iraq. Representatives of 33 different Societies and the International Federation met on the premises of the ICRC Delegation in Baghdad ten days ago.

When it comes to assessing the current humanitarian situation, it is essential to understand that it cannot be dissociated from the security context nor from the current dysfunction of key administrative structures. The ICRC

has drawn the attention of the Coalition and of the International Community to this fact at an early stage. I recall my public appeal on April 11th.

Improving security and establishing functioning administrative structures so that people can go back to work and get paid remain top priorities, also from a humanitarian point of view. This was also my main message to Coalition forces when I visited Baghdad at the beginning of May.

The ICRC remains concerned by the security situation in Baghdad and other parts of the country. Various incidents over recent days further show that main roads remain unsafe.

Our early analysis, based on our field experience, that Iraq was not faced with a general humanitarian catastrophe seems now to be widely shared.

However, three considerations should be borne in mind:

- things could still turn wrong if security is not improved fast; more has to be done;
- there are urgent humanitarian needs in specific sectors and various contexts;
- there are, beyond humanitarian emergencies, immense needs for repair and upgrades of infrastructures, in particular in the health and water sectors.

If there is, at present, no major lack of dry food, people are lacking fresh food – not so much because of a lack of supply but lack of money to buy. It is good news to hear that the payment of salaries or other financial incentives has now started in different places. The lack of fuel in some parts of the country makes difficult the transportation for the staff in different institutions or can reduce supply lines.

A systematic evaluation of needs by ICRC medical teams in hospitals and other medical structures across the country is under way. In the course of the week of May 11th through 18th alone, ICRC medical teams visited about 10 hospitals in Baghdad and 7 in the central region of the country. The situation in hospitals does vary widely from one place to the other. There is a clear need for medical supplies in order to treat specific diseases like cancer, diabetes or cardiovascular diseases. In order to fill the gap until the central system of drug supplies is functioning again, the ICRC has just placed a large order of pharmaceuticals to be distributed through the central pharmacy and monitored by the ICRC.

One of our main humanitarian worries relates to the high number of incidents caused by unexploded ordnance and mines, and to the potentially disastrous effects of plenty of weapons and ammunition easily accessible

across the country. In order to spread emergency information and to evaluate the situation, an ICRC team has recently visited ten of the 13 southern Governorates.

As far as the legal framework in Iraq is concerned, we are, in terms of international humanitarian law, in the situation of an occupation. The applicability of the relevant provisions of the Geneva Conventions – in particular the Fourth Convention – and the Hague Regulations is accepted by the Occupying Powers. To monitor the application of these provisions will be one of the tasks of the ICRC.

I thank the Deputy Secretary-General and the representative of the U.N. agencies for their kind words addressed to the ICRC for its work during the conflict. The ICRC is ready to cooperate closely with U.N. agencies and other humanitarian actors while maintaining its full independence in relation to all actors.

The ICRC will strictly respect the principles of independence, neutrality and impartiality, in Iraq as in all other operational contexts. If the ICRC was able to conduct its activities for the last 23 years in contexts like Iraq, for the last 24 years in Afghanistan or in many other places, it is also because the Institution was perceived as a neutral, impartial and independent humanitarian organization, and therefore accepted by the local population and the different groups.

Present and active in Iraq for 23 years, also in the most difficult moments, the ICRC will continue to assist the Iraqi population in full respect of its dignity.

Première session spéciale de la Conférence des États parties chargée d'examiner le fonctionnement de la Convention sur les armes chimiques (Première Conférence d'examen) La Haye, 28 avril - 9 mai 2003 Déclaration du Comité international de la Croix-Rouge, Genève

Le Comité international de la Croix-Rouge (CICR) est très reconnaissant de pouvoir s'adresser aux États parties à la Convention sur les armes chimiques (CAC), à l'occasion de la Première Conférence d'examen de cet important traité. Nous nous exprimons aujourd'hui en tant qu'institution à qui les États ont confié le mandat de gardien du droit international humanitaire, ou « droit de la guerre ». C'est en effet dans ce domaine du droit que sont énoncées les normes, anciennes et modernes, établies par maintes civilisations partageant une ferme conviction : même la guerre a des limites, que lui imposent la décence, la morale et « les exigences de la conscience publique ».

La raison d'être de la CAC est de confirmer, et de sceller à tout jamais, le rejet de l'usage du poison dans la guerre, tel qu'il figurait dans les anciens codes militaires, et tel qu'il a été exprimé, plus récemment, dans le Protocole de Genève de 1925. Le fait de ne voir dans la CAC qu'un simple accord conclu entre les États pour éliminer – à des fins politiques ou de sécurité – un important système d'armements, affaiblit le statut et la mission de ce traité ainsi que sa capacité à mobiliser le public en sa faveur.

L'emploi massif des armes chimiques au cours de la Première Guerre mondiale a conduit le CICR à protester, le 6 février 1918, « de toutes les forces de notre âme » contre ce moyen de guerre, qualifié de « criminel », et à en demander l'interdiction. En effet, si la guerre chimique n'était pas prohibée, le Comité déclarait redouter « une lutte qui dépassera en férocité ce que l'histoire a connu de plus barbare ». Cet appel a contribué à la mobilisation de l'opinion publique et des dirigeants politiques ainsi amenés à négocier le Protocole de Genève.

Le monde a connu plusieurs centaines de conflits depuis 1918 mais l'emploi des armes chimiques n'a été confirmé que dans quelques cas. Indéniablement, tant le droit que le sentiment d'horreur éprouvé par le public ont contribué à rendre inacceptable l'usage du poison dans la guerre. Les interdictions qui frappent l'emploi des armes chimiques et biologiques font aujourd'hui partie du droit international coutumier qui, dans chaque situation de conflit armé, lie toutes les parties au conflit, qu'elles aient ou non adhéré aux traités spécifiques énonçant ces règles.

Depuis son entrée en vigueur, il y a cinq ans, la CAC a joué un rôle essentiel: les interdictions existantes ont été renforcées, la destruction des stocks et des installations de production d'armes chimiques a débuté et le monde peut espérer, avec davantage de confiance, que d'autres substances chimiques toxiques ne seront pas détournées et utilisées à des fins interdites. Ces succès sont dus en grande partie à l'action du Secrétariat technique de l'OIAC. Pour pouvoir accomplir sa mission, cet organe doit bénéficier d'un appui, à travers la mise à disposition de ressources suffisantes et le respect de son indépendance et de son mandat étendu. Si l'on tentait d'atteindre les objectifs de la Convention sans observer strictement les dispositions de son régime de contrôle, sans poursuivre son ambitieux programme de destruction des stocks et sans consentir des investissements suffisants en termes de ressources humaines et financières, une telle démarche aurait de graves conséquences, tant pour la Convention elle-même que pour les normes du droit international humanitaire qui en constituent le fondement.

Le CICR exhorte tous les États qui ne l'ont pas encore fait à s'associer à l'action – d'importance historique – qui a été engagée pour que, demain, les armes chimiques ne soient plus que des vestiges du passé. Il est important que les États adhérent à la Convention sur les armes chimiques et au Protocole de Genève de 1925, qu'ils adoptent une législation nationale effective afin de criminaliser les actes prohibés par la Convention et, enfin, qu'ils lèvent les éventuelles réserves formulées en adhérant au Protocole de Genève. Dorénavant, les armes chimiques et biologiques ne devraient avoir de place ni dans la guerre ni dans l'avenir de l'humanité.

Notre époque est marquée par les progrès rapides de la science, en particulier dans les domaines de la chimie et des biotechnologies. L'intégrité de la Convention dépend donc de manière cruciale de la vigilance qui sera exercée à l'égard des nouvelles technologies susceptibles de la priver « de son objet et de son but ». Il est essentiel que les milieux scientifiques, industriels et médicaux soient parties prenantes et que les implications des nouveaux développements soient débattues franchement avec eux.

À ce propos, le CICR souhaite exprimer sa préoccupation devant l'intérêt accru que la police, les forces de sécurité et les forces armées portent aujourd'hui à l'usage d'agents chimiques incapacitants, ainsi que devant l'absence de toute manifestation d'inquiétude, de la part des États parties à la CAC, quant aux implications de tels développements. Tant le Protocole de Genève que la CAC contiennent des dispositions interdisant de manière absolue l'emploi, en tant que moyens de guerre, d'agents chimiques incapacitants (agents dits « irritants » compris). Une telle interdiction n'est pas le fruit du hasard. De fait, plusieurs des cas documentés d'utilisation d'armes chimiques lors de conflits du XXe siècle ont commencé par l'emploi d'agents chimiques incapacitants, pour prendre ensuite des proportions plus inquiétantes avec le recours à des agents « traditionnels » de la guerre chimique.

Certes, la CAC autorise l'utilisation d'agents chimiques dans le cadre du maintien de l'ordre public. Il est clair, cependant, que les négociateurs avaient seulement l'intention d'autoriser l'emploi de ces agents pour la lutte anti-émeute sur le plan intérieur ainsi que le recours à des substances chimiques létales pour les exécutions lorsque la législation nationale le permet. L'usage courant de toute une gamme de produits incapacitants n'était pas envisagé; il convient donc d'examiner soigneusement ce risque de banalisation avant de poursuivre dans cette voie.

Bien que l'application des lois sur le plan intérieur ne relève pas du domaine de compétence directe du CICR, les données médicales montrent qu'il serait illusoire d'espérer parvenir rapidement à « incapaciter » des groupes de personnes sans que cela entraîne un certain taux de mortalité. Nous redoutons que la quête d'agents chimiques incapacitants dans un but de maintien de l'ordre public entraîne leur prolifération; les forces de sécurité, les criminels et les personnes qui commettent des actes terroristes se livreraient alors à une « course aux armements » dans laquelle alterneraient mesures et contre-mesures. En ce cas, l'usage d'agents chimiques incapacitants risquerait, à plus long terme, de s'étendre aux situations de conflit armé. Nous sommes également préoccupés par les liens qui semblent exister entre deux axes de la recherche, l'un portant sur les agents incapacitants destinés au maintien de l'ordre public et l'autre sur ce que l'on nomme parfois les armes « non létales », destinées à être utilisées en tant que moyens de guerre.

La quête d'agents chimiques et biologiques incapacitants a des implications importantes, non seulement pour la CAC, mais aussi pour les règles fondamentales du droit international humanitaire. Si de tels agents étaient employés durant un conflit armé, il serait difficile (voire impossible) de déterminer si un adversaire est véritablement hors de combat et, par conséquent,

en droit de recevoir protection et assistance. Ainsi « neutralisé », un combattant ne paraîtrait sans doute pas blessé, sans pour autant être en état de manifester son intention de se rendre. Il ne serait pas aisé d'apprendre aux soldats à faire la distinction entre un ennemi qui est hors d'état de réagir et un ennemi qui continue à les menacer. Le résultat – l'utilisation combinée d'agents incapacitants et de la force létale – pourrait accroître de manière significative le niveau de létalité lors d'un conflit armé. L'introduction d'agents incapacitants viendrait aussi probablement affaiblir l'une des règles essentielles de la conduite de la guerre: l'interdiction d'employer des armes contre des civils.

Le CICR ne prétend pas que tous les incapacitants posent un problème. Par contre, nous sommes fermement convaincus que l'interdiction absolue de l'emploi, en temps de guerre, de toutes les formes d'agents chimiques et biologiques revêt une importance cruciale, et que cette règle doit être maintenue. L'intérêt porté à de tels agents en tant que moyens de guerre nous inquiète, comme nous préoccupe le fait qu'aucune attention ne soit accordée aux implications de la mise au point de tels agents à des fins de maintien de l'ordre public. Nous demandons instamment à cette Conférence d'examen d'amorcer un processus, auquel seraient associés les États parties et les organes spécialisés, visant à clarifier le sens des dispositions de la Convention relatives au maintien de l'ordre public; les risques évoqués ici pourraient ainsi être pris en compte.

Le CICR adresse un appel aux délégations présentes pour qu'elles réaffirment leur engagement vis-à-vis des buts élevés de la Convention sur les armes chimiques, pour qu'elles fassent en sorte que ce traité soit pleinement mis en œuvre, en toute transparence, sans entraves liées au manque de moyens et, enfin, pour qu'elles s'attachent avec vigueur à relever les défis que les progrès réalisés dans les domaines de la science et de la technologie constituent pour la CAC. En tant que gardiens de cette Convention, vous avez à assumer un rôle crucial: faire en sorte que les interdits sociaux et les structures juridiques qui, durant plusieurs millénaires, ont protégé l'humanité contre l'usage du poison dans la guerre soient maintenus et renforcés, pour le bien de notre génération et de celles qui lui succèderont.

First Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention (First Review Conference) The Hague 28 April - 9 May 2003 Statement of the International Committee of the Red Cross, Geneva

The International Committee of the Red Cross (ICRC) is very grateful for this opportunity to address States Parties to the Chemical Weapons Convention (CWC) on the occasion of the First Review Conference of this important Convention. We speak as an organisation mandated by States to serve as the guardian of international humanitarian law, or the "law of war". This field of law embodies the ancient and modern norms of diverse civilisations which uphold the belief that even in warfare there are limits demanded by decency, morality and the "dictates of the public conscience".

The very *raison d'être* of the Chemical Weapons Convention is to uphold and reinforce for all time the rejection of warfare by poison found in ancient codes of war and, more recently, in the 1925 Geneva Protocol. When the Convention is seen simply as an agreement among States to eliminate, for political or security reasons, an important weapon system, its status and mission are diminished and its power to command public support is undermined.

Following the widespread use of chemical weapons in the First World War the ICRC, on 6 February 1918, protested "with all the force at its command" against such warfare, which it deemed "criminal", and called for the prohibition of such weapons. If chemical warfare was not outlawed the Committee foresaw "a struggle which will exceed in barbarity anything which history has known so far". This Appeal contributed to mobilizing public opinion and leaders to pursue the negotiation of the Geneva Protocol.

Despite the occurrence of several hundred conflicts since 1918 the use of chemical weapons has been confirmed in only a few cases. Both the law and public abhorrence have undoubtedly played a role in making poison

warfare unacceptable. The prohibitions on the use of chemical and biological weapons are now part of customary international law binding on all parties to all armed conflicts — whether or not they are parties to the specific treaties which contain these rules.

Since the CWC entered into force five years ago it has played a crucial role in reinforcing existing prohibitions, beginning with the elimination of existing chemical weapons stocks and production facilities and increasing confidence that other toxic chemicals are not diverted for prohibited purposes. The Technical Secretariat has played a central role in these achievements. It is important that its mission is supported through the provision of adequate resources and respect for its independence and broad mandate. Any effort to achieve the objectives of the Convention without a rigorous approach to its inspection regime, pursuit of its ambitious stockpile destruction programme and adequate human and financial investments would have serious consequences for the Convention and the international humanitarian law norms upon which it is based.

The ICRC urges all States which have not done so to join in this historic effort to make chemical weapons a relic of the past by adhering to the Chemical Weapons Convention and 1925 Geneva Protocol, by adopting effective national legislation to criminalize acts prohibited by the Convention and by withdrawing any reservations to the Geneva Protocol concerning use of prohibited agents. Chemical and biological weapons should have no place in the future of warfare or the future of humanity.

In an age of rapid developments in science and, in particular, in the field of chemistry and biotechnology the Convention's integrity is crucially dependent on vigilance regarding new technologies that could undermine its object and purpose. Participation of and frank debate with the scientific, industrial and medical communities on the implications of new developments are essential.

In this regard the ICRC would like to express its alarm at the increasing interest among police, security and armed forces in the use of incapacitating chemicals and the lack of expressions of concern about the implications of such developments by States parties to this Convention. Both the 1925 Geneva Protocol and the CWC contain absolute prohibitions on the use of incapacitating chemicals, including irritants, in warfare. This is not by chance. Several of the documented cases of chemical weapons use in conflicts over the last century began with the use of incapacitating chemicals and escalated to the employment of "traditional" chemical warfare agents.

The CWC permits the use of chemical agents for law enforcement. However, it is clear that the intent of its negotiators was only to permit the use of domestic riot control agents and the use of lethal chemicals for executions — where permitted by national law. The routine use of a variety of incapacitants was not envisaged and needs to be carefully considered before moves in this direction are pursued.

Although domestic law enforcement is beyond the ICRC's field of direct expertise, medical evidence shows that it is illusory to believe that rapid incapacitation can be achieved without a certain level of mortality. We are deeply concerned that the pursuit of incapacitating chemicals for law enforcement could lead to their proliferation, to an "arms race" of measures and countermeasures among security forces, criminals and those who commit acts of terror. In the longer term the result could be an extension into warfare of the use of incapacitating chemicals. We are also concerned about the apparent links between research into incapacitants for law enforcement and those pursuing what are sometimes called "non-lethal" weapons for use in warfare.

The pursuit of incapacitating chemical and biological agents has important implications not only for the CWC but also for fundamental rules of international humanitarian law. If used in armed conflict they would make it difficult or impossible to determine when a combatant is "out of action" and thereby afforded protection and assistance. An incapacitated combatant would probably not appear to be injured and may be unable to show a sign of surrender. It would be difficult to train soldiers to distinguish whether an enemy were incapacitated or remained a threat. The resulting combination of incapacitants and lethal force could significantly increase the lethality of armed conflicts. The introduction of incapacitants would also be likely to undermine the rule prohibiting the use of weapons against civilians — one of the most basic norms of warfare.

While the ICRC does not claim that all incapacitants are problematic, we firmly believe that the absolute prohibition in warfare of all forms of chemical and biological agents is of crucial importance and must be maintained. We are concerned about the interest being shown in such agents as a means of warfare; we are concerned therefore by lack of attention being given to the implications of the development of such agents for law enforcement. We urge this Review Conference to begin a process involving States Parties and specialist bodies which would aim to clarify the meaning of the Convention's law enforcement provisions and so address the risks raised here.

The ICRC calls on delegations here to reaffirm their commitment to the noble goals of the Chemical Weapons Convention, to ensure that the Convention's full and transparent implementation is not hampered by a lack of resources and to confront squarely the challenges to this Convention posed by scientific and technological developments. As guardians of this Convention you have a crucial role in ensuring that the social taboos and legal structures which, for several millennia, have protected humanity from poison warfare are maintained and strengthened for this and succeeding generations.

Cérémonie de remise du Prix Paul Reuter 2003 jeudi 22 mai 2003 Lauréate: Madame le Professeur Ruth Abril Stoffels Université Cardenal Herrera, Valence, Espagne

Allocution du Professeur Daniel Thürer, Vice-Président de la Commission du Fonds Paul Reuter et membre du CICR

En ma qualité de Vice-Président de la Commission du Fonds Paul Reuter, j'ai l'honneur et le grand plaisir de décerner, ce jour, le Prix Paul Reuter 2003 à Madame le Professeur Ruth Abril Stoffels.

Le Jury, composé du professeur Paolo Bernasconi, Président de la Commission du Fonds Paul Reuter et membre du CICR, des professeurs Christian Dominicé et Giorgio Malinverni de l'Université de Genève et de membres de l'administration du CICR, a décidé à l'unanimité et avec l'appui de deux experts et anciens collaborateurs du CICR, Messieurs Hans-Peter Gasser et Christophe Swinarski, de récompenser Madame le Professeur Ruth Abril Stoffels pour son ouvrage intitulé *La Asistencia Humanitaria en los Conflictos Armados: Configuración jurídica, principios rectores y mecanismos de garantía.*

Madame Abril Stoffels, de nationalité espagnole, est docteur en droit. Après un Diplôme d'Etudes Approfondies en Etudes Européennes au Collège de l'Europe de Bruges, c'est en 2000 qu'elle a soutenu à l'*Universidad Complutense de Madrid* sa thèse sur l'assistance humanitaire dans les conflits armés, que le Prix Paul Reuter 2003 récompense aujourd'hui.

Actuellement, Madame Abril Stoffels est Professeur de Droit international et de Relations internationales à la faculté des Sciences juridiques et sociales de l'Université Cardenal Herrera de Valence. A ce titre, elle est régulièrement appelée à donner des conférences et de nombreux séminaires en Espagne comme à l'étranger.

Mme Abril Stoffels a par ailleurs tissé des liens étroits avec la Croix-Rouge espagnole, en particulier avec son Centre d'Etudes de Droit International Humanitaire, où elle a enseigné et diffusé le droit international humanitaire, entre autres aux Forces de sécurité de l'Etat. C'est d'ailleurs

avec le soutien du Centre d'Etudes de Droit International Humanitaire de la Croix-Rouge espagnole que sa thèse a été publiée.

Mme Abril Stoffels a en outre nombre d'articles et de publications à son actif, qui traitent d'une grande variété de sujets.

L'ouvrage aujourd'hui primé est une thèse, rédigée sous la direction du Professeur Manuel Pérez González, titulaire de la chaire de droit international public à l'*Universidad Complutense de Madrid* et Directeur technique du Centre d'Etudes de Droit International Humanitaire de la Croix-Rouge espagnole. Sa publication a été retenue, car elle étudie non seulement l'ensemble des concepts et problèmes de l'assistance humanitaire dans les conflits armés, mais aussi la pratique en la matière.

Mme Abril Stoffels examine tout d'abord la nature juridique de l'assistance humanitaire, sa définition et ses objectifs théoriques, établissant des cadres de références claires et utiles, surtout en ce qui concerne le débat opposant les notions d'assistance et protection.

L'auteur analyse le régime juridique de l'assistance dans l'ensemble du droit international, y compris le droit international humanitaire, ainsi que les devoirs des Etats et les droits des victimes en la matière. Ensuite, elle se penche sur les mécanismes d'effectivité et les procédures juridiques y afférents, y compris la problématique de « l'ingérence humanitaire », puis elle se concentre sur les définitions et la portée de l'assistance humanitaire à la lumière des principes humanitaires, notamment ceux de l'impartialité, de la proportionnalité et de la neutralité. Enfin, Mme Abril Stoffels termine par une vingtaine de conclusions, susceptibles par elles-mêmes de servir de manuel abrégé en la matière !

A relever également l'imposante bibliographie, qui offre une liste très complète des publications pertinentes, dont les documents des organes des Nations Unies, de l'Union Européenne, du Mouvement international de la Croix-Rouge et du Croissant-Rouge, et la jurisprudence en la matière.

Il s'agit là non seulement d'un outil précieux pour la promotion et la diffusion des règles concernant l'assistance humanitaire, abordée – et c'est ce qui en fait sa force – d'une façon globale, mais aussi d'un ouvrage de référence qui constitue une contribution majeure à la conceptualisation de la problématique actuelle de l'assistance. Il offre ainsi un instrument de travail à toutes les entités gouvernementales et non-gouvernementales concernées par ce sujet, y compris aux délégués du CICR et des Sociétés nationales de la Croix-Rouge ou du Croissant-Rouge.

L'excellente qualité et l'utilité de l'ouvrage de Madame Abril Stoffels sont dignes d'un Prix qui évoque la mémoire du grand juriste, de l'homme

généreux et dévoué, feu le Professeur Paul Reuter, qui a tant contribué au développement du droit international, les membres ici présents de la Commission du droit international des Nations Unies en savent quelque chose.

Le prix Paul Reuter a été créé en 1983 grâce à une donation faite au CICR par Paul Reuter, alors professeur honoraire à l'université de Paris, membre de l'institut de droit international et ancien président de la Commission du droit international des Nations Unies.

C'est la septième fois que le prix Paul Reuter récompense un travail hors du commun dans le domaine du droit international humanitaire.

Enfin, je souhaite vous annoncer que la Commission du Fonds Paul Reuter a décidé de promouvoir l'ouvrage de Madame Abril Stoffels en y apportant une aide pour sa traduction en anglais, afin de le rendre accessible à un plus large public.

J'ai ainsi le plaisir de remettre au Professeur Ruth Abril Stoffels le Prix Paul Reuter 2003, ainsi que le diplôme qui l'accompagne.

Presentation ceremony, Paul Reuter Prize 2003
Thursday, 22 May 2003
Recipient: Professor Ruth Abril Stoffels
Cardenal Herrera University, Valencia, Spain

Address by Professor Daniel Thürer, Vice-Chairman of the Paul Reuter Fund Committee and member of the ICRC

It is a pleasure and a great honour for me in my capacity as Vice-Chairman of the Paul Reuter Fund Committee to present the Paul Reuter Prize for 2003 to Professor Ruth Abril Stoffels.

The jury for the prize consisted of Professor Paolo Bernasconi, who is the Chairman of the Paul Reuter Fund Committee and a member of the International Committee of the Red Cross, Professors Christian Dominicé and Giorgio Malinverni of Geneva University, and several members of the ICRC staff. With the support of two legal experts who formerly worked at the ICRC, Hans-Peter Gasser and Christophe Swinarski, they unanimously decided to award Professor Ruth Abril Stoffels the Paul Reuter Prize for her work entitled *La Asistencia Humanitaria en los Conflictos Armados: Configuración jurídica, principios rectores y mecanismos de garantía.*

Professor Ruth Abril Stoffels is from Spain, and holds a doctorate in law. In 2000, following a postgraduate diploma in European Studies at the College of Europe, in Bruges, she defended her thesis on humanitarian assistance during armed conflict at Complutense University in Madrid, and it is for this thesis that she is receiving the Paul Reuter Prize 2003 today.

Mrs Abril Stoffels is currently professor of international law and international relations at the faculty of law and social sciences of Cardenal Herrera University in Valencia. In that capacity, she regularly gives lectures and takes part in a large number of seminars in Spain and abroad.

She has also established close links with the Spanish Red Cross, in particular with its Centre for the Study of International Humanitarian Law, where she teaches and promotes that body of law to groups that include the security forces. Indeed, it was with the Centre's support that she was able to publish her thesis.

Mrs Abril Stoffels has published a number of articles on a wide variety of subjects.

The work for which she has won this prize is her thesis, written under the direction of Professor Manuel Pérez González, who holds the Chair for international public law at Complutense University in Madrid and is Technical Director of the Centre for the Study of International Humanitarian Law of the Spanish Red Cross. The jury selected this study because it examines not only all concepts and problems of humanitarian aid during armed conflict, but also the practical aspects.

Professor Abril Stoffels starts by discussing the legal status of humanitarian assistance, its definition and its theoretical objectives, thereby setting up a clear frame of reference, particularly with respect to the debate regarding aid versus protection.

She analyses the legal regime governing assistance within international law, including international humanitarian law, together with the duties of States and the rights of victims. She then moves on to consider implementation mechanisms and the related legal procedures, including the problem of so-called "intervention on humanitarian grounds". This is followed by the definitions and scope of humanitarian aid in the light of humanitarian principles, particularly those of impartiality, proportionality and neutrality. Professor Abril Stoffels ends with some 20 conclusions. These alone could serve as a basic handbook on the subject!

There is also an imposing bibliography, which includes a very comprehensive list of relevant publications, including documents from United Nations bodies, the European Union and the International Red Cross and Red Crescent Movement, together with relevant jurisprudence.

This work is not just a valuable tool for promoting the rules governing humanitarian aid, covered – and it is this which gives the document its strength – in a most comprehensive fashion; it is also a reference work, making a major contribution to the conceptualization of current aid issues. It will hence be of great practical value to all governmental and non-governmental bodies involved in this area, and to ICRC delegates and the National Red Cross and Red Crescent Societies.

The quality and usefulness of Professor Abril Stoffels' work render it worthy indeed of a prize that commemorates that great jurist, that generous and committed individual, the late Professor Paul Reuter, who contributed so much to the development of international law, as the members of the United Nations International Law Commission present will testify.

The Paul Reuter Prize was set up in 1983 through a donation made to the ICRC by the late Paul Reuter, Honorary Professor at the University of Paris, member of the Institute of International Law and former Chairman of the United Nations International Law Commission.

This is the seventh time that the Paul Reuter Prize has been awarded for outstanding work in the field of international humanitarian law.

Finally, before presenting the Prize, I wish to announce that the Paul Reuter Fund Committee has decided to promote Mrs Abril Stoffels' work by supporting its translation into English, thereby making it accessible to a wider audience.

It is therefore my great pleasure to present the Paul Reuter Prize 2003, and the accompanying diploma, to Professor Ruth Abril Stoffels.

Livres et articles
Books and articles

Récentes acquisitions faites par le Centre d'Information et de Documentation, CICR
Recent acquisitions of the Library & Research Service, ICRC

Afrique – Africa

Livres – Books

– **Les nouveaux prédateurs: politique des puissances en Afrique centrale** / Colette Braeckman. – Paris: Fayard, 2003. – 309 p.: cartes; 24 cm

– **Visions of transforming Africa: the challenge of leadership** / Fasil Nahum. – Addis Abeba: [s.n.], 2003. – 117 p.; 20 cm

Articles

– **L'évolution des opérations du maintien de la paix en Afrique** / Anne-Sophie Millet–Devalle. – janvier 2003. – p. 11–25. – In: Arès; Vol. 20, No. 50

– **Le règlement de paix entre l'Ethiopie et l'Erythrée: « un succès majeur pour l'ensemble de l'Afrique »?** / par Emmanuelle Jouannet. – novembre 2001. – p. 849–896. – In: Revue générale de droit international public; Tome 105, n°. 4

– **Les conflits des Grands Lacs** / C. Thibon. – janvier 2003. – p. 27–39. – In: Arès; Vol. 20, n° 50

– **Outbreak of beri–beri in a prison in West Africa** / Dominique de Montmollin, Julie MacPhail, Jenny Mcmahon, Rudi Coninx. – October 2002. – p. 234–236. – In: Tropical doctor; 32

– **The political management of ethnic conflict in Africa: a human needs–based approach** / University of Cape Town. Centre for conflict resolution; ed. Roshila Nair. – Cape Town: Centre for conflict resolution, September 2002. – 44 p.: photogr, ill., tabl.; 30 cm. – In: Track two; Vol. 11, No. 4

Asie – Asia

Livres – Books

– **Où va la Chine?** / Jean–Luc Domenach. – Paris: Fayard, décembre 2002. – 392 p.: carte; 24 cm

– **Religious minorities in Pakistan** / Minority rights group; by Iftikhar H. Malik. – London: MRG, September 2002. – 32 p.: carte; 30 cm. – A MRG report

Articles

– **Afghanistan: the reconstruction process** / Peter Marsden. – January 2003. – p. 91–105. – In: International Affairs; Vol. 79, No. 1

– **Afghanistan and the future of warfare** / Stephen Biddle. – March/April 2003. – p. 31–46. – In: Foreign affairs; Vol. 82, No. 2

Moyen-Orient – Middle East

Livre – Book

– **Building democracy in Iraq** / Minority rights group; by Yash Ghai, Mark Lattimer and Yahia Said. – London: MRG, February 2003. – 44 p.: carte; 30 cm. – A MRG report

Articles

– **Autour de la crise irakienne** / David Baran... [et al.]. – Printemps 2003. – p. 59–102. – In Politique étrangère ; No. 1
– **Face à la guerre** / Joseph Maïla. – Février 2003. – p. 149–152. – In: Etudes; 3982
– **Health crisis in Iraq: special report** / Haroon Ashraf... [et al.]. – February 2003. – p. 622–631: cartes, photogr. – In: The Lancet; vol. 361, No. 9358
– **How to build a democratic Iraq** / Adeed Dawisha and Karen Dawisha. – May–June 2003. – p. 36–50. – In: Foreign affairs; Vol. 82, No. 3
– **Iraq at the crossroads: state and society in the shadow of regime change** / ed. by Toby Dodge and Steven Simon. – London: The International Institute for Strategic Studies, 2003. – 178 p.; 24 cm. – In: Adelphi paper; 354
– **Iraq, US and the war on terror** / Shashi Tharoor... [et al.]. – Winter/Spring 2003. – p. 9–70. – In: The Fletcher Forum of world affairs; Vol 27, No. 1
– **Policekeeping is the key: rebuilding the internal security architecture of postwar Iraq** / Graham Day and Christopher Freeman. – March 2003. – p. 299–313. – In: International Affairs; Vol. 79, No. 2

Armes – Weapons

Articles

– **Chemical and biological warfare: non-proliferation and the ethics of science** / University of Cape Town. Centre for conflict resolution; ed. Roshila Nair. – Cape Town: Centre for conflict resolution, December 2001. – 60 p.: photogr, ill., tabl.; 30 cm. – In: Track two; Vol. 10, No. 3
– **La conférence d'examen de la convention sur les armes chimiques = The CWC review conference** / Institut des Nations Unies pour la recherche sur le désarmement; réd. Kerstin Vignard. – Genève: UNIDIR, 2002. – 67, 65 p.; 30 cm. – In: Forum du désarmement = Disarmament forum; No. 4
– **Seeking security: weapons or words** / Jack Piachaud... [et al.]. – London: F. Cass, Oct.–Dec. 2002. – p. 343–410; 24 cm. – In: Medicine, conflict and survival; Vol. 18, No. 4

Assistance humanitaire – Humanitarian assistance

Livres – Books

– **Condemned to repeat? The paradox of humanitarian action** / Fiona Terry. – Ithaca; London: Cornell University, 2002. – 282 p.: cartes, tabl.; 23 cm

– **La victime écran: la représentation humanitaire en question** / Philippe Mesnard; postscriptum Rony Brauman. – Paris: Textuel, février 2002. – 176 p.; 19 cm. – La discorde; 8

– **Une guerre contre les civils: réflexions sur les pratiques humanitaires au Congo Brazzaville (1998–2000)** / Marc Le Pape et Pierre Salignon (éds); Médecin Sans Frontières. – Paris: Karthala, 2001. – 176 p.: tabl., graph., cartes; 22 cm

Articles

– **Action humanitaire** / Institut de médecine tropicale du service de santé des armées; P. Perrin... [et al.]. – Marseille: Le Pharo, 2002. – p. 345–464; 30 cm. – In: Médecine tropicale; Vol. 62, no. 4

– **Humanitarian action in the 21st century: the danger of a setback** / Paul Grossrieder. – 2002. – p. 23–32. – In: Refugee survey quarterly; Vol. 21, No. 3

– **Les relations entre les services de santé militaire et les organisations humanitaires: le point de vue du CICR** / par P. Perrin. – 2002. – p. 414–417. – In: Médecine tropicale; Vol. 62, No. 4

Conflits, sécurité et forces armées – Conflicts, security and armed forces

Livres – Books

– **Privatizing peace: from conflict to security** / Allan Gerson and Nat J. Colletta; pref. by Richard Holbrooke. – Ardsley, NY: Transnational, 2002. – XII, 207 p.: graph., tabl.; 24 cm

– **The Chechen wars: will Russia go the way of the Soviet Union?** / Matthew Evangelista. – Washington: Brookings Institution, 2002. – XI, 244 p.: cartes; 23 cm

Articles

– **Causes of violence against local populations by Western soldiers on peace keeping operations** / Stanislas Horvat. – 2001. – p. 87–113. – In: Revue de droit militaire et de droit de la guerre = The military law and the law of war review; Vol. 40, No. 1–2

– **Information war: Tendenzen – Optionen – Perspektiven** / Ralf Hoffmann. – 2002. – p. 158–165. – In: Humanitäres Völkerrecht: Informationsschriften; 3

– **Les Etats-Unis, la puissance et la guerre** / Martin van Creveld... [et al.]. – Printemps 2003. – p. 11–56. – In: Politique étrangère; no. 1

– **Operation enduring freedom: the use of force in self-defense against Al Qaida and the Taliban** / M. Scott Holcomb. – 2001. – p. 115–145. – In: Revue de droit militaire et de droit de la guerre = The military law and the law of war review; Vol. 40, No. 1–2

– **Putting people at the centre of the international agenda: the human security approach** / Mirko Zambelli. – 2002. – p.173–186. – In: Die Friedens-Warte; Bd. 77, Heft 1–2
– **The legitimate use of force** / Edward B. Davis, Sheila M. Davis, Terry Mays. – 2001. – p. 61–85. – In: Revue de droit militaire et de droit de la guerre = The military law and law of war review; Vol. 40, no 1–2

Droit international humanitaire – International humanitarian law

Livres – Books

– **Code de droit international humanitaire: textes réunis au 1er mars 2002** / par Eric David, Françoise Tulkens, Damien Vandermeersch. – Bruxelles: Bruylant, 2002. – 750 p.; 20 cm
– **La codification des normes applicables aux conflits armés non internationaux par le CICR** / Mohammad Hossein Ramazani Ghavamabadi. – [S.l.]: [s.n], 2002. – 112 f.; 30 cm Mémoire de D.E.A de droit des relations économiques, internationales et communautaires, Faculté de droit, Université de Paris X–Nanterre, 2002
– **There is no need to revise the laws of war in light of September 11th** / Jordan J. Paust; The American Society of International Law, Task force on terrorism. – Washington: The American Society of International Law, November 2002. – 13 f.

Articles

– **Der völkerrechtliche Status der Gefangenen von Guantanamo nach dem III. Genfer Abkommen über die Behandlung der Kriegsgefangenen vom 12. August1949** / Judith Wieczorek. – 2002. – p. 88–96. – In: Humanitäres Völkerrecht: Informationsschriften; 2
– **International humanitarian law and spirituality** / Michel Veuthey. – 2002.– p. 45–110. – In: Refugee survey quarterly; Vol. 21, No. 3
– **International humanitarian law as customary international law** /Jean–Marie Henckaerts. – 2002. – p. 186–193. – In: Refugee survey quarterly; Vol. 21, No. 3

Droit international pénal – International criminal law

Livres – Books

– **Amnesty for crime in international law and practice** / Andreas O'Shea. – The Hague: Kluwer Law International, 2002. – XXXIII, 376 p.; 25 cm
– **International justice and the international criminal court: between sovereignty and the rule of law** / Bruce Broomhall. – Oxford: Oxford University, 2003. – X, 215 p.; 25 cm. – Oxford monographs in international law
– **Materialien zum Völkerstrafgesetzbuch: Dokumentation des Gesetzgebungsverfahrens** / Sascha Rolf Lüder, Thomas Vormbaum (Hg.). – Münster: LIT Verlag, [2002]. – 132 p.; 24 cm. – Beiträge zur Strafrechtswissenschaft; Bd 6

Articles

– **International criminal procedure: "adversarial", "inquisitorial" or mixed?** / Kai Ambos. – 2003. – p. 1–37. – In: International criminal law review; Vol. 3, No. 1

– **International law, the crime of aggression and the ius ad bellum** /Richard L. Grif-–fiths. – 2002. – p. 301–373. – In: International criminal law review; Vol. 2, No. 4

– **La compétence pénale universelle: une question non résolue par l'arrêt Yerodia** / par Marc Henzelin. – 2002. – p. 819–854. – In: Revue générale de droit international public; Tome 106, n°. 4

– **La Cour pénale internationale partagée entre les exigences de l'indépendance judiciaire, de la souveraineté des Etats et du maintien de la paix** / par Luc Willemarck. – janvier 2003. – p. 3–21. – In: Revue de droit pénal et de criminologie; n°. 1

– **Resolution 1422 (2002) des Sicherheitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofs / Sebastian Heselhaus.** – 2002. – p. 907–940. – In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht; 62/4

– **The International Committee of the Red Cross as a witness before international criminal tribunals** / Joshua McDowell. – 2002. – p. 158–184. – Chinese journal of international law; 1

– **The United States and international criminal justice** / David P. Forsythe. – November 2002. – p. 974–991. – In: Human rights quarterly; Vol. 24, No. 4

Enfants – Children

Livres – Books

– **Adult wars, child soldiers: voices of children involved in armed conflict in the East Asia and Pacific region** / UNICEF. – Bangkok: UNICEF, October 2002. – 81 p.: ill., tabl.; 21 x 30 cm

– **Johnny chien méchant: roman** / Emmanuel Dongala. – Paris: Le Serpent à Plumes, 2002. – 361 p; 21 cm. – Fiction française

Articles

– **Les enfants et la sécurité = Children and security** / Rachel Brett... [et al.]; UNIDIR. – Genève: UNIDIR, 2002. – 81, 77 p.; 30 cm. – In: Forum du désarmement = Disarmament forum; 3

Femmes – Women

Livres – Books

– **Throwing the stick forward: the impact of war on southern Sudanese women** / Mary Anne Fitzgerald. – Nairobi: UNIFEM: UNICEF, 2002. – VIII, 144 p., [13] p. de photogr.: tabl.; 21 cm. – African women for peace

Mouvement international de la Croix-Rouge et du Croissant-Rouge – International Red Cross and Red Crescent Movement

Livres – Books

– **Dunant: théâtre** / Michel Beretti. – Chambéry: Comp'act, 2003. – 95 p.; 21 cm. – L'acte même

– **Moi, Henry Dunant, j'ai rêvé le monde: mémoires imaginaires du fondateur de la Croix-Rouge** / Serge Bimpage. – Paris: Albin Michel, 2003. – 279 p.; 23 cm

Organisations internationales, ONG – International Organizations, NGOs

Livres – Books

– **How to complain to the UN human rights treaty system** / Anne F. Bayefsky; foreword by Stephen M. Schwebel. – Ardsley, NY: Transnational, 2002. – XXIII, 397 p.: graph., tabl.; 22 cm

– **Human Rights Watch World Report 2003: events of 2002 (November 2001–November 2002)** / Human Rights Watch. – New York [etc.]: Human Rights Watch, 2003. – XXXIII, 558 p.: photogr.; 23 cm

– **The Charter of the United Nations: a commentary** / ed. by Bruno Simma; in collab. with Hermann Mosler...[et al.]. – 2nd ed. – München: C. H. Beck, 2002. – 2 vol (LXIV, XXXI, 1405 p.); 25 cm

Réfugiés, personnes déplacées – Refugees, displaced persons

Livres – Books

– **Human rights and forced displacement** / ed. by Anne F. Bayefsky and Joan Fitzpatrick. – The Hague [etc.]: Martinus Nijhoff, 2000. – 320 p.; 25 cm. – Refugees and Human Rights; 4

– **La revitalización de la protección de los refugiados** / Pablo Antonio Fernández Sánchez (ed.). – Huelva: Universidad de Huelva, 2002. – 359 p.; 24 cm

– **Les réfugiés rwandais dans la région de Bukavu Congo RDC: la survie du réfugié dans les camps de secours d'urgence** / Jérôme Karimumuryango. – Paris: Karthala; Genève: IUED, 2000. – 138 p.: carte, tabl.; 22 cm

Terrorisme – Terrorism

Livres – Books

– **Le droit international face au terrorisme: après le 11 septembre 2001** / sous la dir. d'Olivier Corten... [et al.]; préf. de Gilbert Guillaume. – Paris: Pedone, octobre 2002. – VI, 356 p.; 22 cm. – Cahiers internationaux; 17

– **Power inferno: requiem pour les Twin Towers: hypothèses sur le terrorisme: la violence du mondial** / Jean Baudrillard. – Paris: Galilée, 2002. – 83 p.; 22 cm. – L'espace critique.
– **Romantics at war: glory and guilt in the age of terrorism** / George P. Fletcher. – Princeton: Princeton University, 2002. – XVI, 351 p.; 24 cm

Articles

– **Der Terrorismus als Herausforderung für das Völkerrecht** / Jochen Abr. Frowein. – 2002. – p. 879–905. – In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht; 62/4
– **Inter–American convention against terrorism** / Organization of American States. – January 2003. – p. 19–25. – In: International legal materials; Vol. XLII, No. 1
– **Legal control of international terrorism: a policy-oriented assessment** / M. Cherif Bassiouni. – Winter 2002. – p. 83–103. – In: Harvard international law journal; Vol. 43, No. 1
– **Terrorisme et action internationale humanitaire d'urgence** / Yves Sandoz. – 2002. – p. 33–44. – In: Refugee survey quarterly; Vol. 21, No. 3

Information for contributors

General information: submission of manuscripts

The *International Review of the Red Cross* invites submission of articles on subjects relating to international humanitarian law, humanitarian policy or humanitarian action, provided the article has not been published, submitted or accepted elsewhere. Articles are peer-reviewed prior a decision being taken about their acceptability for publication. The decision whether or not to publish an article is made by the Editor. The *Review* reserves the right to edit articles. Notification of acceptance, rejection or the need for revision will be given within four weeks of receipt of the manuscript. In any case, manuscripts will not be returned to authors.

Manuscript requirements

CONTENT: The manuscript should contain a title page with the name(s) of the author(s) and short biographical statement(s) (maximum 40 words); a summary; the main text; tables and figures (if any), and notes and references.

LANGUAGE: Manuscripts should be submitted in either English or French. Texts are published in the original version together with a summary in the other language.

LENGTH: Articles should be within 10 to 30 double-spaced printed pages (3,000 to 12,000 words). Authors are kindly requested to provide a summary, comprising 100 to 200 words.

SUBHEADINGS: Articles can include only 2 levels of subheadings. The first should be in bold, the second in italics.

NOTES AND REFERENCES: These should be in the form of footnotes. Authors should follow the *Review's* Guidelines for Referencing and Footnotes available on the ICRC website. To access this page go to http://www.icrc.org/eng/review and click on Information for contributors. There you will find a link to the Guidelines.

Manuscripts that do not fulfill the above requirements will not be considered for publication.

Where to submit manuscripts

Manuscripts should be sent to the *Review* as an email attachment (preferably Word or PDF file) or by diskette together with a hard copy to the address below.

Address: International Review of the Red Cross
19, Avenue de la Paix, CH – 1202 Geneva
Email: review.gva@icrc.org
Telephone: (+41) 22 734 60 01 Fax: (+41) 22 733 20 57

Information à l'intention des auteurs de la Revue

Informations générales : présentation des manuscrits

La rédaction de la *Revue internationale de la Croix-Rouge* sollicite des articles sur des sujets touchant à la politique, à l'action ou au droit international humanitaire, étant entendu que ces articles ne doivent pas avoir été publiés, présentés ou acceptés ailleurs. Les articles font l'objet d'un examen collégial pour déterminer s'ils peuvent être acceptés ou pas. La décision de publier ou non un article est prise par la rédaction de la *Revue*. Celle-ci se réserve le droit de modifier les articles. La décision d'accepter, de refuser ou de réviser un article est communiquée à l'auteur dans les quatre semaines qui suivent la réception du manuscrit. En tous les cas, les manuscrits ne sont pas retournés aux auteurs.

Règles de rédaction

CONTENU : le manuscrit doit comprendre une page de titre portant le nom de l'auteur, une courte notice biographique, un résumé, le texte de l'article, les tableaux et chiffres (le cas échéant), ainsi que les notes et références.

LANGUE : le manuscrit doit être rédigé en français ou en anglais. Les textes sont publiés dans leur langue originale, avec un résumé dans l'autre langue.

LONGUEUR : l'article doit compter de 10 à 30 pages dactylographiées en interligne double (3 000 à 12 000 mots). L'auteur est invité à en fournir un résumé de 100 à 200 mots.

SOUS-TITRES : l'article ne peut comporter que deux niveaux de sous-titres, le premier en gras et le second en italique.

NOTES ET RÉFÉRENCES : elles doivent être présentées sous la forme de notes de bas de page. L'auteur doit suivre les Règles de rédaction – citations et notes de bas de page de la *Revue*, qui peuvent être consultées sur le site web du CICR. Pour accéder à ces informations il faut composer l'adresse suivante http://www.icrc.org/fre/revue puis cliquer sur la rubrique Information à l'intention des auteurs de la *Revue* dans laquelle se trouve le lien informatique sur les Règles de rédaction.

Les manuscrits ne remplissant pas les critères sus-mentionnés ne seront pas pris en considération.

Envoi du manuscrit

Le manuscrit est envoyé à la *Revue* par e-mail, sous forme de fichier joint (de préférence en format Word ou PDF) ou sur disquette avec copie papier à :

Adresse : Revue internationale de la Croix-Rouge
avenue de la Paix 19, CH – 1202 Genève

Email : review.gva@icrc.org

Téléphone : (+41) 22 734 60 01 Fax: (+41) 22 733 20 57

Rédacteur en chef: Toni Pfanner

Adresse:
Revue internationale de la Croix-Rouge
Avenue de la Paix 19
CH – 1202 Genève, Suisse
T (++41 22) 734 60 01
F (++41 22) 733 20 57
e-mail: review.gva@icrc.org

La *Revue internationale de la Croix-Rouge / International Review of the Red Cross* paraît quatre fois par an, en mars, juin, septembre et décembre. Elle publie des textes en langue française ou en langue anglaise, accompagnés d'un résumé dans l'autre langue.

Les articles de la *Revue* sont également accessibles sur le site Web du CICR:
http://www.cicr.org/fre/revue

Souscription à adresser à:
Comité international de la Croix-Rouge (CICR)
Division Production-Marketing-Distribution
Avenue de la Paix 19
CH - 1202 Genève, Suisse
F (++41 22) 730 27 68
e-mail: com_pmd.gva@icrc.org

Prix de l'abonnement annuel:
USD 30/ CHF 40/ EUR 30
Numéro individuel:
USD 8 / CHF 12/ EUR 8

Paiement sur facture uniquement

Conception graphique / Design:
Kohler & Tondeux
Atelier de Création Graphique Genève

Impression / Printing:
Atar Roto Presse SA Genève

Editor: Toni Pfanner

Address:
International Review of the Red Cross
19 Avenue de la Paix
CH – 1202 Geneva, Switzerland
T (++41 22) 734 60 01
F (++41 22) 733 20 57
e-mail: review.gva@icrc.org

The International Review of the Red Cross / Revue internationale de la Croix-Rouge is published four times a year, in March, June, September and December. The *Review* publishes articles in French or in English, with an abstract in the other language.

Articles appearing in the *Review* are also accessible on the ICRC Website:
http://www.icrc.org/eng/review

Address for subscriptions:
International Committee of the Red Cross (ICRC)
Production, Marketing and Distribution Division
19, Avenue de la Paix
CH - 1202 Geneva, Switzerland
F (++41 22) 730 27 68
e-mail: com_pmd.gva@icrc.org

Annual subscription rate:
USD 30/ CHF 40/ EUR 30
Single copy:
USD 8 / CHF 12/ EUR 8

Payment on receipt of invoice

Comité international de la Croix-Rouge

Organisation impartiale, neutre et indépendante, le Comité international de la Croix-Rouge (CICR) a la mission exclusivement humanitaire de protéger la vie et la dignité des victimes de la guerre et de la violence interne, et de leur porter assistance. Il dirige et coordonne les activités internationales de secours du Mouvement dans les situations de conflit. Il s'efforce également de prévenir la souffrance par la promotion et le renforcement du droit et des principes humanitaires universels. Créé en 1863, le CICR est à l'origine du Mouvement international de la Croix-Rouge et du Croissant-Rouge.

International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

Jakob Kellenberger
président / President

Anne Petitpierre
vice-présidente / Vice-President

Jacques Forster
vice-président permanent / permanent Vice-President

Renée Guisan

Paolo Bernasconi

Liselotte Kraus-Gurny

Susy Bruschweiler

Jacques Moreillon

Daniel Thürer

Éric Roethlisberger

Ernst A. Brugger

Jean-Roger Bonvin

Jakob Nüesch

André von Moos

Olivier Vodoz

Gabrielle Nanchen

Jean de Courten

Jean-Philippe Assal

Jean Abt

Yves Sandoz

Revue internationale
de la Croix-Rouge
Juin 2003

International Review
of the Red Cross
June 2003

Volume 85 N° 850

Dans ce numéro

L'interprétation du droit international humanitaire par les tribunaux internationaux

In this issue

Interpretation of international humanitarian law by the international tribunals

CICR
PRODUCTIONS
COMITÉ INTERNATIONAL
DE LA CROIX-ROUGE/GENÈVE

ISSN 1560-7755