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Editor

PROFESSOR YORAM DINSTEIN
Yanowicz Professor of Human Rights
Pro-President, Tel Aviv University

Associate Editor

DR. FANIA DOMB
Faculty of Law, Tel Aviv University

English Style

GAYLE RINOT

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TABLE OF CONTENTS

ARTICLES

I. INTERNATIONAL CONFERENCE ON THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE

United States Naval War College
Newport, Rhode Island
22 - 24 June 2005

The ICRC Customary International Humanitarian Law Study *Yoram Dinstein* 1

Coalition Warfare – Challenges and Opportunities *Dale Stephens* 17

"England Does Not Love Coalitions": Does Anything Change? *Charles Garraway* 29

Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs? *Kenneth Watkin* 43

II. THE SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA: TEN YEARS LATER

Institute of International Humanitarian Law
San Remo, Italy
Annual Round Table
8 September 2005

A Comparison between the San Remo Manual and the U.S. Navy's Commander's Handbook *Jane Dalton* 71

The United Kingdom's Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared *Steven Haines* 89

How to Update the San Remo Manual on International Law Applicable to Armed Conflicts at Sea *Wolff Heintschel von Heinegg* 119

III. TERRORISM

International Terrorism and Self-Defence *Daniel Janse* 149

Prosecuting Insurgents and Terrorists in Iraq *Andru E. Wall* 181

IV. MISCELLANEOUS ISSUES

The Ambit of the Law of Neutrality and Space Security
Michel Bourbonnière 205

Israel and the International Criminal Court –
An Outsider's Perspective *Andreas Zimmermann* 231

Self-Determination in the 21st Century –
Modern Perspectives for an Old Concept *Peter Hilpold* 247

JUDICIAL DECISIONS

Judgments of the Supreme Court of Israel
Relating to the Administered Territories *Fania Domb* 289
I. H.C. 5784/03, Salama *et al.* v. IDF Commander in the West Bank 289
II. H.C. 316/01, Bakhri v. Israel Film Censorship Council *et al.* 293
III. H.C. 10356/02, Hess *et al.* v. IDF Commander in the West Bank 308
IV. H.C. 5627/02, Sayif *et al.* v. Government Press Office *et al.* 317
V. H.C. 1890/03, Bethlehem Municipality *et al*. v. IDF Commander in the West Bank 321

SPECIAL SUPPLEMENT

The Manual on the Law of Non-International Armed Conflict
(with Commentary),
International Institute of Humanitarian Law, Sanremo, 2006.
Drafting Committee:
Michael N. Schmitt, Charles H.B. Garraway, Yoram Dinstein

THE ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY

By Yoram Dinstein[*]

I. THE STUDY

1) The publication in 2005 of an impressive Study of Customary International Humanitarian Law [IHL] by the International Committee of the Red Cross [ICRC] [hereinafter: the Study][1] is undoubtedly an important landmark. The Study – done in two parts (Rules and Practice) – is bound to be scrutinized, cited and debated for a long time to come. It will leave its imprints in the future both in the case-law and in the legal literature, and, whatever one's view is of the overall success of the enterprise, no scholar or practitioner can afford to ignore it.

2) The mandate for the preparation of the Study came exactly ten years prior to publication (1995), from the 26th International Conference of the Red Cross and Red Crescent. For an entire decade, the ICRC spared no effort to put the Study together. The project was based, *inter alia*, on extensive consultations with academic and government experts; nearly fifty reports of individual States' practice, submitted by national research teams; research on the practice of international organizations produced by several additional teams; and further archival research pursued by the ICRC itself. The resulting three-volumes (for reasons of sheer size, part 2 – Practice – is published in two separately bound volumes) comprise more than 5,000 printed pages (621 covering Rules and commentary thereon; and 4411 encompassing Practice and appendices). The final product represents the largest scholarly undertaking (on any theme) ever undertaken in the long history of the ICRC.

3) Since this paper is an unadorned critique of the Study, I would like to emphasize two important personal points. First, I was marginally involved in the enterprise: I am responsible for the Israeli country report; I have participated in subsequent consultations convened by the ICRC; and I have been given ample opportunity – which I liberally used – to express

* M.Jur., LL.M., Dr.Jur. Yanowicz Professor of Human Rights and Pro-President, Tel Aviv University (Israel); Member, *Institut de Droit International*.

1 *Customary International Humanitarian Law* (ICRC, J.-M. Henckaerts and L. Doswald-Beck eds., Cambridge University Press, 2005).

reservations about earlier drafts of volume 1 (although I have not seen volumes 2-3 prior to publication). Secondly, and even more significantly, I feel that the initiative was absolutely right, even if I do not approve of some of the results. Indeed, I take credit for being probably the first to have put on record the idea of launching a project with a view to examining the text of Additional Protocol I[2] [API] of 1977 against the background of customary international law. I first raised the proposal publicly in 1987, in a conference convened in Geneva on the 10th anniversary of the conclusion of the two Additional Protocols of 1977, where I said:

> I happen to believe that it is very important to try to pinpoint those provisions of Protocol I, which are either reflective of existing customary international law or at least are non-controversial to such an extent that there is every reason to believe that they will crystallize as customary international law in the near future.

A year later, in another International Colloquium held at Bad Homburg in 1988 (the proceedings of which have been published), I reiterated the argument:

> The insertion of clauses like Article 44 in the Protocol is lamentable. All the same, these clauses should not overshadow other provisions reflecting customary *lex lata* or widely supported *lex ferenda*. To my mind, an attempt ought to be made to identify in an authoritative way those sections of the Protocol which are declaratory or non-controversial (I should hasten to add that, in my assessment, the great majority of the norms of the Protocol – perhaps as many as 85% – qualify as declaratory or non-controversial). Such an evaluation of the Protocol's text could be undertaken by informal meetings of experts like the present one, and it will prove invaluable not only to Israel but also to other countries – primarily, the United States – which are not expected to become contracting parties in the foreseeable future.
> I have broached this idea before, but have failed to persuade the ICRC representatives that it has much merit.[3]

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* 711 (D. Schindler and J. Toman eds., 4th ed., 2004).

[3] Y. Dinstein, "The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order", *National Implementation of International*

In other words, my main concern was to bridge over what I like to call the "Great Schism",[4] dividing Contracting from Non-Contracting Parties of API because of the 15% or so of the text (such as Article 44, which will be adverted to below) thoroughly rejected by the latter States. The ICRC in the late 1980s was unenthusiastic, its apprehension being that such an exercise might undermine the authority of API as a treaty.

4) Admittedly, the Study goes in several different directions, compared to my own idea. A critical segment of the Study relates to non-international armed conflicts and Additional Protocol II[5] [APII] (something that did not occur to me in the 1980s but I find most useful today). There are also sections dealing with IHL norms contained in treaties other than API and APII, particularly those dealing with prohibited weapons (an addition which has merit, although it has certainly complicated the process). Conversely, not every clause of API is dealt with (an omission that I find puzzling) and not much attention is given to *lex ferenda* stipulations that seem to be non-controversial (for instance, API provisions dealing with civil defence[6]). From the subjective angle of my original idea, the entire project is upside down. Instead of systematically examining API, Article by Article, what is presented in the Study is a set of independent Rules with only the commentary indicating the relationship (if any) to API's provisions. Still, much as I may have wished the Study to be differently structured, the three volumes have to be taken as they are.

II. THE METHODOLOGY

5) Let me start with some comments about part 2 (Practice). This is the methodological underpinning of the Rules plus commentary, and its size is not just daunting: it is overwhelming. However, when one tries to get into the thicket of literally tens of thousands of cites, one begins to get underwhelmed for reasons that will become apparent in the ensuing text of the present paper. Indeed, to my mind, part 2 is proof positive of the adage that sometimes more is less.

Humanitarian Law: Proceedings of an International Colloquium Held at Bad Homburg, June 17-19, 1988 29, 34 (M. Bothe ed., 1990).

4 *See* Y. Dinstein, "International Humanitarian Law and Modern Warfare", *International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law* 17, 18-19 (K. Byström ed., 2004).

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *The Laws of Armed Conflicts*, *supra* note 2, at 775.

6 Protocol I, *supra* note 2, at 742-46 (Arts. 61-67).

6) The preliminary question that must be addressed is: what is customary international law? The classical definition of international custom is encapsulated in the well-known formula of Article 38(1)(b) of the Statute of the International Court of Justice: "international custom, as evidence of a general practice accepted as law".[7] The *font et origo* of customary international law is, in essence, the general practice of States. States are the main actors in the international arena, and it is their general practice that constitutes the core of custom. Without State practice there is no general customary international law.

7) What does State practice consist of? There is much scholarly debate over the question of whether conduct constitutes the sole expression of custom-making practice, and whether statements – at times referred to as mere "claims"[8] or as "verbal [as distinct from "physical"] acts"[9] – count. I share the view of the Editors of the Study that "[b]oth physical and verbal acts of States constitute practice that contributes to the creation of customary international law".[10] Nevertheless, not every statement counts: it all depends on who is making the statement, when, where and in what circumstances. The Study has attached an import to statements in a most comprehensive generic fashion. I strongly believe that this is going way too far: the gamut of admissible statements – as grist to the mill of State practice – must be much more focused and filtered.

8) The Study includes much State practice but a lot besides. One cannot cavil that the Study incorporates the practice of inter-governmental international organizations (IGOs). To some extent, this is due to the fact that IGOs may have an international legal personality of their own,[11] but additionally it must not be forgotten that IGOs are comprised of States. Member States of an IGO may therefore contribute to State practice through their conduct and statements within the fold of the organization. As pronounced by the International Court of Justice in its Advisory Opinion on *Nuclear Weapons*, UN General Assembly resolutions (not binding as such) "can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[12]

7 Statute of the International Court of Justice (Annexed to Charter of the United Nations), 1945, 9 *Int'l Legislation* 510, 522 (M.O. Hudson ed., 1950).

8 A. D'Amato, *The Concept of Custom in International Law* 88 (1971).

9 K. Wolfke, "Some Persistent Controversies Regarding Customary International Law", 24 *Netherlands Y.B. Int'l L.* 1, 3 (1993).

10 1 *Customary International Humanitarian Law*, *supra* note 1, at xxxii.

11 *Ibid.,* xxxv.

12 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, [1996] *I.C.J. Rep*. 226, 254-55.

9) In contradistinction to IGOs, the role of non-governmental organizations (NGOs) in international law-making is confined to a consultative status,[13] not to mention lobbying and other behind-the-scenes activities *vis-à-vis* States. NGOs, whatever their standing, can never contribute directly through their own practice to the creation of customary norms. This is true even of the most important – and unique – NGO, the ICRC. Admittedly, the ICRC is assigned by IHL important functions to carry out.[14] But that fact does not turn the ICRC into a State-like entity. It is therefore surprising (and inappropriate) that the Editors of the Study give a lot of attention to the practice of the ICRC itself[15] (and occasionally even to that of other NGOs, such as Amnesty International[16]). ICRC reports, communications, press releases, statements and the like – recapitulated at some length in part 2 of the Study – are simply not germane to customary international law, unless and until they actually impact on State practice. It is true that "the official reactions which ICRC statements elicit are State practice".[17] However, this is not ICRC practice: this is State practice and it should be subsumed under the right heading. The ICRC plays in such circumstances the role of a catalyst for the evolution of State practice, but no more. One problem with the wrong designation of such practice is that when ICRC appeals exhorting States to action are registered as ICRC practice, the gaze shifts from the actor to the catalyst. If the ICRC is successful, eliciting a positive response from States,[18] no real harm is done. But what happens when the ICRC's appeal evokes no response?[19] At best, the ICRC action proved itself to be irrelevant. At worst, it is an indication *a contrario* that States are not willing to accept the position of the ICRC.

10) The ICRC practice at least deserves that designation, albeit it does not qualify in the context of the term of art "practice" employed in the definition of customary international law. But, in a manner bordering on the bizarre, the Study goes far beyond anything remotely resembling practice. How can one refer to resolutions of the *Institut de Droit International* – weighty as they indisputably are – as "other practice"?[20] Whose practice? The same

13 *See Oppenheim's International Law*, vol. 1: *Peace*, 21 (R. Jennings and A. Watts eds., 9th ed., 1992).

14 *See especially* Art. 81(1) of Protocol I, *supra* note 2, at 752.

15 This policy is rather briefly and unpersuasively defended in 1 *Customary International Humanitarian Law*, *supra* note 1, at xxxv.

16 *See* 2(1) *ibid*., 400.

17 1 *ibid*., xxxv.

18 For an example, *see ibid.,* 38; 2(1) *ibid*., 266 (regarding the prohibition of indiscriminate attacks).

19 For several instances of such apparently fruitless exhortations, *see* 2(1) *ibid.,* 267-69.

20 *Ibid*., 450.

question arises, in an even starker way, when the Restatement prepared under the aegis of the American Law Institute is cited as "other practice", [21] and most egregiously when scholarly books (however prestigious) get a similar classification.[22] When everything is categorized as practice, the reader cannot be blamed for a modicum of skepticism.

11) There is much reliance in the Study on a host of military Manuals, especially where it really counts, *viz*. in part 1 (Rules). Indeed, it appears that the Editors themselves – sharing perhaps some of the skepticism re the plethora of items collated in part 2 (Practice) – opted, to be on the safe side, to predicate the Rules more on legislative Codes and military Manuals than on any other single source of practice. This editorial decision should be commended. Irrefutably, legislative Codes and military Manuals (*i.e*., binding instructions to the armed forces) are invaluable sources of genuine State practice. However, are all the documents called Manuals in the Study authentic Manuals?

12) From personal knowledge, I can attest that the so-called Israeli Manual on the Laws of War of 1998[23] – cited quite often throughout the Study – is not a genuine Manual. As I tried on several occasions to point out to the Editors of the Study prior to its publication – to no avail – this is merely a tool used to facilitate instruction and training, and it has no binding or even authoritative standing. The insistence on regarding the text as a Manual has led the Editors of the Study to a number of errors. Thus, in the context of Rule 65 (whereby "[k]illing, injuring or capturing an adversary by resort to perfidy is prohibited"),[24] I alerted them to the fact that Israel does not accept the words "or capturing" as a reflection of customary international law. They refused to accept this, and, in the commentary on Rule 65, even singled out the so-called Israeli Manual as the "exception" among non-Contracting Parties to API: other Manuals of these countries do not mention "capturing"; the Israeli Manual does.[25] As it turns out, the cite given in a footnote does not refer to the so-called Manual at all, but to another booklet.[26] When one checks out the matching material in the Practice part, it turns out that (a) the paragraph cited does quote the "Manual" (rather than the booklet) but there is no mention of "capturing" at all; (b) a previous paragraph (not the one cited) refers to capture, but the quote is from that other booklet (rather than the "Manual"), and, for that matter, it is based on a

21 2(2) *ibid*., 2105.
22 2(1) *ibid*., 232, 324-25.
23 2(2) *ibid*., 4201.
24 1 *ibid*., 221.
25 *Ibid*., 225.
26 *Ibid*., n. 152.

secondary source![27] Thus, in deciding that the "Manual" trumps any and all disclaimers, they went completely astray. Since nobody can afford the time to go through every cite in a Study comprising thousands of pages, I can only express the hope that this wild goose chase is the exception rather than the rule.

13) But is the Israeli "Manual" the only non-Manual? I wonder. It should be mentioned that there are many references to a UK Manual of 1981 on the Law of Armed Conflict (listed separately and independently of the 1958 British Military Manual).[28] In reality, there have been only three UK Manuals on the subject of the law of armed conflict. The first one (written jointly by L. Oppenheim and Colonel Edmonds) was a chapter of the Army Manual of Military Law published in 1914 and revised in 1936. The second (written by H. Lauterpacht with the assistance of Colonel Draper), again a part of the Army Manual of Military Law, came out in 1958. The third (written jointly by several authors), a completely new and separate Manual of the Law of Armed Conflict, was issued by the Ministry of Defence in 2004, not in time for inclusion in the Study. It is not clear what the 1981 text represents.

14) When the ICRC decided to look into its own (otherwise closed) archives to research some 40 recent armed conflicts, the news was greeted with enthusiasm. Everybody hoped that the research would yield a trove of inaccessible State practice. In the event, the results have been quite disappointing. First off, although the conflicts are specified in a general list,[29] no identification of the State (or rebel group) concerned is made in context. This already diminishes considerably from the weight that one can attach to the practice concerned. Secondly, and even more significantly, the "practice" cited is often of no practical use. What value added to IHL in non-international armed conflicts can be derived, for instance, from the following vignette: "The Head of Foreign Affairs of an armed opposition group told the ICRC in 1995 that his group was conscious of the necessity to respect and to spare the civilian population during an armed conflict"?[30] This, lamentably, is quite typical of the kind of statements that the Study distilled from the archives. Even when more specificity is added, the result can be the following: "In 1991, an official of a State rejected an ICRC request to protect the civilian population from pillage by government troops. He replied that as long as they provided a hiding place for rebels, the army would burn the fields if necessary. However, this behaviour was not representative of the

27 2(1) *ibid*., 1381.
28 2(2) *ibid*., 4206.
29 1 *ibid*., xlix-l.
30 2(1) *ibid*., 161.

general opinion of the military personnel met by the ICRC in this context".[31] If civilian fields are burnt, to deny a hiding place to rebels, why is this legally deemed "pillage"?[32] And, whatever the juridical taxonomy, why does one statement by one unidentified organ of an unknown State – inconsistent with other statements by other organs of the same State – shed any light on that State's practice? We are not told what actually happened or what the circumstances were; nor are we informed about the relative ranks of the officials adverted to. And so it goes.

III. THE RULES

15) Having focused so far on methodology, it is necessary to consider some of the Rules – constituting the backbone of the Study – and the commentary thereon. I do not take issue with many of the black-letter Rules and much of the commentary, as presented in part 1 of the Study. But I believe that there are grave errors in the formulation of some of the Rules, and part of the commentary, in ways that adversely affect the ability of the Study to project an image of objective scholarship.

16) Rule 1 starts off with an unassailable statement that "[t]he parties to the conflict must at all times distinguish between civilians and combatants".[33] But then, in Rule 5, the dichotomy changes from civilians/combatants to civilians/members of the armed forces: "[c]ivilians are persons who are not members of the armed forces".[34] Is that so? Rule 3 rightly states that, in fact, not all members of the armed forces are combatants, since medical and religious personnel are excluded from that category.[35] By the same token, not every person who is not a member of the armed forces is a civilian. In particular, by directly (or actively) participating in hostilities, a person who claims to be a civilian loses that protective mantle and becomes a (perhaps unlawful) combatant.[36] Even API, in its "Basic rule" (Article 48[37]), distinguishes between the civilian population and combatants; and in its definition of civilians (Article 50(1)[38]) prescribes that civilians are persons who do not belong to certain categories of persons,

31 *Ibid*., 1105.

32 For a definition of pillage emphasizing the private or personal use of the pillaged property, *see* 1 *ibid*., 185.

33 *Ibid*., 3.

34 *Ibid*., 17.

35 *Ibid*., 11.

36 On unlawful combatancy, *see* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 27-54 (2004).

37 Protocol I, *supra* note 2, at 735.

38 *Ibid*., *id*.

including the category referred to in Article 4A(2) of Geneva Convention (III) (covering irregular troops).[39] By switching the dichotomy from civilians/combatants to civilians/ members of the armed forces, the Study lays the ground to loading the legal dice. If the antonym of civilians under customary international law is members of the armed forces, it follows (as the ICRC believes) that civilians who directly (or actively) participate in hostilities do not lose their classification as civilians. Conversely, if – as I think the right approach is – the antonym of civilians is combatants, civilians who directly (or actively) participate in hostilities may turn themselves into unlawful combatants.

17) One of the cardinal causes for the "Great Schism" – sharply dividing Contracting and non-Contracting Parties to API – is the utter and unqualified rejection by the latter countries of those provisions of API that, to all intents and purposes, eliminate the status of unlawful combatants in all cases except spies and mercenaries.[40] The epicenter of the controversy lies in the combination of Articles 43 and 44.[41] Rule 4 of the Study simply reiterates some of the language of Article 43 of API: "The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates".[42] The commentary treats this definition as customary international law, trying to create the impression that organization and discipline (rather than distinction from civilians) are the gist of the matter; and – whereas the commentary briefly refers to the other, cumulative, Hague and Geneva conditions of lawful combatancy (which non-Contracting Parties to API continue to regard as of essence) – it makes short shrift of them and somehow manages to convey the message that even Article 44 of API (one of the key sources of the "Great Schism") hardly presents a real problem.[43] This is plainly misleading.

18) In a written comment to the ICRC on an earlier (but not much different) version of Rule 4, I stated:

> Rule 4. The text and commentary are highly objectionable. Israel utterly and unreservedly rejects Articles 43-44 of Additional Protocol I as a source of customary international law. Israel adheres to the original texts of the Hague Regulations and the Geneva Conventions and does not

39 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, *The Laws of Armed Conflicts*, *supra* note 2, at 507, 513.

40 *See* Dinstein, *supra* note 36, at 44-47.

41 Protocol I, *supra* note 2, at 732-33.

42 1 *Customary International Humanitarian Law*, *supra* note 1, at 14 *et seq*.

43 *Ibid.,* 14, 16.

> accept any and all changes that Articles 43-44 of the Protocol purport to introduce. Allow me to add that the objections to Articles 43-44 lie at the root of the refusal to ratify the Protocol. Should the ICRC attempt to gloss over the fundamental differences of opinion re this crucial issue, the whole study will be irremediably flawed.

The Editors of the Study did not heed these cautioning words, nor did they choose to allude to them in the commentary's footnotes. Instead, the commentary – in trying to establish the case for the customary nature of Rule 4 and in attempting to create the false impression that the customary definition is mainly concerned with the discipline and organization of the armed forces – purports to rely even on the practice of non-Contracting Parties to API: a footnote relies specifically on the practice of the United States.[44] The US text cited (appearing in the Commander's Handbook on the Law of Naval Operations) is quoted in the Practice part, but lo and behold: it does not confine itself to discipline and organization; it explicitly speaks about members of forces "who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population".[45] These last Hague/Geneva conditions are of course the crux of the issue. And, in the Annotated Supplement to the Commander's Handbook, the text is followed by a footnote which mentions expressly the construct of unlawful combatants.[46]

19) It must be added that when the emergence of customary international law subsequent to a treaty (in this instance, API) is examined, it is the practice of non-Contracting Parties that carries the day. In the 1969 *North Sea Continental Shelf* cases, the International Court of justice made it amply clear that – in analyzing the post-treaty practice of States, with a view to establishing whether a new custom has been created in the wake of the treaty – it is required to leave aside (and not to consider as a reliable guide) not only the practice of Contracting Parties among themselves but even the practice among States that shortly would become Contracting Parties, since they were all "acting actually or potentially in the application of the Convention".[47] The Court held that "[f]rom their action no inference could legitimately be drawn as to the existence of a rule of customary international

[44] *Ibid*., 14 n. 91.

[45] 2(1) *ibid*., 93.

[46] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations,* 73 *Int'l L. Studies* 296 (US Naval War College, A.R. Thomas and J.C. Duncan eds., 1999).

[47] North Sea Continental Shelf Cases, [1969] *I.C.J. Rep*. 3, 43.

law" generated by the treaty.[48] The Court therefore concentrated on the practice of "those States … which were not, and have not become parties to the Convention", the goal being to find whether an "inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law".[49] The Editors of the Study are fully aware of this ruling of the Court, although they made a deliberate decision not to confine the Study to the practice of non-Contracting Parties to API.[50] On the central issue of unlawful combatancy, that decision led them to an overt misreading of customary international law.

20) There are manifold other issues. For instance, Rule 6 states, as a matter of customary international law, that "[c]ivilians are protected against attack unless and for such time as they take a direct part in hostilities".[51] Nobody would challenge most of the sentence. However, the words "and for such time" – which are based on Article 51(3) of API[52] – are contested. The Study relies on practice, including that of the US, but when one takes a look at the Commander's Handbook, which is explicitly cited more than once,[53] it is striking that the text omits the words "and for such time"![54] Moreover, although in my written comments to the ICRC, I had observed:

> Rule 6. Israel does not accept the qualifying phrase 'for such time', which – incidentally – has been removed from Article 8 of the Rome Statute,

no account was taken in the Study's commentary either of the remark itself or of the deletion of the words "and for such time" from Article 8(2)(b)(i) of the 1998 Rome Statute of the International Criminal Court.[55]

21) It is not proposed here to parse every Rule in the Study. However, it is noteworthy that Rule 35 sets forth that "[d]irecting an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited".[56] As the commentary mentions, the idea is based on the provisions of Article 23 of Geneva Convention (I)[57] and Articles 14-15

48 *Ibid*., *id*.
49 *Ibid*., 43-44.
50 1 *Customary International Humanitarian Law*, *supra* note 1, at xliv.
51 *Ibid*., 19.
52 Protocol I, *supra* note 2, at 736.
53 1 *Customary International Humanitarian Law*, *supra* note 1, at 20; 2(1) *ibid*., 110, 117.
54 *Annotated Supplement*, *supra* note 46, at 484.
55 Rome Statute of the International Criminal Court, 1998, 37 *I.L.M.* 999, 1006 (1998).
56 1 *Customary International Humanitarian Law*, *supra* note 1, at 119.
57 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *The Laws of Armed Conflicts*, *supra* note 2, at 459, 469.

of Geneva Convention (IV)[58] (dealing with hospital zones, safety zones and neutralized zones). But, as the ICRC Commentary on Geneva Convention (I) states categorically, "[t]he zones will not, strictly speaking, have any legal existence, or enjoy protection under the Convention, until such time as they have been recognized by the adverse Party".[59] The same observation appears in the Commentary on Geneva Convention (IV).[60] Where does the text of Rule 35 even imply that the establishment of a protected zone cannot be effected without the prior consent of the other side?

22) It seems that the concept of consent is not an easy construct for the framers of the Study. Thus, Rule 55 states *tout court* that "[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control".[61] This obligation is based on Article 70 of API, except that Article 70 adds the pivotal caveat (missing from Rule 55): "subject to the agreement of the Parties concerned in such relief actions".[62] Even the ICRC Commentary on API does not claim more than that Article 70 may be construed as precluding refusal of agreement to allow relief for arbitrary or capricious reasons.[63] Surely, as I have argued elsewhere, "[i]t is impossible to assert, at the present point, that a general right to humanitarian assistance has actually crystallized in positive international law".[64] This is a prime example that the Study – instead of looking for a compromise between Contracting and non-Contracting Parties to API – actually transcends API (which is *lex lata* for the former States) and moves into the realm of the *lex ferenda* (for both the former and the latter States). Curiously enough, in the commentary on Rule 55, the requirement of consent in API and APII is explicitly mentioned, but there follows a vague statement that "[m]ost of the practice collected does not mention this requirement".[65] Uncharacteristically, no footnote accompanies the proposition, and it is not spelt out whose practice this is in reference to.

58 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *ibid*., 575, 584-85.

59 *Commentary, Geneva Convention I* 215 (ICRC, J.S. Pictet ed., 1952).

60 Commentary, *Geneva Convention IV* 127 (ICRC, O.M. Uhler and H. Coursier eds., 1958).

61 1 *Customary International Humanitarian Law*, *supra* note 1, at 193.

62 Protocol I, *supra* note 2, at 747.

63 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 819 (ICRC, Y. Sandoz *et al*. eds., 1987).

64 Y. Dinstein, "The Right to Humanitarian Assistance", 53 *Naval War College Rev.* 77, *id.* (2000).

65 1 *Customary International Humanitarian Law*, *supra* note 1, at 196.

23) Rule 45 of the Study[66] confirms the customary standing of the provisions of Articles 35(3) and 55(1) of API, which prohibit the use of methods or means of warfare expected to cause widespread, long-term and severe damage to the natural environment.[67] The commentary on Rule 45 mentions objections by France, the UK and the US, adding: "these three States are especially affected as far as possession of nuclear weapons is concerned, and their objection to the application of this specific rule to such weapons has been consistent since the adoption of this rule in treaty form in 1997. Therefore, if the doctrine of 'persistent objector' is possible in the context of humanitarian rules, these three States are not bound by this specific rule as far as any use of nuclear weapons is concerned".[68] The extract reveals total confusion between two completely disparate concepts in the modern analysis of customary international law, namely, "persistent objector", on the one hand, and "States whose interests are specially affected", on the other.

24) The "persistent objector" doctrine (supported by most commentators) maintains that a State, which persistently and unequivocally objects from the outset to the emergence of a new customary rule, cannot be held bound by that rule.[69] A timely "persistent objector" cannot be caught in the net of the new custom, but otherwise that custom will bind the entire international community. In other words, the custom will consolidate – notwithstanding the opposition – although it will not affect the "persistent objector".

25) The construct of "States whose interests are specially affected" was developed by the International Court of Justice, in the *North Sea Continental Shelf* cases.[70] These are States with priority in contributing to the creation of customary international law (the paradigmatic example being that of the chief maritime States where the law of the sea is concerned). If several "States whose interests are specially affected" object to the formation of a custom, no custom can emerge.

26) When three nuclear Powers – the US, the UK and France – have taken the position that Rule 45 does not reflect customary international law, there is no doubt that they act as "States whose interests are specially affected" (as conceded by the commentary quoted above). By arriving at the conclusion that (at the most) the three Powers can only be viewed as "persistent objectors" – and that, therefore, they will not be bound by the custom which

66 *Ibid*., 151-52.

67 Protocol I, *supra* note 2, at 730, 738.

68 1 *Customary International Humanitarian Law*, *supra* note 1, at 154-55.

69 *See* Committee on Formation of Customary (General) International Law, Final Report, *International Law Association, 69th Conference* 712, 738-39 (London, 2000).

70 North Sea Continental Shelf Cases, *supra* note 47, at 43.

has emerged – the Study gets the law completely wrong. There is no question that, when adopted in 1977, Articles 35(3) and 55(1) were innovative in character.[71] The question, consequently, is whether custom has developed thereafter, and it cannot be denied that three leading members of the small and select "nuclear club" have opposed it vocally since 1977. Surely, as "States whose interests are specially affected", the three countries cannot be relegated to the status of persistent objection. By repudiating the putative custom protecting the environment from all means of warfare, the three nuclear States have not merely removed themselves from the reach of such a custom: they in fact managed to successfully bar its formation (as a minimum, with respect to the employment of nuclear weapons).

27) Finally, Rule 77 states that "[t]he use of bullets which expand or flatten easily in the human body is prohibited".[72] I explicitly transmitted to the ICRC the official position of Israel re the use of expanding bullets, namely, that it is permissible for domestic law-enforcement purposes, as well as in the fight against terrorists and "suicide bombers" (when every split-second counts and there is a vital need to prevent the completion of their heinous attack). Once more, unfortunately, this is not reflected in the commentary.

IV. CONCLUSION

In order not to further complicate the discussion, I did not get into specific issues of non-international armed conflicts in this paper. This is not to suggest that the Study is unassailable where such conflicts are concerned. But an examination of the Study's provisions thereon raises different issues and deserves a separate paper.

On the whole, as regards international armed conflicts, I am afraid that the Study clearly suffers from an unrealistic desire to show that controversial provisions of API are declaratory of customary international law (not to mention the occasional attempt to go even beyond API). By overreaching, I think that the Study has failed in its primary mission. After all, there is no practical need to persuade Contracting Parties to API that it is declaratory of customary international law. Whether or not such is the case, Contracting Parties are bound by API by virtue of their consent to ratify or accede to it. But there is a need to persuade non-Contracting Parties that they must comply with a large portion of API: not because it is a treaty but because it is general custom. I do not think that non-Contracting Parties will be persuaded

[71] *See* 1 *Customary International Humanitarian Law*, *supra* note 1, at 152.
[72] *Ibid*., 268.

by the conclusions of the Study. Thus, the authors missed a golden opportunity to bring Contracting and non-Contracting Parties to API closer together. Indeed, at least on some central points, far from bridging over the present abyss, the Study will only drive the two sides of the "Great Schism" farther away from each other.

COALITION WARFARE – CHALLENGES AND OPPORTUNITIES

*By Dale Stephens**

INTRODUCTION

When planning for coalition warfare, the military lawyer is concerned with achieving effective interoperability under applicable international and domestic law. In the modern context of "coalitions of the willing", this essentially means achieving a harmonization of "Rules of Engagement" (ROE) with the lead nation, having regard to the specific taskings and missions the coalition partner has assumed. Usually (but not always) the lead nation in conducting serious global operations in the contemporary environment is the United States. As is well known, the United States has averred from signing and ratifying a number of treaties applicable in the context of armed conflict[1] and has been consistent in pointing to the "progressive" nature of a number of assertive statements of customary law heralded by some.[2] Therein lies the obvious, but "ostensible" challenge, for coalition military partners in trying to ensure operational effectiveness when operating under potentially divergent legal regimes. The word "ostensible" is emphasized, because at the working officer level of coalition warfare, there is much more commonality of approach than what one might expect notwithstanding the stridency of statements sometimes made as to national divergence under the law.

It is a theme of this essay that coalition operations are frequently successful due to the pragmatic approach taken to interpreting the law by coalition partners. This is not to suggest any subversion of the law, but rather

* Commander D. Stephens CSM, Royal Australian Navy; B.A., LL.B (Hons) (Adel.); LL.M (Melb.); LL.M (Harv.).
The views expressed in this article are those of the author alone and do not necessarily represent the views of the Australian Government or the Australian Defence Forces.

1 At the time of writing the United States had not ratified Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, [1991] *Australian Treaty Series* (*A.T.S.*) 29; nor the Rome Statute of the International Criminal Court, 1998, [2002] *A.T.S.* 15; nor Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, [1999] *A.T.S.* 3.

2 *See generally* critical commentary on the ICRC customary law study by D. Rivkin & L. Casey, "Rule of Law: Friend or Foe", *The Wall Street J.*, Apr. 11, 2005, found at: http://www.defenddemocracy.org/research_topics/.

reflects choices made by coalition partners to intelligently accommodate differing legal approaches by coalition partners for the common good. This success is also due to the nature of the law itself, which is generally cast in terms of "standards" as opposed to "bright line" rules and thus is more usually predicated upon the invocation of "values" by the military decision-maker. Within this interdependent world, such values are more convergent and synonymous with those of society at large than what many outside of the military may think.

I. MODES OF ANALYSIS – FORMALISM

There are of course, a number of ways in which to assess the issue of coalition interoperability under the law. At the immediate or formalist level, one can merely compare Treaties ratified by coalition partners and statements of customary law made by such partners to determine who is able to do what in the course of a campaign and to orchestrate missions accordingly. Of course, this assumes the absence of a single consensus standard to which all will comply, which in terms of coalitions of the willing, is a relatively safe assumption.[3]

From this formalist position, we are faced with some obvious direct inconsistency issues under international law. The 1997 Land Mines Convention[4] is the classic example of such inconsistency, especially Article 1(c) which provides that "Each State Party undertakes never under any circumstances: to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention".[5] US allies such as Australia,[6] Canada,[7] Germany,[8] Japan,[9] New Zealand[10] and the United Kingdom[11] have all signed and ratified this Treaty. Having regard to the literal wording of the obligation imposed, mission taskings by such signatories could not, for example, contemplate the tactical level carriage of US forces or refuelling of US assets where such forces or assets are carrying

3 This conundrum may even apply in the circumstances of a standing alliance such as NATO – *see* M. Kelly, "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability", II *Australian Army J.* 161, 162-63 (No. 2, 2005).
4 *Supra* note 1.
5 *Id.*
6 Ratified 14 Jan. 1999.
7 Ratified 3 Dec. 1997.
8 Ratified 23 July 1998.
9 Ratified 30 Sept. 1998.
10 Ratified 27 Jan. 1999.
11 Ratified 31 July 1998.

and/or contemplate the use of anti-personal landmines.[12] Additionally, a number of US allies have assumed obligations under the International Criminal Court Statute[13] and a number of Protocols under the 1980 Conventional Weapons Convention[14] to which the US is not a party, which have their own dynamics regarding tactical level mission taskings.

Such dissonance is also potentially found under interpretations of customary international law. The potential dichotomy between the definitions "war sustaining" under the US Commanders Handbook on the Law of Naval Operations[15] and "effective contribution to direct military action" under the San Remo Manual on International Law Applicable to Armed Conflicts at Sea[16] is one such obvious area.

Similarly, those who have ratified Additional Protocol 1[17] (AP1) are bound by a number of provisions that the US is not. For example, Article 56 with its prohibition on attacking dams, dykes and nuclear electrical generating stations is one where the US has stressed its opposition as a

12 Kelly, *supra* note 3, at 169.

13 *Supra* note 1.

14 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, 1980, and Protocol I on Non-Detectable Fragments, 35 *I.L.M.* 1218 (1996); Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices, 1996, 35 *I.L.M.* 1206 (1996); Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 1980, [1984] *A.T.S.* 6; Protocol IV on Blinding Laser Weapons, 1996, 35 *I.L.M.* 1218, [1998] *A.T.S.* 8.

15 *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations,* 1997, 73 *Int'l L. Studies* (U.S. Naval War College, A.R. Thomas & J.C. Duncan eds., 1999), at para. 7.4, n. 88 states:

> Although war-sustaining commerce is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. … Examples of war-sustaining commerce include imports of raw materials used for the production of armaments and exports of products which are used by the belligerent to purchase arms and armaments.

16 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law, L. Doswald-Beck ed., 1995), at para. 60.11, where, after discussing the US formulation of "war-fighting/war-sustaining" outlined above, the paragraph states:

> … the Round Table accepted the view that the descriptive phrase 'integration into the enemy's war-fighting/war-sustaining effort' was too broad to use for the residual category. The phrase chosen to describe the residual category of merchant vessels which were legitimate military objectives was merchant vessels which make an effective contribution to military action by, for example, carrying military materials.

17 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, s*upra* note 1.

ground for non-ratification.[18] Equally, the issue of belligerent reprisal is also one where Article 51(6) of AP1 expressly prohibits attacks on civilians. Such a constraint is not articulated to apply within US formulations as to the residual scope of this right under customary international law.[19] Such differences in obligation are real and are necessarily reflected in default statements of national ROE and "red card" directives to Coalition Commanders.[20]

Under the formalist paradigm, all of this would seem to render the chance of effective interoperability very difficult if not impossible. But of course this has not been the case. In recent years, coalition forces have participated with the United States in numerous operations without any serious compromise to mission effectiveness. Coalition operations during Operation Desert Shield and Desert Storm, during operations in Somalia, in East Timor, in Afghanistan and during Operation Iraqi Freedom are, in fact, a testament to coalition effectiveness under the law. Why is this so? The answer to this question lies not in a formalist paradigm of the law, but rather resides in a realist critique of formalism.

II. REALIST CRITIQUE

The theme of this essay is that effective legal interoperability is possible, indeed very common, despite the impression of grave difference of view. This is not a unique position. The US Army JAG officer, Colonel David Graham, has previously addressed this theme[21] and has put forward a number of explanations for why this may be so. Firstly, he offered the proposition that while US allies had ratified these treaties, they had

[18] M. Schmitt, "The Law of Armed Conflict as Soft Power: Optimizing Strategic Choice", in *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday* 455, 459 (75 *Int'l L. Studies,* U.S. Naval War College, 2000).

[19] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, supra* note 15, at para. 6.2.3, n. 36, where it is provided that:

> Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. Under customary international law, members of the enemy civilian population are legitimate objects of reprisals. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate objects of attack to be inappropriate in most circumstances. For nations party to GP I, enemy civilians and the enemy civilian population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable … .

[20] Kelly, *supra* note 3, at 165.

[21] D. Graham, "Legal and Ethical Lessons of NATO's Kosovo Campaign", 78 *Int'l L. Studies* 377 (U.S. Naval War College, A. Wall ed., 2002).

submitted a number of agreed upon reservations or declarations that effectively achieved a common understanding of application.[22] Secondly, Colonel Graham highlighted the extensive consultation and sharing of Military Law Manuals that has happened in more recent times, which have prompted a greater socialization of concepts.[23] Finally, he stressed the operational significance of multi lateral ROE development on operations occurring since 1977, which has driven a convergence of legal principle.[24]

The insightful observations of Colonel Graham are fully supported in this essay. It is the third ground in particular, which it is submitted, has been decisive in forging successful legal compatibility. The investigation of this phenomenon is the primary focus of this essay. Firstly, however, as to the initial ground proffered by Colonel Graham, namely the issue of collective reservation/declaration. There is no doubt that the language used in such reservations/declarations by many nations when ratifying AP1 is very similar, if not identical. A cursory review of the tenor of declarations made to operative provisions of AP1 does evidence a certain symmetry of language and intent with respect to things like the definition of military advantage concerning attacks to be assessed as "whole",[25] to the incorporation of the lives of one's own military members in the proportionality equation,[26] and to the definition of "deployment" for

22 *Ibid.,* 378.

23 *Ibid.,* 378.

24 *Ibid.,* 378-79.

25 *Australia* : "In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack".
United Kingdom: "In relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack".
Canada: "It is the understanding of the Government of Canada in relation to sub-paragraph 5 (b) of Article 51, paragraph 2 of Article 52, and clause 2 (a) (iii) of Article 57 that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack".

26 *For example*, *New Zealand* declared: "In relation to paragraph 5 (b) of Article 51 and to paragraph 2 (a) (iii) of Article 57 … the term 'military advantage' involves a variety of considerations, including the security of attacking forces". A similar declaration was made by *Australia*. Whilst not a party to Additional Protocol I, the US has included in the *Commander's Handbook on the Law of Naval Operations* (*supra* note 15) the following commentary: "Military advantage may involve a variety of considerations, including the security of the attacking force".

ascertaining combatant status.[27] This necessarily allows for a common understanding and confidence when applying potentially ambiguous operative provisions in the specific contexts contemplated in the course of combined/coalition operations.

The second ground put forward relates to the increasing declassification and sharing of military manuals, such publications having had the effect of engendering a convergence of thinking. There is ample normative evidence that official publications which distil national interpretations of the law, do have significant impact upon international thinking. The US Commanders Handbook on Naval Operations (NWP 1-14M) and public release of the US CJCS ROE Instruction for US Forces in the mid-1990s, have had a tremendous proselytizing effect on the development of Manuals and ROE doctrine in other countries. Partly because of the simple availability of such resources, partly because of the accomplished line of reasoning employed, the tenor and substance of the positions reached in these sources has consciously and subconsciously influenced the operational legal thinking of others. Indeed, the very phrases of the US ROE are repeated in numerous iterations of coalition ROE that have been relied upon and have even found their way into UN Model ROE for Peacekeeping Forces.

Finally, it is in the last category of Colonel Graham's three grounds, the question of ROE development through multilateral operations, where the most effective tool for convergence of legal principle is found.

III. THE PSYCHOLOGY OF MISSION ACCOMPLISHMENT

The psychology of coalition ROE development in active, combined operations is something that is little explored in the literature.[28] As a

[27] *Australia*: "It is the understanding of Australia that in relation to Article 44, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Australia will interpret the word 'deployment' in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words 'visible to the adversary' in the same paragraph as including visible with the aid of binoculars, or by infra-red or image intensification devices".
United Kingdom: "In relation to Article 44, that the situation described in the second sentence of paragraph 3 of the Article can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1, and that the Government of the United Kingdom will interpret the word 'deployment' in paragraph 3 (b) of the Article as meaning 'any movement towards a place from which an attack is to be launched'".

[28] In the broader context of national security decision-making, an insightful analysis of the psychological foundation for such thinking can be found in Y. Ben-Meir, *National Security Decisionmaking: The Israeli Case* 8-21 (Jaffee Center for Strategic Studies, Tel Aviv University, 1986).

normative experience, it is evident that this process is one that engenders an irresistible quality of intellectual facilitation. The methodology of coalition ROE harmonization appeals to the pragmatic, mission accomplishment goals of the military psyche. The process of intense consultation between military partners generates a compulsive mindset and fosters cooperative and creative legal engagement to achieve nationally agreed upon strategic outcomes. Obvious legal prohibitions such as those contained in the 1997 Convention concerning anti-personnel land mines[29] for example, plainly constitute "show stoppers" but the law is not commonly that stark. The modern law of armed conflict is generally more concerned with attaining specific standards, than imposing bright line rules. Thus, the perennial issues of deciding upon questions of "military advantage"[30] and quantifying "proportionality"[31] anticipate a calibrated discretion, which in turns allows for realistic acuity between Coalition Force ROE.

The issue of "law choice" theory is not new. Answering international relations school critics of international law alleged "legalistic-moralistic" inertia in the early 1950s, the well known international lawyer, Myres McDougal emphasized the dynamic nature of international law and spoke of a choice between "effective and ineffective"[32] law. Writing in a 1952 American Journal of International Law article "Law and Power" McDougal observed that "The process of decision-making is indeed, as every lawyer knows, one of continual redefinition of doctrine in its application to ever-changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is therefore, not the most conducive to understanding"[33] and that "A realistic conception of law, must, accordingly, conjoin formal

[29] *Supra* note 1.

[30] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, *supra* note 15, at para. 8.1.1, where in describing "military advantage" in the context of determining the efficacy of an attack it is stated that:

> Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.

[31] *Ibid*., at para. 8.1.2.1, where proportionality is described as follows:

> It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.

[32] M. McDougal, "Law and Power", 46 *A.J.I.L.* 102, 113 (1952).

[33] *Ibid.,* 110.

authority and effective control and include not only doctrine but also the pattern of practices of both formal and effective decision makers".[34] This thesis of "effective law" shares much with the subsequent Hammerskjold approach to innovative and pragmatic legal resolution[35] and is anchored very heavily within a defined societal value set.

This thinking also draws on the concept of the law of armed conflict as "soft power", a process articulated masterfully by Professor Michael Schmitt in his 2000 essay "The Law of Armed Conflict as Soft Power: Optimizing Strategic Choice". In this article, Professor Schmitt examines the decision-making calculus resident within US attitudes concerning treaty ratification and offers a number of hypotheses concerning law as policy choice. Professor Schmitt seeks to identify the causative impact of American decision making, both with respect to those Treaties that are ratified, and more intriguingly, those that are not. Hence, he makes the significant point that "Law can even shape war for those not party to a particular normative standard. For instance, AP1, which the United States has not ratified, prohibits most attacks on dams, dikes, and nuclear electrical generating stations. Despite US opposition to this particular provision, there have been no US attacks on any of these target sets since the Vietnam War; should it conduct such an attack it would be condemned. "… [A]pprehension over condemnation certainly influences the policy choice of whether to engage in such strikes … it would be hard to imagine … U.S. forces in a coalition intentionally conducting an operation that would violate Protocol I, … if any significant coalition partners were parties to the treaty. The realities of coalition-building and maintenance would simply not allow it".[36]

The point artfully made by Professor Schmitt discloses two underlying precepts. The first being that US views on the scope of action legally available from not ratifying AP1 is often contextualized in an operational environment in a manner that accommodates coalition harmony. Just because the US does have the full legal capacity to attack the types of objects prohibited to others does not mean that the US will necessarily undertake such attacks. Policy imperatives regarding coalition cohesion plainly inform decisions concerning attack profiles.

Secondly, the assessment made by Professor Schmitt acknowledges the role of "values" when assessing the relative cost exchange for attacking particular targets or deciding upon requisite levels of collateral damage or incidental injury. The law of armed conflict requires a military commander

34 *Id.*

35 O. Schachter, "Dag Hammarskjold and the Relation of Law to Politics", 56 *A.J.I.L.* 1 (1962).

36 Schmitt, *supra* note 18, at 459.

to exercise his/her judgement as to whether the significance of attacking a particular military objective is worth the "cost". There is actually a wide level of discretion available to the military commander under the law provided that such judgements are "reasonable and made in good faith". In the modern context of volunteer military and naval forces, it is likely that military commanders will reflect the very values of the population at large when assessing amorphous standards like "concrete and direct military advantage anticipated". One is often struck with how civilian audiences will go through a target evaluation process and arrive at strikingly similar legal solutions concerning the proportionality equation as would a seasoned military audience. Indeed, the political ramifications of such methodologies tend to be more prescient within military decision making evolutions than that found within civilian thinking.

It is also evident that within professional military audiences of different nations there tends to be a broad consensus as to values placed upon the military significance of certain targets and the costs deemed acceptable in terms of incidental civilian injury and collateral damage to property when attacking (or not) those targets. This has been a product of the increasing frequency of multilateral coalition operations over recent years, in conjunction with the dramatic increase of UN Peace Operations that have operated under common sets of ROE. Similarly, it is also the product of the increasing socialization process brought about by international professional military education. Venues such as the US Naval War College have been hosting officers from around the world for almost 50 years and have been inculcating the teaching program with the promotion of democratic liberal values. These values find precise expression in the targeting decisions made by senior Commanders who are driven by both the goals of mission achievement under extant ROE and the increasingly homogenous cultural imperatives of modern societies.

IV. CHALLENGES TO COALITION WARFARE

While there is much greater commonality to ROE development than what one may imagine, that isn't to deny the very real challenges that pervade this process. At the tactical level, it is self-evidently difficult to frame appropriate ROE in circumstances where Government policy as to the existing law is either unarticulated or has been subject to several reversals. While Governments may prefer the policy flexibility of leaving their options open as to what they perceive to be customary international law, this has an obviously deleterious consequence for planning for both the subject nation and coalition partners.

The other challenge to coalition interoperability is overt political intervention in the ROE process by Governments. Although to be fair, unlike the Vietnam era, the contemporary practice of Governments has been to allow the military full reign for the execution of the campaign under the law and to interject political involvement once calculations concerning compliance with the law have been undertaken. Hence, approval may be required for an attack even though it fulfills the proportionality test, but nonetheless anticipates a significant loss of life. Such "intervention" is plainly appropriate and reflects the realities of the political dimension of undertaking modern armed conflict.[37]

Ironically, the greatest potential challenge to coalition operations may come from the application of domestic law to the ROE process. It is somewhat of a paradox that military lawyers of different countries can speak easily about applicable legal concepts and yet when those same lawyers speak to national legal colleagues of other Government Departments who may have a stake in ROE development, such conversations are at cross-purposes.

The ICC Statute has also brought into focus the challenge of aligning criminal law standards reflected in this Treaty with more traditional standards contained within domestic law. Issues such as "intent" and "recklessness" and their translation into an operational context are obvious points of potential difficulty. Similarly, the use of lethal force to protect mission essential property and the application of domestic law self-defence criteria to operations against deadly enemies in the jungles and deserts of the world where military forces operate in the twilight zone between war and peace are two other areas where there is potential for dichotomous answers.

The issue of dealing with domestic legal conundrums when striving for coalition interoperability is not unique one. It may be time to revisit the concept of "transnational law" that was originally championed by those such as Professor Jessup in the 1920s as a more reliable way to advance international law's reforming promise.[38] It is a theme that, in a modified way, has been picked by more recently by Ann-Marie Slaughter and her liberalist, international relations critique of the modern legal method and may well be a profitable avenue of focus for those of us keen to reconcile public international law rights and responsibilities with domestic law.[39] Professor Slaughter advocates a recasting of international law to assimilate

[37] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* 117 (2004), who comments on the "CNN effect" and consequential political significance of proportionality determinations.

[38] P.C. Jessup, *The Functional Approach to International Law* (1928).

[39] A. Slaughter, "International Law in a World of Liberal States", 6 *E.J.I.L.* 503 (1995).

public and private law across and between territorial boundaries of liberal States, in order to conceive of a more effective body of resulting law that is defined not by "subject or source but rather in terms of purpose and effect".[40]

CONCLUSION

Writing in his influential 1979 publication "How Nations Behave", Professor Louis Henkin famously observed that "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".[41] It remains a trite but powerfully correct statement. Despite some clear differences of opinion on some aspects of the Law of Armed Conflict, and despite some very real challenges under both domestic and international law, the process of ensuring legal interoperability for ROE development and mission fulfillment between coalition partners is not as grave as one might imagine. It is incumbent upon professional military lawyers to continue to use their best creative endeavours to seek solutions to otherwise intractable legal problems. This is essential not only to ensure the success of the mission, which is always the paramount obligation, but to also instill greater strength into the intricate mosaic that is international law.

[40] *Ibid*., 516.
[41] L. Henkin, *How Nations Behave* 47 (2nd ed., 1979).

"ENGLAND DOES NOT LOVE COALITIONS": DOES ANYTHING CHANGE?

*By Charles Garraway**

My title comes from a quote from Benjamin Disraeli, speaking in the House of Commons on 16 December 1852.[1] In 1852, Victoria was on the throne of England and Abbott Lawrence was the United States Ambassador to the Court of St. James. Lawrence was born in Groton, Massachusetts, not too far from the Naval War College, and is the founder of Lawrence, Massachusetts and of the Lawrence Scientific School at Harvard. The British Empire was at its height in 1852 and on it the sun never set. Livingstone was setting out on his journeys into the African hinterland. This was two years before the start of the Crimean War, British forces were fighting in Burma, the Punjab had just been annexed and gold had been discovered in a remote prison colony called Australia. Disraeli was not yet Prime Minister – that was yet to come. He was Chancellor of the Exchequer – Treasury Secretary in United States terms.

But what did Disraeli mean by "coalition"? I have not been able to find an 1852 English dictionary and I therefore take my definition from my old copy of the Concise Oxford Dictionary (which still bears my school particulars on the front cover!). This reads:

> Coalition, n. Union, fusion; (Pol.) temporary combination for special ends between parties that retain distinctive principles.[2]

Why, therefore did England not love coalitions? I would suggest that the problem is similar to that facing the United States today. Britain at that time did not need coalitions – except, as it soon found out in the Crimea, in Europe. In the rest of the world, it was supreme and could act as it liked. A coalition, by my definition, is a "temporary combination for special ends between parties that retain distinctive principles". The problem is not so

* Charles H. Stockton Professor of International Law, United States Naval War College (2004-2005).

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1 *Hansard*, 16 Dec. 1852, at Col. 1666.

2 *The Concise Oxford Dictionary of Current English* (H.W Fowler & F.G Fowler eds., 4th ed., 1951, repr. in 1960).

much in the "temporary combination" as in the "distinctive principles". For a coalition to work, those "distinctive principles" must be at least similar. If there is no "coalescing" there, there can be no "coalition". In Europe, coalitions came and went as principles coalesced in certain fields and then parted again. The Crimean War itself was a classic example where British and French interests in stopping Russian expansion led to a temporary coalition between countries that less than half a century before had been locked in bloody conflict.

Modern history is full of talk of coalitions. The most relevant here is that of the "United Nations" – not the modern entity, but the group of countries that came together in the 1940s to stand up to tyranny and fascism. That metamorphasised into the NATO Alliance where the need to hold the Communist bear in check outweighed the "distinctive principles" of the different countries involved. The collapse of the Soviet Union and the end of the Cold War has led to the balance shifting and more emphasis now being on the distinctive principles rather than the common purpose. It is the new World Superpower that now states that it has no love for coalitions. Joseph Fitchett of the International Herald Tribune writing in 2002 in European Affairs, talks of "the dismissive attitudes that have recently seemed to prevail in Washington toward NATO, ranging from benign neglect during the Afghan campaign to forthright dislike for coalition warfare in the comments of some Pentagon officials".[3]

Yet, as the British found less than two years after Disraeli's dismissive comment, coalitions are a necessary evil when the interests of the differing parties combine sufficiently to outweigh the differences in the principles. But does that mean that the differences are removed or set aside? No. The distinctiveness of each coalition partner remains and ways are found of working round the differences without prejudicing the position of any of the partners. That is difficult and requires compromise on all sides. It is that need for compromise that superpowers – whether Great Britain in the mid-19th Century or the United States in the 21st Century – find so difficult.

What I would like to examine is the way that we have reached the current state of affairs and then look at two specific areas of apparent disagreement between the United States and some of its major Allies. I will also try to see whether these "distinctive principles" are in fact distinctive and, if so, whether they can be worked around. Those two specific areas are the impact of the Additional Protocol I of 1977[4] and of human rights law.

3 J. Fitchett, "New NATO Force Could Help, Not Hinder Europe", 3 *Eur. Aff.* (No. 4, Fall 2002), accessed at: http://www.ciaonet.org/olj/ea/2002_fall/2002_fall_34.html

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.*

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, speaking in the Security Council on 24 September 2003 on Justice and the Rule of Law in International Affairs, stated:

> The United States of America is a nation founded, not upon ethnicity or cultural custom or territory, but upon law enshrined in our Constitution. As a consequence, establishing and maintaining the rule of law has been an enduring theme of American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated. Democracy, justice, economic prosperity, human rights, combating terrorism, and lasting peace all depend on the rule of law. The rule of law is essential to fulfill the ideas behind the UN Charter we are all pledged to support.[5]

I make this point right at the start because it is often overlooked. The United States is a country founded on and believing in the Rule of Law. The very fact that debate today in political circles often centers on that phrase is an illustration of how fundamental it is to the American psyche. The United States does not only recognize the validity of the rule of law in the domestic sphere but also in the international sphere as Ambassador Cunningham makes plain. It is therefore of vital importance to those who work with and alongside the United States to understand where, in the opinion of the United States, that law exists and what it is. However, what is good for the goose is also good for the gander and it is just as vital that the United States understands the laws that govern the activities of their Allies. It would not be appropriate for the United States to demand that their Allies act outside the law that binds them, even if that law is not binding on the United States. Such a demand would make a mockery of the rule of law as a concept.

This was recognized by the United States in the early 1990s, and in particular in Desert Storm. Although Additional Protocol I did not apply as a matter of treaty law because Iraq was not a party (nor at the time were the United States, the United Kingdom or France), it was recognized by the United States that many of the provisions of that Protocol were seen as binding law by some of the Coalition Forces. Indeed, the Final Report to

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3, repr. in *Documents on the Law of War* 422 (A. Roberts & R. Guelff eds., 3rd ed., 2000).

5 United States Mission to the United Nations Press Release # 147, 24 Sept. 2003, accessed at: http://www.un.int/usa/03_147.htm

Congress on the Conduct of the Persian Gulf War of April 1992, in Appendix O, The Role of the Law of War, discusses Additional Protocol I at some length, confirming that parts are "generally regarded as a codification of the customary practice of nations, and therefore binding on all".[6] However, it also confirms the United States' view that parts are not such a codification and seeks to identify specific "deficiencies".[7] There are frequent approving references to Articles of Additional Protocol I throughout Annex O, and under "Observations" the remark is made that "Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law provided Iraq no advantage".[8]

This very practical approach mirrored the approach taken by President Reagan in his Letter of Transmittal to the Senate on 29 January 1987[9] when he declined to recommend that the Senate grant advice and consent to Additional Protocol I describing it as "fundamentally and irreconcilably flawed".[10] However he referred to the Protocol as containing "certain sound elements" and to "the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts". He went on to state:

> We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.[11]

In fact, the initiative had been underway since the adoption of the Protocols with a NATO working group looking at possible agreed reservations which would enable NATO to adopt a united front. Unfortunately, the negotiations seemed to go on for too long for some European States who broke ranks and ratified whilst they were still continuing, adopting some – but not all – of the recommended reservations. For example, and I am not seeking to isolate any particular State, Belgium, who ratified in 1986, prior to the Reagan transmittal, made "interpretative declarations" on Article 44 and Article 1(4), the two areas of particular concern identified by the United States. Whilst the

6 *Conduct of the Persian Gulf War, Final Report to Congress*, App. O, at 0-13 (Apr. 1992).
7 *Ibid.*, 0-15.
8 *Ibid.*, 0-36.
9 Printed in Agora: "The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims", 81 *A.J.I.L.* 910 (1987).
10 *Ibid.*, 911.
11 *Ibid.*, 911-12.

former was in accordance with the NATO formula, that on Article 1(4) was in less stringent terms.[12] The statements made by the United Kingdom on their ratification in 1998 probably bear the closest resemblance to the almost-agreed NATO position.[13]

Unfortunately, the failure of the NATO initiative seemed to bring an end to negotiation on a formal level though there was continuous contact amongst military lawyers, particularly those tasked with the drafting of military manuals. There were a series of meetings in various countries at which such issues were discussed and attempts were made to strike a common balance. In addition, Michael Matheson, then the Deputy Legal Adviser at the State Department, in a presentation made in 1987 and subsequently published in the American University Journal of International Law and Policy,[14] gave a comparatively detailed analysis of the Protocol indicating those areas which the United States found acceptable and those that it did not.

Although, as we have seen, Additional Protocol I was considered and tested during Operation Desert Storm, the tide in the United States was already beginning to turn against the treaty. There had always been a strong element within the United States that opposed any compromise, illustrated by Douglas Feith's article "Law in the Service of Terror – The Strange Case of the Additional Protocol", published in 1985.[15] On the other hand, the military, who actually had to work in the field, were seeking to adopt the Reagan approach and to develop "appropriate methods for incorporating these positive provisions into the rules that govern our military operations". The problem that the military faced was in identifying those "positive provisions" in the absence of any clear government position. The military inevitably turned to the only guidance that they could find, namely the Matheson article, and this found its way into military manuals of all the Services. There are frequent references to parts of Additional Protocol I, for example in the Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M),[16] usually citing Matheson as the

12 These can be found in *Documents on the Law of War*, *supra* note 4, at 501.

13 *Ibid.*, 510.

14 *See* "The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", Remarks of M.J. Matheson, 2 *Am. Univ. J. Int'l L. & Pol'y* 415, 418 (1987).

15 *The National Interest* 36 (Fall 1985).

16 *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations,* 73 *Int'l L. Studies* (US Naval War College, A.R. Thomas & J.C. Duncan eds., 1999).

authority. For example, in referring to Article 54(1) of Additional Protocol I creating a new prohibition on the starvation of civilians as a method of warfare, NWP 1-14M states that this is a prohibition that "the United States believes should be observed and in due course recognized as customary law", citing Matheson.[17] The Operational Law Handbook of the Army Judge Advocate General's Corps[18] went further, publishing in detail a list of the articles which "the U.S. views … as either legally binding as customary international law or acceptable practice though not legally binding".[19] This type of detail appeared in the Handbook from 2000 to 2003 but was omitted in 2004. It reappeared in 2005,[20] only to be overtaken by an Errata note stating that the entry should be "disregarded". This note went on to say "Information was taken from an article written by Michael Matheson in 1986. It takes an overly broad view of the U.S. position and as a result may cause some confusion as to U.S. Policy".[21] This followed an article by Hays Parks in 2003 in which in a footnote he had stated that Michael Matheson had expressed his "personal opinion" that "certain provisions of Protocol I reflect customary international law or are positive new developments which should … become part of that law".[22] In fact, the full text of that paragraph of Matheson's article reads:

> The executive branch is well aware of the need to make decisions and to take action on these issues. We know from our conversations with our allies that there is a shared perception, particularly among North Atlantic Treaty Organization (NATO) countries, of a strong military need for common rules to govern allied operations and a political need for common principles to demonstrate our mutual commitment to humanitarian values. We recognize that certain provisions of Protocol I reflect customary international law or are positive new developments which should in time become part of that law.[23]

This should be read together with his opening statement that:

17 *Ibid.,* para. 8.1.2.1, at 404.

18 *Operational Law Handbook*, published by the International and Operational Law Department, US Army Judge Advocate General's Legal Center & School (2000).

19 *Ibid.*, 2001 version, at 10.

20 *Ibid.*, 2005 version, at 15.

21 E. Sheet, *Operational Law Handbook* (27 Sept. 2004) (2005).

22 H. Parks, "'Special Forces' Wear of Non-Standard Uniforms", 4 *Chicago J. Int'l L.* 519, n. 55 (No. 2, 2003).

23 Matheson, *supra* note 14, at 421.

> I appreciate the opportunity to offer this distinguished group a presentation on the United States position concerning the relationship of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions.[24]

It is hard to see this as reflecting a personal statement. The Royal "we" went out in American English at the time of George III!

So where are we now? It appears that the Matheson analysis is no longer considered "authoritative". It is interesting in reading the so-called "Torture Memos",[25] to find the almost complete lack of reference to Additional Protocol I at all. It is as if it has been wiped out of the memory bank. It is no longer even clear whether the United States accepts such key provisions as Article 75 on Fundamental Guarantees, of which Matheson had said:

> We support in particular the fundamental guarantees contained in article 75 … .[26]

This lack of legal clarity causes acute problems for Allies seeking to work alongside the United States. Quite apart from the issues arising from targeting decisions – what is the United States definition of a military objective? – serious issues arise over detainee handling. If the United States is not prepared even to accept the fundamental guarantees of Article 75, it is hard to see how allies can hand over detainees to the custody of the United States. This is before one takes into account the Presidential Decision that Common Article 3 to the Geneva Conventions does not apply outside non-international armed conflict.[27] Whilst this may be correct as a matter of treaty law, it is now generally accepted that, in the words of the International Court of Justice, "there is no doubt that, in the event of international armed conflicts, these rules [Common Article 3] also constitute a minimum yardstick ...".[28]

My point here is not to criticize the United States' decision not to ratify Additional Protocol I. That is an acceptable position. However, the existence of the Protocol cannot be ignored, nor the fact that the majority of the United

24 *Ibid.*, 419.

25 These have been compiled in *Torture Papers – The Road to Abu Ghraib* (K. Greenberg & J. Dratel eds., 2005).

26 Matheson, *supra* note 14, at 427.

27 White House Memo, Humane Treatment of Al Qaeda and Taliban Detainees, 7 Feb. 2002, *Torture Papers*, *supra* note 25, at 134.

28 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nic. v. USA), 76 *I.L.R.* 349, para. 218, at 448 (1988).

States' traditional allies are parties to it, including the United Kingdom,[29] Japan[30] and Australia.[31] You will note that I have omitted other parts of "Old Europe" such as France[32] and Germany[33] though in fact almost all the NATO States are indeed parties.[34] We need to know what the United States position is and uncertainty simply undermines the trust that is vital for coalition operations. I appreciate that the role of customary international law – and even its very existence – is sometimes questioned within the Administration.[35] However, it should still be possible for the Administration to publish in an authoritative form its stance on the provisions of Additional Protocol I which at least will allow a base line from which others can work. It is to be hoped that the planned Law of War Manual being worked on by Hays Parks in the Office of General Counsel of the Department of Defense will in fact do exactly that and for that reason, if for no other, I would urge its early completion. As Michael Matheson himself said:

> The United States [must] give some alternative clear indication of which rules they consider binding or otherwise propose to observe.[36]

Indeed he went on to put it even more clearly:

> It is important for both the United States government and the United States scholarly community to devote attention to determining which elements in Protocol I deserve recognition as customary international law, either now or in the future.[37]

That was true in 1987 and remains true today. If Matheson saw his effort as "work in progress", it needs to be completed.

My second point is the increasing role of human rights law. Again there is a growing divide between the United States and, in particular, Europe – and not just "Old Europe". The 1950 European Convention for the

29 Ratified 28 Jan. 1998.
30 Ratified 31 Aug. 2004.
31 Ratified 21 June 1991.
32 Ratified 11 Apr. 2001.
33 Ratified 14 Feb. 1991.
34 Turkey is a notable exception.
35 *See for example* Department of Justice Memorandum for A. Gonzales, Counsel to the President, and W.J. Haynes Jr., General Counsel of the Department of Defense, "Application of Treaties and Laws to al Qaeda and Taliban Detainees", dated 22 Jan. 2002, *Torture Papers*, *supra* note 25, at 81, 111 *et seq*.
36 Matheson, *supra* note 14, at 420.
37 *Ibid.*, 421.

Protection of Human Rights[38] has probably the most effective enforcement mechanism of any human rights organization in the world. The European Court of Human Rights passes binding judgments and presents a progressive interpretation of human rights law. Whether one agrees with that approach or not, it is a fact. The Convention requires Parties to "secure to everyone within their jurisdiction the rights and freedoms" contained in the Convention (Article 1).[39] Jurisdiction has been interpreted widely and it has been ruled that although the application of the Convention is primarily territorial, extraterritorial jurisdiction is not ruled out, *inter alia,* "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".[40] The United Kingdom courts have interpreted that as allowing the application of the Convention to some activities in Iraq.[41]

There is a difference here from the wording of the 1966 International Covenant on Civil and Political Rights (ICCPR) which requires States to grant rights to "all individuals within its territory and subject to its jurisdiction".[42] This clearly seems to lay down a two-part test which is lacking in the text of the European Convention where jurisdiction alone is the standard. However, this has been interpreted as "those within its territory and those otherwise subject to its jurisdiction".[43] This interpretation was confirmed by the United Nations Human Rights Committee in General Comment 31, adopted on 29 March 2004, when they stated:

38 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, *Basic Documents in International Law* 244 (I. Brownlie ed., 5th ed., 2002).

39 *Ibid.*, 245.

40 Banković and Ors. V. Belgium and Ors., Case No. 552207/99, 123 *I.L.R.* 94, para.71, at 113 (2003).

41 R (Al-Skeini and others) v. Secretary of State for Defence, Divisional Court, [2005] 2 *W.L.R.* 1401 (and later in the Appeal Court, [2005] *All E.R.* (D) 337 (Dec.)).

42 Art. 2(1), International Covenant on Civil and Political Rights, 1966, *Basic Documents*, *supra* note 38, at 205, 206; hereinafter: ICCPR.

43 *See* T. Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", in *International Bill of Rights: The Covenant on Civil and Poiltical Rights* 72, 73-75 (L. Henkin ed., 1981).

> A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.[44]

The United States' position, however, appears to adopt the literal reading of the text and limit the application of the Covenant to United States territory. This position is confirmed by the Working Group Report on Detainee Interrogations in the Global War on Terrorism which stated:

> The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.[45]

It is interesting to note that the 1969 American Convention on Human Rights,[46] signed but not ratified by the United States, in Article 1, also refers to the obligation to ensure rights "to all persons subject to their jurisdiction", thus equating to the language of the European Convention.

Thus the first divergence of opinion is to the territorial applicability of human rights law. The United States considers that it is not bound in law to grant rights to persons within its jurisdiction if they do not meet the territoriality test. The Europeans – and many others – consider that, whilst territoriality is a key factor, it is not the sole governing factor and that they are therefore obliged as a matter of law to extend certain rights outside their own territory.

But the quote from the Working Party also reveals another divergence. The United States view appears to be that in time of international armed conflict, human rights law is inapplicable and is replaced by the law of armed conflict. This was indeed an accepted view amongst many in the past and seemed to reflect the classic divide between the law of peace and the law of war. But in the same way that the boundary between peace and war itself has become blurred, so an analysis of the treaties themselves no longer

44 Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 29 Mar. 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

45 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, 6 Mar. 2003, *Torture Papers*, *supra* note 25, at 241, 243.

46 American Convention on Human Rights, 1969, repr. in *Human Rights* (Documentary Supplement) 374 (L. Henkin *et al.,* eds., 2001).

supports the purist view. Article 4 of the ICCPR deals with derogations and provides for such "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed".[47] Even then, there are certain rights that are non-derogable. The European Convention is even more specific referring in Article 15 to "in time of war or other public emergency threatening the life of the nation". In Article 15(2), it specifically states:

> No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war…..shall be made under this provision.[48]

It is clearly therefore not open to the European States to argue that the Convention does not apply in time of war as it specifically caters for that eventuality. It is therefore necessary for them to examine how the two bodies of law mesh together in time of conflict.

For purposes of completeness, the American Convention refers to "war, public danger, or other emergency that threatens the independence or security of a State Party" in its derogation clause (Article 27).[49]

The International Court of Justice has addressed this issue in a number of cases including the *Nuclear Weapons* case[50] and, most recently, the *Barrier* case involving the so-called "Wall in the Occupied Palestinian Territory".[51] In the *Nuclear Weapons* case, the Court observed 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 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

47 *Supra* note 42, at 207.
48 *Supra* note 38, at 249.
49 S*upra* note 46, at 383.
50 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996, 110 *I.L.R.* at 163 (1998).
51 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, accessed at: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.

> 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.[52]

In the *Barrier* case, the Court quoted from the *Nuclear Weapons* case and continued:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[53]

Lawyers operating with Allied countries have no choice but to wrestle with this complex interaction and find it difficult to understand the United States' objections, particularly if they lead to Presidential statements such as:

> Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, *including those who are not legally entitled to such treatment*.[54]

Is the President seriously suggesting that there are people who are not legally entitled to "humane treatment"? Indeed, this sits oddly with the words of the same President on his second inauguration when he said:

> From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value.[55]

52 Nuclear Weapons case, *supra* note 50, para. 25, at 190.

53 *Barrier* case, *supra* note 51, para. 106.

54 My emphasis. White House Memo, Humane Treatment of Al Qaeda and Taliban Detainees, 7 Feb. 2002, *Torture Paper*s, *supra* note 25, at 134. .

55 Inauguration speech of President George W Bush, 20 Jan. 2005, accessed at: http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html.

I agree with these words and the President is right, not least because this is indeed the exact opposite of the doctrine preached by our terrorist opponents. The United States has stood as a bastion for human rights since its founding. It was the United States that led the human rights movement in the early days and the 1948 Universal Declaration of Human Rights[56] itself had Eleanor Roosevelt as its guiding force. It was the United States who during the Cold War stood as a beacon of light offering a different vision to oppressed people. It is therefore unfortunate that the view being given to the world now is that only Americans have rights – the rest of the world has them only at the will of the United States! That is not the message of the Founding Fathers, nor is it the message of the President but:

> If the trumpet gives an uncertain sound, who shall prepare himself to the battle?[57]

In the same way as there is confusion about the status of Additional Protocol I in the United States, so there is confusion on the applicability of human rights law to military operations. Whether we like it or not, the world is moving on and the United States is part – a big part – of that world. However, it is not so big that it can ignore what is going on in the rest of the world. Those of us who are wrestling with these knotty legal problems need the help and expertise that the United States can bring. Furthermore, if the United States wants to shape the legal landscape, it can only do so by a position of active involvement. There are many who are concerned with the manner in which human rights law is being used to reinterpret accepted principles of the law of armed conflict. The law of armed conflict reflects the realities of war in a way that human rights law does not – and was never designed to do.

I come back to my definition of Coalition:

> … temporary combination for special ends between parties that retain distinctive principles.

The United States has distinctive principles but so do all its friends and allies. If a coalition is to work, all parties need to retain those distinctive principles. The fact that they exist – and are distinctive – cannot be ignored. If the United States wishes to impose its own distinctive principles on others,

56 *Basic Documents*, *supra* note 38, at 192.
57 I *Corinthians*, Ch. 14, verse 8 (Authorised Version).

that is not a "coalition". Nor can we – or should we – as allies, impose our own principles on the United States. However, in recognizing that we do have differences, we need to work together to find ways of channeling those distinctive principles so that we move forward together. Our purpose is the same.

CHEMICAL AGENTS AND EXPANDING BULLETS: LIMITED LAW ENFORCEMENT EXCEPTIONS OR UNWARRANTED HANDCUFFS?

*By Kenneth Watkin**

I. INTRODUCTION

Modern armed conflict has entered a particularly dangerous and in many ways chaotic phase. The post September 9, 2001 period has witnessed significant debate concerning the ability of existing humanitarian norms to regulate 21st century warfare, and in particular the "war on terror".[1] In an international system of "order" based on the nation-State much of today's conflict is taking place on the fringes of what Clausewitz might have viewed as war between "civilized peoples".[2]

Certainly as the 2003 Iraq campaign demonstrated traditional conflict between States is still a reality. Here, the "black and white" treaty law provides a well established, if not perfect, normative structure known as the law of armed conflict or international humanitarian law.[3] Customary

* Brigadier-General Ken Watkin is a Canadian military legal officer and Judge Advocate General for the Canadian Forces. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Government of Canada, the Canadian Forces, or the Office of the Judge Advocate General.

1 *For example, see* T. Pfanner, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", 87 *Int'l Rev. Red Cross* 149 (2005); G. Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'", 27 *The Fletcher Forum of World Affairs* 55 (2003), available at: http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/$File/Rona_terror.pdf and N. Quenivet, "The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature", in *International Humanitarian Law and the 21st Century's Conflicts* 25 (R. Arnold & P.-A. Hildbrand eds., 2005). *Also see generally* K. Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", 98 *A.J.I.L.* 1, 2-6 (2004).

2 C. Von Clausewitz, *On War* 86 (M. Howard & P. Paret trans. & eds., 1986). (Although most of his work is dedicated to removing external factors when considering the application of force he also indicates that in his view wars between "civilized nations are far less cruel and destructive than war between savages").

3 The terms "law of armed conflict", "law of war" and "international humanitarian law" are often used synonymously. However, the fact that military writers exhibit a preference for the more martial connection to armed conflict or war, while humanitarian organizations (such as the International Committee of the Red Cross [ICRC]) and human rights non-government organizations (such as Human Rights Watch and Amnesty International

international law also sets out the obligations of States in international armed conflict. Determination of the exact scope of this second body of law is more challenging as is evidenced in the continuing dialogue over which of the provisions of Additional Protocol I are viewed as customary international law.[4] However, notwithstanding this dialogue there is a significant commonality in the understanding of the obligations on States during the conduct of hostilities.[5]

However, much of contemporary conflict is occurring in what can be termed a "gray" zone. There are four situations where the military forces of the State are required to conduct operations at the interface between warfare and policing: occupation, non-international armed conflict, peace support operations and the international campaign against terrorism. Consistent with the term "gray zone" the determination of the normative framework to be applied is not always clear. While there is often a common theme of violence being applied between State and non-State actors the lack of clarity as to what rules should be followed occurs in two ways. First, there is the question of the degree to which the law of armed conflict, designed for inter-State conflict, can or should regulate violence between State and non-State actors. Secondly, there is the inevitable interface between the law of armed conflict and human rights norms. In simpler terms: the rules governing armed conflict versus those applying to law enforcement.

Resolving the question of which normative framework applies is extremely important. For the personnel involved identification of the correct normative framework governing the decision to use force can be literally a matter of life and death. Complying with that framework means military

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[hereinafter: NGOs]) prefer to use "humanitarian" law graphically demonstrates a fundamental tension in this area of the law: the balancing of military necessity and humanity.

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, 1125 *U.N.T.S.* 3 [hereinafter: Additional Protocol I-AP I]. *See* M.J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", 2 *Am. U. J. Int'l L. & Pol'y* 415 (1987); C. Greenwood, "Customary Law Status of the 1977 Geneva Protocols", in *Humanitarian Law of Armed Conflict: Challenges Ahead* 93 (A.J.M. Delissen & G.J. Tanja eds., 1991); and G.S. Prugh, "American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions", 31 *Mil. L. & L. of War Rev*. 224 (1992). *See also Customary International Humanitarian Law* xxvii-xiv (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., Cambridge University Press, 2005). [hereinafter: *Customary Law Study*].

5 J.D. Reynolds, "Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground", 56 *Air Force L. Rev*. 1, 23-24 (2005) ("[AP I] is thoroughly represented in U.S. military doctrine, practice and rules of engagement").

personnel are not only acting "legally", but also in accordance with the value system demanded by modern States of its "warriors".[6] The importance for soldiers, sailors and airmen to act according to the standards of society, both broader society as well as military society, cannot be overstated.

In dealing with this challenge of applying the law in complex security situations military and civilian government legal advisors can take some solace from the fact that they are not alone in their struggle to do the right thing in the complex security situations confronting States. NGOs and other humanitarian groups are also wrestling with what law or norms should be applied to 21st century conflict.[7] Just as military forces are changing their understanding and approaches towards armed conflict human rights and humanitarian groups are being confronted with having to apply long cherished norms in an uncertain operational environment. One scholar from the humanitarian law community has written "[i]t is debatable whether the challenges of asymmetrical war can be met with the current law of war. If war between States is on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well".[8] This observation provides an indication that the ability of existing codified law to meet the challenges of 21st century warfare is being opened up to considerable debate.

The purpose of this article is to look at two discrete areas of weapons usage: chemical agents and expanding bullets in order to identify some of the challenges presented in determining the law governing their use during complex security operations. Such operations often straddle the armed conflict and law enforcement paradigms. In this analysis particular reference will be made to the 2005 ICRC Customary International Humanitarian Law Study.[9] This ambitious study seeks to outline customary international law rules for both international and non-international armed conflict as well as provide an important compendium of State practice. In seeking to clarify the customary law of armed conflict rules that apply to non-international armed conflict the study represents the most fulsome attempt to date to do something that the courts, academics and the militaries themselves have increasingly attempted to do over the past few decades.[10] That being said the

6 *See* K. Watkin, "Warriors, Obedience and the Rule of Law", 3/4 The Army Doctrine and Training Bulletin 24, 28 (Winter 2000, Spring 2001) available at: http://armyapp.forces.gc.ca/ael/adtb/vol_3/No_4/vol3_no_4_E.pdf (last visited Nov. 5, 2005).

7 *See* Pfanner, *supra* note 1.

8 *Ibid.,*158.

9 *Supra* note 4.

10 *For example see* Prosecutor v. Tadic (Appeal on Jurisdiction) paras. 65-142 (2 Oct. 1995) available at: http://www.un.org/icty/tadic/appeal/decision-e/51002.htm

study offers a starting point for discussion rather than the definitive word on what constitutes customary international humanitarian law. The ultimate test for such statements of customary international law, and particularly those dealing with the law of armed conflict, may be whether they can be practically applied by governments and the military forces who act on their behalf.

This exploration of the law surrounding the use of chemical agents and "expanding" bullets in contemporary conflict is divided into four parts. The first part outlines the law of armed conflict governing the use of these weapons. Particular emphasis is placed on identifying the restrictions on their use set out in treaty law. However, as will be noted those prohibitions are not absolute as both chemical agents and expanding bullets are permitted in law enforcement situations. The second part identifies two approaches to analyzing contemporary armed conflict. The first more formal approach sets out distinct categories of conflicts such as international armed conflict, non-international armed conflict and domestic disturbances that are often analyzed independently of one another. However, the second approach notes armed conflict is increasingly being viewed in a less structured manner thereby recognizing greater potential for overlap between the law of armed conflict and human rights normative regimes.

This then leads to the third area of analysis: the challenge of applying the law of armed conflict rules governing chemical agents and expanding bullets in contemporary conflict. The final part outlines State practice of applying the "spirit and principle" of the laws of armed conflict rather than the formal rules governing large scale inter-State conflict. In effect there is a more flexible application of the law than a rule based system of international armed conflict otherwise provides. In the final analysis it is suggested the complex 21st century security environment may require a re-analysis of rules governing the use of less lethal weapons such as riot control agents and expanding bullets.

II. BROAD PROHIBITIONS?

In dealing with "chemical weapons" and "expanding bullets" across the broad spectrum of conflict it will be helpful to first review the provisions of the law as they apply to international armed conflict.

[hereinafter: *Tadic*]; and L. Moir, "Towards the Unification of International Humanitarian Law?", in *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* 108 (R. Burchill, N.D. White & J. Morris eds., 2005).

A. Chemical Weapons

As is noted in the Customary Law Study there is a broad treaty prohibition against the use of chemical weapons in international armed conflict including: the 1899 Hague Declaration concerning Asphyxiating Gases, the 1925 Geneva Gas Protocol, the 1993 Chemical Weapons Convention[11] and the 1998 Statute of the International Criminal Court. For example, there are only 13 States that are not a "party to either the Geneva Gas Protocol or the Chemical Weapons Convention".[12] Strong support for suggesting that such a ban is customary is found in domestic legislation, military manuals and the statements of governments and national case-law.[13]

Similarly, in respect of non-international armed conflict the Chemical Weapons Convention, Article I broad prohibition framed as "under any circumstances" reflects a more general trend "towards reducing the distinction between international and non-international armed conflicts for the purposes of the rules governing the conduct of hostilities".[14] Many of the contemporary abuses, perhaps most infamously the use of chemical weapons by Saddam Hussein against the Kurds in 1988,[15] have occurred in non-international armed conflict. In terms of a normative prohibition there appears to be a broad consensus, including a strong statement by the International Criminal Tribunal for the former Yugoslavia Appeal Chamber in the *Tadic* decision against the use of such weapons in non-international armed conflict.[16]

[11] There are 174 States parties to the Chemical Weapons Convention (Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical Weapons and on Their Destruction, 1993, 1974 *U.N.T.S.* 3). *See* States Parties to Main Treaties available at: www.icrc.org. (last visited Nov. 6, 2005).

[12] *Supra* note 4, at 259.

[13] *Ibid.,* 260.

[14] D. Kaye & S.A. Solomon, "The Second Review Conference of the 1980 Convention on Certain Conventional Weapons", 96 *A.J.I.L.* 922, 922 (2002).

[15] *See* H. Osman, "Iraqi Kurds Recall Chemical Attack", BBC News, 17 Mar. 2002, available at: http://news.bbc.co.uk/1/hi/world/middle_east/1877161.stm. (last visited Nov. 5, 2005).

[16] *See Tadic*, ICTY Appeal Chamber (1995), *supra* note 10, at para. 124. ("It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals – a matter on which this Chamber obviously cannot and does not express any opinion – there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts"). *See also Customary Law Study*, *supra* note 4, at 263. *See also* A. Cassesse, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 *E.J.I.L.* 144, 152-53 (1999) ("That Appeals Chamber rightly [found]…that the prohibition

However, not all military use of "chemicals" is prohibited. It is after all a "weapons" convention with such weapons involving "toxic chemicals and their precursors".[17] As a result military purposes "not connected with the use of chemical weapons and not dependent upon the use of the toxic properties of chemicals as a method of warfare" are not prohibited.[18] This is not the end of the discussion. The use of "chemical agents" is not absolutely forbidden for all purposes by States seeking to control violence. There is a significant exception regarding the use of such agents. Among the purposes not prohibited under the Convention is "[l]aw enforcement including domestic riot control purposes".[19] However, "riot control agents" will not be used as a method of warfare.[20] A rationale provided for the prohibition of what is otherwise an effective less lethal means of warfare, and one particularly suited to certain activities such as forcing an enemy out of caves, bunkers and confined spaces, is "the fact that use of tear gas… 'runs the danger of provoking the use of other more dangerous chemicals'…since a party 'may think it is being attacked by deadly chemicals and resort to the use of chemical weapons'".[21]

Riot control agents have traditionally been associated with CS and CN gases as well as vomiting agents.[22] The clarification over the use of chemical agents for law enforcement found in the Chemical Weapons Convention ended long standing controversy over the scope of the 1925 Gas Protocol. The Customary Law Study indicates the vast majority of States were of the view that the Protocol did apply to riot control agents, however, there were

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of weapons causing unnecessary suffering, as well as the specific ban on chemical weapons, also applies to internal armed conflicts").

17 *See* Chemical Weapons Convention, *supra* note 11, Art. II, para. 1.

18 *Ibid.*, Art. II, para. 9(c).

19 *Ibid.*, Art. I, para. 5.

20 *Ibid.*, Art. II, para. 9(d).

21 *See Customary Law Study*, *supra* note 4, at 265 quoting in part the *Military Manual* of the Netherlands.

22 *See* FM 8-9, Nato Handbook on The Medical Aspects of NBC Defensive Operations Amedp-6(B) Ch. 7, Riot Control Agents, para. 701 (1996), available at: http://www.fas.org/nuke/guide/usa/doctrine/dod/fm8-9/toc.htm (last visited Nov. 5, 2005) ("Riot control agents are irritants characterised by a very low toxicity (chronic or acute) and a short duration of action. Little or no latent period occurs after exposure. Orthochlorobenzylidene malononitrile (CS) is the most commonly used irritant for riot control purposes. Chloracetophenone (CN) is also used in some countries for this purpose in spite of its higher toxicity. A newer agent is dibenzoxazepine (CR) with which there is little experience. Arsenical smokes (sternutators) have in the past been used on the battlefield. Apart from their lachrymatory action they also provoke other effects, e.g., bronchoconstriction and emesis and are sometimes referred to as vomiting agents".)

notable exceptions.[23] The United States took the view that the Gas Protocol did not apply to agents with temporary effects and used such agents during the Vietnam Conflict.[24] The United Kingdom clarified its position in 1970 to indicate "CS and other such gases accordingly as being outside the scope of the Geneva Protocol".[25]

The exception regarding the use of chemical agents for law enforcement purposes is reflected, perhaps too narrowly, in the Customary Law Study in Rule 75 which states "[t]he use of riot-control agents as a method of warfare is prohibited". It should be noted that under the Chemical Weapons Convention "law enforcement" is a broader concept than "riot control".[26] These provisions reflect State practice where certain chemical agents are used against citizens for law enforcement purposes, primarily as a less lethal alternative to using deadly force.[27] Not all such agents are used as "riot control agents" as chemical substances such as "pepper spray" may be used for self-defence and for subduing of violent suspects.[28]

[23] *Customary Law Study*, *supra* note 4, at 263-64 (The noted exceptions are Australia, Portugal and the United Kingdom).

[24] *Id.* For a detailed outline of the U.S. position regarding the 1925 Gas Protocol *see Annotated Supplement to the Naval Commander's Handbook on the Law of Naval Operations* 10-8 to 10-17 (1997), available at: http://www.nwc.navy.mil/ILD/Annotated%20Supplement%20to%20the%20Commander's%20Handbook.htm. [hereinafter: *Annotated Supplement to Naval Commander's Handbook*] (last visited Nov. 5, 2005).

[25] D. Carlton & N. Sims, "The CS Gas Controversy", [1971] *Survival* 333, *id.* quoting *Hansard (Commons),* Vol. 795, Ch. 17-18.Written answers: Feb. 1970. (The authors suggest "it may well be the British Government in 1969-1970 came to share [the US delegate's] opinion either as a result of the use of CS gas in Northern Ireland or as a result of contemplating how best to assist President Nixon…in seeking to persuade Congress to approve…the Geneva Protocol".) *Ibid.,* at 336-37.

[26] *See* D.P. Fidler, *Law Enforcement Under the Chemical Weapons Convention*, FAS Working Group on Biological and Chemical Weapons for the Open Forum on Challenges to the Chemical Weapons Ban, The Peace Palace, The Hague 5 (1 May 2002) available at: http://www.armscontrolcenter.org/cbw/papers/wg/wg_2002_law_enforcement.pdf (last visited Nov. 5, 2005) ("application of international law on treaty interpretation indicates that the definition of a RCA in Article 11.9(d) [of the 1993 Chemical Weapons Convention] does not limit the range of toxic chemicals that can be used for law enforcement purposes".)

[27] *See* "Protesters Battle Police at Summit of Americas", CNN, 20 Apr. 2001, available at: http://archives.cnn.com/2001/WORLD/americas/04/20/summit.americas.02/ (last visited Sep. 27, 2005) ("Riot police with helmets, batons and shields stood shoulder-to-shoulder trying to maintain their perimeter while demonstrators lobbed rocks, bottles and parts of the fence at the officers. Police answered with tear gas. Protesters picked up some of the tear gas canisters and tossed them back at police. The air soon grew hazy with the gas").

[28] *See* "The Effectiveness and Safety of Pepper Spray", U.S. Department of Justice, Office of Justice Programs, National Institute of Justice 1, 1 (Apr. 2003) available at:

In addition to riot control agents, chemical incapacitants can include malodorants[29] and calmatives.[30] The use of the latter led to tragic consequences during the 2002 Moscow Theatre hostage rescue operation when Russian security forces attempted to incapacitate Chechen terrorists with gas.[31]

B. Expanding Bullets

The second area where the law of armed conflict and law enforcement can interface is in respect to the prohibition against using "bullets which expand or flatten easily in the human body".[32] This prohibition is linked to the 1899 Hague Declaration, and Additional Protocol I, article 35(2) in that it is prohibited "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering". The use of bullets "which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions" is listed as a "war crime" in the 1998 Rome Statute of the International Criminal Court in respect of international armed conflicts.[33]

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www.ncjrs.org/pdffiles1/nij/195739.pdf (last visited Aug. 27, 2005) ("Pepper spray, or oleoresin capsicum (OC), is used by law enforcement and corrections agencies across the United States to help subdue and arrest dangerous, combative, violent, or uncooperative subjects in a wide variety of scenarios".)

29 *See* C.R. Coles, "Air-delivered Non-lethal Weapons and the RAAF Weapons Inventory", *Geddes Papers, Australian Command and Staff College* 70, 78 (2003) ("Commonly referred to as 'stink bombs' malodorants are derived from living organisms or toxins and produce a powerful smell which humans find repugnant. When applied can be used to disperse a crowd or deny an area to an adversary and quite clearly have potential application in all forms of military action including peacekeeping. The effects of exposure to malodorants can range from mild displeasure to gagging and vomiting".)

30 *Id.* ("Calmatives act much like sedatives they depress the central nervous system having a psychological effect in altering moods as well as a physiological effect by depressing the respiratory system. Calmatives have obvious applications against large bodies of people or against individuals who are either unmanageable or are dispersed among a group of civilians"). However, *see* S.V. Hart, "Less-Than-Lethal Weapons: Statement Before the Subcommittee on Aviation Committee on Transportation and Infrastructure U.S. House Of Representatives", National Institute of Justice (May 2, 2002) ,available at: http://www.ojp.usdoj.gov/nij/speeches/aviation.htm (last visited Nov. 6, 2005) (outlining the challenges of using calmatives in an aircraft high-jacking situation).

31 *See* Quenivet, *supra* note 1, at 31.

32 *See Customary Law Study*, *supra* note 4, at 268 ("Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited".)

33 *See* Rome Statute of the International Criminal Court, July 17, 1998, (37 *I.L.M.* 999 (1998)), Art. 8(2)(b)(xix) [hereinafter: ICC Statute].

The question of whether "expanding bullets" may be used in non-international armed conflict is a more interesting one. In respect of the Customary Law Study it is noted that the prohibition against the use of expanding bullets "in any armed conflict is set out in several military manuals"[34] and that "[n]o official contrary practice was found with respect to either international armed conflict or non-international armed conflict".[35]

Since Canada was one of the countries whose manual was identified as supporting this principle it is important to note that the Canadian manual approaches the application of the law of armed conflict to internal armed conflict situations in a much more nuanced fashion than the Customary Law Study appears to suggest. The Canadian manual does not make a broad statement suggesting that "expanding bullets" are prohibited as a matter of law in non-international armed conflict situations. *The Law of Armed Conflict at the Operational and Tactical Level*, does state that expanding bullets are prohibited weapons under the law of armed conflict.[36] However, the application of the law of armed conflict to non-international armed conflict is specifically discussed in terms of common Article 3 and Additional Protocol II. As the Canadian manual indicates "[t]oday a significant number of armed conflicts in which the CF may be involved are non-international in nature. As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations".[37]

This is not to suggest that expanding bullets are permitted as a means of warfare in non-international armed conflict. However, the rules of the law of armed conflict may have a far more nuanced application in complex security situations where a significant part of the duties of military forces may also

34 *Customary Law Study supra* note 4, at 270.

35 *Id.*

36 *See Canadian Forces Doctrine Manual: The Law of Armed Conflict at the Operational and Tactical Level*, B-GJ-005-104/FP-021 para. 510, at 5-2 (Aug. 13, 2001) available at: http://www.forces.gc.ca/jag/training/publications/loac_man_e.asp [hereinafter: *Operational and Tactical Level Manual*] ("bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions (that is, hollow point or "dum-dum" bullets)").

37 *See ibid.*, at 17-1, para. 1702. *See also* the *Code of Conduct for CF Personnel*, B-GG-005-027/AF-023, 1-2, at para. 10 available at: http://www.forces.gc.ca/jag/training/publications/code_of_conduct/Code_of_Conduct_e.pdf. [hereinafter: *Code of Conduct*]
("The Law of Armed Conflict applies when Canada is a party to any armed conflict. During peace support operations the spirit and principles of the Law of Armed Conflict apply. The CF will apply, as a minimum, the spirit and principles of the Law of Armed Conflict in all Canadian military operations other than Canadian domestic operations").

involve law enforcement and other public security duties. In this regard it must be noted that the Appeals Chamber in the *Tadic* decision warned that two limitations would apply to the application of humanitarian law rules to non-international armed conflict. Those limitations were "(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) 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".[38]

There is also a further indication that the broad extension of the law of armed conflict to non-international conflict found in the Customary Law Study may not fully reflect the contemporary consensus of States. In this respect unlike the provision making the use of expanding bullets a war crime during international armed conflict there is no similar provision in the ICC statute in respect of "conflicts not of an international character".[39] As with the use of chemical agents it is also notable that there is a "law enforcement" exception regarding the use of expanding bullets. While this exception is not written in any treaty it is specifically referred to in the Customary Law Study.[40] Unfortunately, in the Study it is phrased in terms of "several" States having decided to use such ammunition for domestic law enforcement purposes. There seems to be a significantly broader practice than this wording suggests extending even to the development of "frangible" ammunition. "Expanding" ammunition appears to be used by security forces in Canada, the United States and the United Kingdom primarily for reasons related to the ammunition being "less susceptible to ricochet and the concomitant creation of unintended collateral casualties".[41]

38 *See Tadic* (Appeals Chamber) (1995), *supra* note 10, at para. 126.

39 *See* ICC Statute, *supra* note 33, Art. 8(2)(d). *See also* Cassesse, *supra* note 16, at 152 ("The prohibited use of weapons in internal armed conflicts is not regarded as a war crime under the ICC statute").

40 *Customary Law Study*, *supra* note 4, at 270.

41 *See* "Rules of War and Arms Control, A Short History of SALW International and Domestic Constraints", 3n. 32 (Foreign Affairs Canada), available at: http://www.dfait-maeci.gc.ca/arms/Trends/section09-en.asp (last visited Nov. 5, 2005). *See also* D. Cracknell *et al.*, "The Web of Terror", *The Sunday Times* 12 (July 17, 2005) (where it is indicated the special Scotland Yard police unit, S019, tasked with stopping suicide bombers "use 'frangible' ammunition that releases all its energy in the targets body, instead of passing through it and endangering nearby civilians").

C. Law Enforcement Operations

It is these exceptions to the prohibitions of chemical agents and expanding bullets that raise some of the most significant challenges to the contemporary law of armed conflict. Both chemical agents and expanding bullets options are employed in law enforcement operations with humanitarian goals in mind. For chemical agents it is the opportunity to apply less lethal means. Regarding the use of expanding ammunition, sometimes, but far too inclusively, referred to as "hollow point" bullets, it is concerns over collateral damage and injury that favour their use. When these means are not allowed, particularly where armed conflicts and law enforcement responsibilities interface, a situation can be created where a less "humane" option is imposed on combatants. As a result uninvolved civilians may be exposed to greater risk of death or injury because of the application of rules that are approximately a century old in their genesis and which were designed specifically for State *versus* State conflict. The circumstances under which these moral and legal challenges arise are particularly evident is the complex operational environment of contemporary conflict. In that respect, the analysis will now turn to look at how modern conflict is impacting the application of normative regimes governing the use of these less lethal weapons.

III. "PAPER WORLDS" AND THE CATEGORIZATION OF CONFLICT

The application of the law of war is dependent upon the categorization of conflict. While Michael Walzer has noted "lawyers have created a paper world which fails at crucial points to correspond to the world the rest of us live in"[42] the establishment of law and order is ultimately dependent upon the drawing of jurisdictional lines. However, the determination of when and how the law of war applies is impacted by two often divergent perspectives.

One more traditional approach sees conflict divided into three formal categories of: international armed conflict, non-international armed conflict and "situations of internal disturbances and tensions".[43] International armed conflict is governed by the extensive treaty and customary law regime of the law of war while the last category is controlled by a law enforcement/human rights regime. The boundaries of each of these two categories are fairly well

[42] M. Walzer, *Just and Unjust Wars* xviii-xix (1977).

[43] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, Art. 1(2), 1125 *U.N.T.S.* 609 [hereinafter: AP II].

prescribed. International armed conflict is largely defined by inter-State conflict while non-international armed conflict is usually separated from normal law enforcement by the requirement for the armed conflict to be between "organized armed groups" controlling territory and exercising a semblance of governance. It should also be noted Additional Protocol I provides recognition that international armed conflict can occur between States and non-State actors.[44] However, there is a generally recognized view that most non-State groups will not be able to avail themselves of its provisions.[45]

Under a traditional interpretation of the law, the law of armed conflict operates during international armed conflict as a *lex specialis* to the exclusion of human rights norms.[46] Even though there is a growing body of case law and opinion that places the law of war in a more tightly woven relationship with human rights norms, even during international armed conflict,[47] in many instances this idea of overlap continues to be rejected particularly where it is suggested that human rights treaties have extra-territorial application.[48]

[44] L. Green, *The Contemporary Law of Armed Conflict* 55-56 (2nd ed., 1996) (where it is noted that "to some extent certain non-international conflicts have come under the aegis of international law since 1977 with the adoption of Article 1(4) of Protocol I and Protocol II additional to the 1949 Geneva Conventions . . . .").

[45] This can occur either because of the limited application of AP I to movements seeking "self-determination" or because of an inability of the national liberation movements to apply the provisions of the Protocol. For a discussion of the limitations of the application of AP I *see* T. Meron, "The Time Has Come for the United States to Ratify Geneva Protocol I", 88 *A.J.I.L.* 678, 682-85 (1994); and G.H. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions", 85 *A.J.I.L.* 1, 4–7 (1991). The responsibility of non-state actors to apply the law are discussed in H.-P. Gasser, "Acts of Terror, 'Terrorism' and International Humanitarian Law", [2002] *Int'l Rev. Red Cross* 547, 563. *See also* K. Suter, *An International Law of Guerrilla Warfare: The Global Politics of Law-Making* 167 (1984) ("Guerrillas, by contrast, would find it much harder if not impossible, to implement these provisions").

[46] I.C.J., Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, [1996] *I.C.J. Rep.* 226 (July 8).

[47] I.C.J., Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 41-42 (July 2004) available at: http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm ("there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law").

[48] M.J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", 99 *A.J.I.L.* 119, 141 (2005).

Finally, in respect of non-international armed conflict it is the provisions of common Article 3 to the 1949 Geneva Conventions[49] and Additional Protocol II[50] which are applied. The scope of internal armed conflict can be quite broad ranging from civil war to conflict just outside the scope of purely criminal activity.[51] A particular challenge has been identifying the limits to the application of common Article 3 which does not have the territorial control; organized armed forces with a responsible command; or "sustained and concerted military operations" criteria of Additional Protocol II.[52] While neither of these law of armed conflict codifications provides as extensive a list of legal provisions as the law applicable to inter-State conflict they inject basic standards of humanity into conflicts where States still view their non-State opponents as "criminals".[53]

The second perspective on the application of the law of war appears to be neither as definitive nor exclusionary as the first, more formal, model. Here, as is reflected in the more general wording of common Article 3 to the 1949 Geneva Conventions, the dividing lines between the categories of armed conflict are less well defined. Particularly, among humanitarian and human rights groups there is a reluctance to clearly identify when common Article 3 applies either by associating it with Additional Protocol II, or definitively outlining how it interfaces with the lower standard of "internal disturbances and tensions".[54] It is these groups which have also pressed to have

[49] The four 1949 Geneva Conventions are: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 *U.N.T.S.* 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 *U.N.T.S.* 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135 [hereinafter: Prisoner of War Convention-GC III]; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 *U.N.T.S.* [hereinafter: Civilian Convention-GC IV].

[50] *Supra* note 42.

[51] AP II, *supra* note 43, Art. 1(2).

[52] *Id.* (For example, AP II does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature".)

[53] *See* W.A. Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice", 33 *Am. U. L. Rev.* 53, 58-59 (1983); and R.K. Goldman & B.D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law", *The American Society of International Law Task Force on Terrorism* 5-6, at:
http://www.asil.org/taskforce/goldman.pdf (last visited Nov. 5, 2005).

[54] In Case 11.137, Juan Carlos Abella v. Argentina, 1997, *Inter-Am. Y.B. Hum. Rts.* 602, 681–84, at paras. 152–53 (Commission report) (the line separating an especially violent incident of internal disturbances from the application of international humanitarian law principles "may sometimes be blurred and, thus, not easily determined").

international human rights standards apply concurrently with the law of armed conflict. In addition, the existence of an armed conflict can be viewed as having a quite limited temporal existence. For example, in *Juan Carlos Abella v. Argentina*, the Inter-American Commission on Human Rights appeared to view the "armed conflict", the retaking of a military barracks from rebels, as being limited in time to the actual operation.[55]

This second, less well-defined, delineation of armed conflict has been significantly influenced in the post Cold War construct of armed conflict. The breakup of Yugoslavia forced the ICTY to address the interface between international and non-international armed conflict resulting in a ruling in the *Tadic* case that the law of armed conflict applied to non-international conflicts.[56] The impetus for this change was a shift from a sovereignty based approach to one placing emphasis on "human beings".[57]

The reality is that some aspects of contemporary armed conflict have changed. The events of 9/11 have highlighted the often complex interface between armed conflict and normal policing. The categorization of the post 9/11 events included assessments that the conflict was international, non-international or internationalized non-international armed conflict.[58] Another category known as "transnational armed conflict" has been suggested primarily, it would appear, to avoid admitting international armed conflict can occur between States and non-State actors.[59] Some scholars have seen the attacks as only being amenable to a law enforcement response.[60] However, it is possible to conclude that "[i]n many respects, global terrorism seems to straddle the law enforcement and armed conflict paradigms. Engagement in criminal activity by terrorist groups, warlords, and other non-

55 *Id.*

56 *Tadic*, *supra* note 10, at paras. 96-127.

57 *Ibid.,* at para. 97 ("A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned").

58 Watkin, *supra* note 1, at 3-4.

59 *See* Rona*, supra* note 1, at 58; Pfanner, *supra* note 1, at 154-56.

60 A. Dworkin, "Revising the Law of War to Account for Terrorism: The Case Against Updating the Geneva Conventions, on the Ground That Changes Are Likely Only to Damage Human Rights, Findlaw's Writ: Commentary" (Feb. 4, 2003), at: http://writ.news.findlaw.com/commentary/20030204_dworkin.html (last visited Nov. 5, 2005); and L.N. Sadat, "Terrorism and the Rule of Law", 3 *Wash. U. Global Studies L. Rev.* 135, 136 (2004).

state actors to finance their operations adds significantly to the perception of an overlap between law enforcement and the conduct of hostilities".[61]

The current emphasis on extending the laws of armed conflict to non-international armed conflict, while seeking to expand the application of human rights norms, sets the scene for a conflict of normative regimes. This could have significant and quite unintended results in the effort to expand humanitarian and human rights protection. The extension of the law of armed conflict not only brings with it a legal regime designed to protect uninvolved civilians, it also expands on the level of violence that can be used by the State to counter an insurgency threat. At the same time the interface with the human rights based regime extends the potential for the application of chemical agents and expanding bullets in the context of law enforcement.

Perhaps the most graphic example of this potential blurring of law of armed conflict and human rights norms can be found in the United Nations Secretary-General's Bulletin *Observance by United Nations Forces of International Humanitarian Law*.[62] The Bulletin states that the "fundamental principles and rules of international humanitarian law" are applicable in situations of armed conflict, which are stated to include "enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence".[63] It appears that the use of force during a United Nations operation, even in self-defence, is equated to "combat". However, it is not clear that would always be the case, nor is it evident that the level of violence confronted during a peace support operation would necessarily rise to that of an armed conflict.

While the use of "weapons or methods of combat of a nature to cause unnecessary suffering" is prohibited under the Secretary-General's Bulletin it is equally evident that the use of riot-control agents for law enforcement purposes is contemplated during United Nations operations. A 2002 CBW Conventions Bulletin, "Law Enforcement" and the CWC,[64] recognizes law enforcement under the Chemical Weapons Convention would include United Nations operations. These law enforcement operations are defined as actions within the scope of a nation's jurisdiction to enforce its national laws and as authorized by the United Nations. In respect of "actions are taken in the context of law enforcement or riot control functions under the authority of the United Nations, they must be specifically authorized by that

61 *See* Watkin, *supra* note 1, at 5.

62 38 *I.L.M.* 1656 (1999).

63 *Ibid.,* at Sec. 1.

64 "Law Enforcement and the CWC, 58 The CBW Conventions Bulletin: News, Background and Comment on Chemical and Biological Weapons Issues", *Q.J. Harv. & Sussex Program on CBW Armament and Arms Limitation* 1 (Dec. 2002).

organization. No act is one of 'law enforcement' if it otherwise would be prohibited as a 'method of warfare'…".[65]

Similarly, another analysis has concluded "peacekeeping operations authorized by the receiving state, including peacekeeping operations pursuant to Chapter VI of the UN Charter; and…peacekeeping operations where force is authorized by the UN Security Council under Chapter VII of the UN Charter…" as operations falling within the context of "law enforcement".[66] This very broad concept of law enforcement increases the likelihood of an awkward interface between the two normative regimes governing the use of chemical agents.

IV. OPERATING IN THE "GRAY ZONE"

Having established the increasing overlap and sometimes unclear interface between normative regimes the questions remains as to how the different norms governing the use of riot control agents and expanding bullets are applied in practice. The answer in part can be found in the reality that operating in an operational "gray zone" has long been a part of military operations.

However, it should be noted that the problem of viewing armed conflict as being limited to inter-State conflict is not unique to the legal community. Military forces themselves often look at "war" primarily through the lens of conventional combat between the armed forces of nation States. Preference for "traditional" armed conflict impacts on doctrine, equipment acquisition, training and ultimately the capabilities of the armed forces. Generally, less time is spent on "low intensity conflict" and the range of operations which require consideration of law enforcement activities.

However, "warfare" has always included a range of conflict significantly broader than battles between the armed forces of a State. Such conflict has been termed, somewhat inaccurately, as "small wars" since they are not necessarily "small" in scope.[67] As Max Boot has stated "[t]hese days social

65 *Ibid.,* at 1, quoting a March 1997 issue of the Bulletin.

66 *See* Fidler, *supra* note 26, at 14-15. *See also* B.H. Rosenberg, "Riot Control Agents and the Chemical Weapons Convention", FAS Working Group on Biological and Chemical Weapons For the Open Forum on Challenges to the Chemical Weapons Ban The Peace Palace, The Hague 3 (1 May 2003) available at: http://www.armscontrolcenter.org/cbw/papers/wg/wg_2003_riot_control_agents.pdf (last visited Nov. 2, 2005).

67 M. Boot, *The Savage Wars of Peace: Small Wars and the Rise of American Power* xvi (2002). Boot categorizes the Vietnam Conflict as a "small" war because of the tactics used rather than the scale of the conflict. *See also Small Wars Manual, United States Marine Corps* (1940).

scientists and soldiers usually call them either 'low intensity conflicts' or – a related category – 'military operations other than war'".[68] In nineteenth century terms they were identified as "campaigns undertaken to suppress rebellions and guerrilla warfare in all parts of the world where organized armies are struggling against opponents who will not meet them in the open field".[69] In those campaigns beating a hostile army is not necessarily the main object. They may involve the subjugation of insurrection, the repression of lawlessness or the pacification of territory. These operations "involve[d] struggles against guerrillas and banditti".[70] While 19th century warfare was not necessarily sensitive to issues of "law" it is clear that governance and "law enforcement" type activities have been an integral part of operations at this end of the conflict spectrum.

The military involvement in law enforcement includes operations in times of occupation, non-international armed conflict and the campaign against terrorism. Further, a broad range of peace support operations can be added to this list. Such operations may not be dependent upon traditional sources of authorization such as a United Nations Security Council resolution, but could also involve a request from the governing authority of the territory involved. The military involvement can arise in a number of ways. The absence of police and other security forces in failed and failing States or the responsibility to govern occupied territory can result in the military performing a law enforcement role.[71] Even where local security forces exist operations may be conducted in support of those forces in order to mentor or augment their capability. Such operations are evident in Afghanistan and Iraq.[72] In addition, law enforcement and military forces may conduct joint

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Small wars vary in degrees from simple demonstrative operations to military intervention in the fullest sense, short of war. They are not limited in their size, in the extent of their theater of operations nor their cost in property, money, or lives. The essence of a small war is its purpose and the circumstances surrounding its inception and conduct, the character of either one or all of the opposing forces, and the nature of the operations themselves … . The ordinary expedition of the Marine Corps which does not involve a major effort in regular warfare against a first-rate power' may be termed a small war.

68 *See* Boot, *supra* note 67, at xiv.

69 *See* C.E. Caldwell, *Small Wars: Their Principles and Practice* 21 (3rd ed., 1996) (1906).

70 *Ibid.,* at 42.

71 As is set out in the 1907 Hague Land Warfare Regulations an Occupying Power has the responsibility to "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". *See also* GC IV, *supra* note 49, Art. 64 regarding the obligation of an Occupying Power "to maintain the orderly government of the territory".

72 As is set out in UN S.C. Res. 1386 (2001) the mandate for the International Security Assistance Forces (ISAF) broadly involves providing assistance to Afghan security forces in the maintenance of security:

operations where the threat is one like global terrorism which contains elements of both criminal activity and armed conflict.[73]

The new complex operational environment is perhaps best articulated in the United States Marine Corps doctrine of the "three block war".[74] This doctrine has been integrated into Canada's 2005 International Policy Statement and has been described as "[o]ur military could be engaged in combat against well-armed militia in one city block, stabilization operations in the next block, and humanitarian relief and reconstruction two blocks over".[75] The doctrine recognizes the significant potential for military forces to be engaged in combat with armed groups while at the same time potentially being confronted with interfacing and controlling civilian populations. The latter responsibility can quickly take on the attributes of a policing function. Finally, military involvement in law enforcement is not restricted to international operations. Many nations regularly use military forces in a domestic law enforcement role including participation in hostage rescue.[76]

The interface with law enforcement means that military forces may themselves be conducting law enforcement operations; or may be conducting operations with security forces performing that function. This could mean participation in joint patrols with local security forces in a policing role under circumstances where the military and police forces both become involved in an engagement with organized insurgents.[77] The question

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> The establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment.

Such a mandate can entail assisting police forces, training security forces and potentially participation in armed conflict with armed groups such as the Taliban and Al Qaeda threatening the Afghan governing authority.

73 *See* G.L. Neuman, "Comment, Counter-terrorist Operations and the Rule of Law", 15 *E. J.I.L.* 1019, 1019-20 (2004).

74 C.C. Krulak, "The Strategic Corporal: Leadership in the Three Block War", *Marines: Official Magazine of the Marine Corps* (Jan. 1999) available at: http://www.usmc.mil/marinesmagazine/pdf.nsf/8e8afdade19e000c852565e700807312/ba6c7b077948be1b852566e800538752/$FILE/jan99.pdf (last visited Nov. 5, 2005).

75 A Role of Pride and Influence in the World, 11 (Apr. 2005) available at: http://www.dfait-maeci.gc.ca/cip-pic/IPS/IPS-Overview.pdf.

76 *See* Watkin, *supra* note 1, at 14.

77 *See* K. Watkin, "Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy", 2 *Occasional Paper Serie*s 66 (Program on Humanitarian Policy and Conflict Research Harvard University, Winter 2005) available at: http://www.hsph.harvard.edu/hpcr/OccasionalPaper2.pdf

immediately arises as to whether those security forces should be barred from carrying riot control or other chemical agents because of the potential to be engaged in armed conflict with insurgents. In this regard it has been suggested the use of such agents would be permissible as part of law enforcement operations of an occupying power or in "non-traditional military operations such as peacekeeping operations, recognized as legitimate under international law".[78] It has also been acknowledged that "non-traditional military operations" may also apply to non-combatant evacuation and rescue missions.[79]

The question of whether riot control agents or "expanding bullets" should be applied in military operations is not limited to operations normally associated with "law enforcement." For example, cramped confined spaces on merchant vessels and the crewing of those vessels by diverse multi-national crews provides ample practical reason to seek out less-lethal means to detain or act in self-defence while conducting visit and search or maritime interdiction operations.[80] The latter operations are normally authorized pursuant to a UN Security Council resolution. However, a strong argument can also be made that less-lethal law enforcement tools should be equally applicable to law of armed conflict based visit and search operations when it is not anticipated that there would be a confrontation with enemy forces.

Similarly, expanding bullets are the ammunition of choice for hostage rescue units in many States. At the same time kidnapping, both criminal and

("Both military forces and their traditional law enforcement counterparts may be confronted with threats that range from violence associated with normal criminal activity to military type attacks under circumstances where it could be difficult to distinguish initially the nature or scope of the threat. In each of these situations, internal order may be maintained by a combination of military and police forces engaged primarily, but not exclusively, in law enforcement against 'criminal' activity".)

78 *See also* Fidler, *supra* note 26, at 14. *See also* Rosenberg, *supra* note 66, at 3.

79 *See* Fidler, *supra* note 26, at 14, n. 7.

80 *See* "Frangible Ammunition", Global Security.org, available at: http://www.globalsecurity.org/military/systems/munitions/frangible.htm (last visited Nov. 5, 2005) ("Concerns with over penetration / ricochet hazards aboard aircraft, ships and (e. g.) nuclear power plants that might release hazardous materials have led to efforts to provide small caliber ammunition with reduced ricochet, limited penetration (RRLP) for use by SOF to reduce risk to friendly forces and innocent persons. There are three general levels of frangible: Training [may be used for training only]; reduced ricochet, limited penetration [RRLP, designed for purposes stated]; and general purpose frangible [though no military requirement has been established for a general purpose round for use by conventional forces]. Specific ammunition must undergo wound ballistics testing/ legal review once developed. It can be used for: Close Quarter Battle (CQB); Military operation in Urban Terrain (MOUT); Visit Board Search and Seizure; and Counter-Narcotics (CN) Operation".)

insurgent based, appears common in many failed or re-building States.[81] It raises interesting moral issues to suggest the civilians of a State such as Afghanistan or Iraq should be exposed to greater risk of injury in a law enforcement operation because there also happens to be an armed conflict occurring in parts of the nation with insurgent forces. All of this points to a broader use of riot control agents and potentially "expanding" bullets than the concept of law enforcement might ordinarily imply.

V. STATE PRACTICE

While many States and their legal advisors acknowledge the delineation of conflict into the various traditional categories there is at some point a requirement to set out the legal framework to be used for operations in the "gray zone". The solution to this challenge is reflected in the approaches already referred to in the Canadian manual and the United Nations Secretary General's Bulletin. The law of armed conflict is applied as a matter of policy in situations where it technically may not apply as a matter of law. The United States approach is articulated as all heads of Department of Defense Components being required to "[e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations".[82]

In practical terms States approach the use of law enforcement tools such as chemical agents and expanding bullets in different ways. The United States permits the use of riot control agents in a variety of circumstances both during armed conflict and lower intensity peace support operations. That policy is set out in Executive Order 11850 and allows their use in defensive military modes to save lives. Since RCAs in this capacity are not being used against combatants, they are not being used as a "method of

[81] For example *see* "Militants Extend Afghanistan Hostages Deadline", Associated Press, *Guardian Unlimited*, 1 Nov. 2004, available at: http://www.guardian.co.uk/afghanistan/story/0,1284,1340957,00.html and "Iraq: Violence Must Stop - Rule Of Law Must Prevail", Amnesty International, News Amnesty (July 30, 2004) http://news.amnesty.org/pages/iraq_press ("Amnesty International condemns the use of civilians as bargaining chips in the continuing political instability in Iraq. … Armed groups must set free all hostages they are detaining and refrain from kidnapping people or attack civilians") (both last visited August 28, 2005).

[82] *See* DoD Law of War Program, Department of Defense Directive, No. 5100.77 4, at para. 5.3.1 (Dec. 9, 1998) available at: http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (last visited Aug. 28, 2005).

warfare".[83] Authorized use includes the following situations: controlling riots in areas under United States military control; the rioting of prisoners of war; escaping prisoners of war in remotely controlled areas; dispersing civilians when they are used to mask an attack; rescue missions for downed pilots; and for police actions in rear areas.[84] The United States military has used both rubber bullets and tear gas in dealing with violent detainee disturbances in Iraq.[85] The United States Navy Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, notes that the United States prohibits the use of riot control agents as a form of warfare in both international and internal armed conflicts, however, it goes on to state "that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts".[86]

Australian air force doctrine outlines a non-exhaustive list where riot control agents can be used. These situations include: rioting prisoners of war; rescue missions involving downed aircrew or escaped prisoners of war; the protection of supply depots, military convoys and rear echelon areas from civil disturbances and terrorist activities; civil disturbance when acting in aid to the civil power; and during humanitarian evacuations involving Australian or foreign nations.[87] Under Canadian doctrine "the use of CS gas or pepper spray is lawful and may be used for crowd control purposes, but

[83] *See Legal Lessons Learned From Afghanistan and Iraq*: *Vol. I Major Combat Operations* (11 Sept. 2001 to 1 May 2003), Center for Law and Military Operations App. A-6, at 297 (1 Aug. 2004), available at: https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/(JAGCNetDocID)/399A488BDCB4F6BB85256F3C0065B445/$FILE/OEF%20OIF%20Volume%20I.pdf (last visited Nov. 5, 2005) [hereinafter: *Lessons Learned*].
See also Annotated Supplement to Naval Commander's Handbook, *supra* note 24, at 10-17 n. 39 (where it is indicated that the United States Senate Resolution of Ratification for the 1993 Chemical Weapons Convention required that "[t]he President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11.850 of Apr. 8, 1975").

[84] *See Lessons Learned*, *supra* note 83, at 297-98.

[85] *See* S. Fainaru & A. Shadid, "In Iraq Jail, Resistance Goes Underground", *Washington Post Foreign Service*, Aug. 24, 2005, at A01 ("The Americans fired back with rubber bullets and tear gas but failed to slow the projectiles cascading from the courtyard".)

[86] *See Annotated Supplement to Naval Commander's Handbook*, *supra* note 24, at 10-15 to 10-16.

[87] *See* "Fundamental of Australian Airpower", *Royal Australian Air Force* 76-77 (4th ed., 2002), at: http://www.raaf.gov.au/airpower/publications/doctrine/aap1003/highres/Ch_9.pdf (last visited Nov. 5, 2005).

their use as a means of warfare is illegal".[88] The United Kingdom, at least in respect of operations in Iraq, appears to have placed a total ban on the use of riot control agents in armed conflict. Defence Minister Hoon was reported to have stated that RCAs "would not be used by the United Kingdom in any military operations or on any battlefield".[89] However, riot control agents appear to be permitted for riot control.[90]

The use of riot control agents in situations involving civilians used to mask or screen attacks; for rescue missions of down aircrew; and to capture escaping prisoners of war has been criticized.[91] However, there has also been an acknowledgment that an "argument can be made that use of an RCA against an escaping prisoner of war in an isolated area might be legitimate …".[92] This concession would not be extended to the use of chemical agents against enemy combatants seeking to capture a downed pilot because such use "more resembles a method of warfare than a law enforcement purpose".[93]

However, this viewpoint appears to assume such use would only be directed towards "enemy combatants". Regarding the rescue of downed aircrew it does not take into account the use of riot control agents to ensure local civilians do not attempt to attack the aircrew. If civilians were to attempt to capture and kill that aircrew those civilians might be considered to be taking a direct part of hostilities and therefore be liable to attack.[94] In any event civilians capturing and causing the death or injury of downed aircrew would be the commission of a criminal act.[95]

Denying the ability to use riot control agents in such circumstances could be seen as an overly formalistic approach to a difficult moral situation. It would indeed be incongruous to end up with a "humanitarian" interpretation that those threatening to attack down aircrew would have to be subjected to deadly force when military personnel would prefer to use riot control agents to spare the civilians.

88 *Code of Conduct*, *supra* note 37, at 2-4, para. 9.

89 *See Lessons Learned*, *supra* note 83, at 116, n. 31.

90 *See* Rosenberg, *supra* note 66, at 3. ["The UK Ministry of Defence recently encapsulated a clear understanding of the CWC regarding the use of RCA, as follows: RCA 'are permitted for dealing with riot control', but the CWC precludes the use of chemicals, including RCA, in [other] 'military operations or on any battlefield'" (G. Hoon, Press Conference, 27 March 2003)].

91 *See* Fidler, *supra* note 26, at 15-16.

92 *Ibid.,* at 15.

93 *Id.*

94 AP I, *supra* note 4, Art. 50(3).

95 *See* Y. Dinstein, "The Distinction Between Unlawful Combatants and War Criminal", *International Law at a Time of Perplexity* 111 (Y. Dinstein & M. Tabory eds., 1989).

Similarly, contemplating the use of riot control agents in situations where civilians are being used as human shields places military personnel in an extremely difficult moral and legal situation. Such chemical agents are not to be used as a "method of warfare", but they may offer the only viable alternative to killing innocent women and children. Interestingly, it has been suggested that riot control agents might be appropriate in some crowd situations during ongoing armed conflict. During an incident in Fallujah, Iraq on April 30, 2003 United States military personnel fired on a crowd of demonstrators from which they believed insurgents were engaging them. This incident attracted the criticism of Human Rights Watch.[96] That NGO noted that the troops "had no tear gas or other forms of non-lethal crowd control"[97] and among the recommendations was that "U.S. troops in Iraq be equipped with adequate crowd control devices to avoid a resort to lethal force".[98]

A recommendation that law enforcement means be used against rioting civilians is an appropriate one in most circumstances. However, the challenge is applying it during an armed conflict with an on-going insurgency when armed members of armed opposition groups may be in the crowd. In that circumstance "the separation between a law enforcement role and operations in armed conflict may not lend itself to being neatly drawn as the occupying power struggles to bring order out of chaos".[99] However, to the extent the use of riot control means provides a viable alternative in situations like those presented in Fallujah it becomes difficult to argue they should also not be applied to limit casualties to human shields being set up by similar armed groups.

Similar challenges arise in respect of military operations in failed or failing States where it may not be possible to easily separate the civilians from the opposing forces, or those forces from ordinary criminals. Here it may be helpful to consider the reason why the ban on the use of riot control agents as a means of warfare was imposed, namely, to avoid a misunderstanding as to whether a Party to the conflict is being attacked by chemical weapons.[100] If, however, that rationale does not apply to the

96 "Violent Response: The U.S. Army In Al-Falluja", 15 *Human Rights Watch,* Iraq, No. 7 (E), June 2003, available at: http://www.hrw.org/reports/2003/iraqfalluja/ (last visited Nov. 5, 2005).

97 *Ibid.,* at 1.

98 *Ibid.,* at 3. *See also* Fidler, *supra* note 26, at 13-14 (where an interpretation of "law enforcement" is provided that supports some of the circumstances in which the United States has indicated RCAs could be used: "in rear echelon areas outside the zone of immediate combat to secure convoys from civil disturbances").

99 Watkin, *supra* note 1, at 32.

100 *See Customary Law Study*, *supra* note 4, at 265.

operational situation and the use of riot control agents involving civilians more closely approximates situations of domestic law enforcement it would be much more difficult to suggest the use of riot control agents does not provide an appropriate response. Further, the opportunity for misunderstanding could be reduced by the use of an information operations campaign explaining the circumstances under which such chemical agents are going to be used for riot control or other forms of law enforcement. Of course many of these situations will be fact dependant. However, the challenge is to ensure rules are not applied overly formally at the expense of employing more humane options.

Regarding the use of "expanding bullets" there appears to have been less overt reference to State practice. Identifying a consistent interpretation of the test for what constitutes "unnecessary suffering" and "superfluous injury" is itself problematic. One approach has been to see the terms as synonymous,[101] while others have viewed the expression to cover "both measurable – objective (mostly physical) injury and subjective – psychological suffering and pain".[102] In addition, as Yoram Dinstein has noted "[s]ome scholars speak about proportionality between injury or suffering and the military advantage anticipated" although he is not in agreement with that approach.[103] This lack of consensus nearly 140 years after the development of the 1868 St. Peter's Declaration highlights the challenges in applying this area of law.

The Customary Law Study does indicate that the prohibition on the use of expanding bullets is set forth in numerous military Manuals and states that "no State has asserted that it would be lawful to use such ammunition".[104] However, it also indicates the United States has taken an "ambiguous" position regarding the use of expanding ammunition "if there is 'a clear showing of military necessity for its use'".[105] The Study reaches a similar conclusion regarding non-international armed conflict.[106] However, the Study deals only tentatively with the question of the use of expanding bullets for law enforcement and relies heavily on references to domestic law enforcement. It is here that the issue of State practice needs to be further explored. It is likely more than the "several States" alluded to in the Study

[101] *Sniper Use of Open-Tip Ammunition,* Memorandum for Commander, United States Army Special Operations Command 3, at para. 3 (12 Oct. 1990) ("In some law of war treatises, the term 'unnecessary suffering' is used rather than 'superfluous injury'. The terms are regarded as synonymous".) (On file with the author).

[102] *See* Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 59 (Cambridge University Press, 2004).

[103] *Id.*

[104] *See Customary Law Study*, *supra* note 4, at 269.

[105] *Id*.

[106] *Ibid.,* at 270.

which permit the use of expanding bullets for law enforcement purposes. It is a common practice in North America.

The Study describes the two most common reasons for using such ammunition in a domestic law enforcement context: avoiding over penetration and the stopping power of such ammunition. Then in a somewhat ambiguous fashion of its own the Study notes "expanding bullets commonly used by police in situations other than armed conflict are fired from a pistol and therefore deposit much less energy than a normal rifle bullet, or a rifle bullet with expands or flattens easily".[107] It could be argued that this statement is problematic for those supporting a complete ban on hollow point ammunition. If the effect of hollow point or expanding bullets fired by a pistol has a less damaging effect than a normal rifle bullet an argument might be made that the ammunition causes neither unnecessary suffering nor superfluous injury. If that is the case then it would be difficult to see why it should not be permitted in armed conflict situations as well. However, it is not apparent this was the intention of the authors of the Study.

A more fundamental question is why ammunition that is viewed as causing unacceptable injury and suffering under international law is viewed as lawful under human rights based law enforcement regime governing domestic law enforcement. This issue becomes even more complex when the humanitarian factor of limiting collateral damage to uninvolved civilians, including those of the opposing State, through the use of "hollow point" ammunition is considered. For example, in the same way that "law enforcement" has been interpreted to permit the use of riot control agents during many international operations a convincing argument can be made that "expanding" ammunition would also be permitted under that exception.[108]

VI. CONCLUSION

In respect of the use of chemical agents and expanding bullets the increasing influence that human rights norms are having on both military operations and the law of armed conflict may very well require a re-assessment of long held beliefs regarding the use of law enforcement means during armed conflict. In many respects the spotlight turned on the "law enforcement" role performed by States in complex security environments is already having that

[107] *Id.*

[108] *See Annotated Supplement to Naval Commander's Handbook*, *supra* note 24, at 9-3, n. 7 (where it is noted the United States practice is to apply hollow-point ammunition in peacetime counter terrorist and special security missions).

effect although it is a role that has long been performed by military forces on international operations.

On a practical level many military lawyers advising commanders are placed in an awkward situation of explaining why riot control agents or expanding bullets can be used domestically (*i.e.*, against your own citizens) and even internationally in a law enforcement role, but cannot be used against an enemy. This is a discussion that becomes even more challenging as military forces are forced to confront the reality of conducting operations in "three block wars" or performing law enforcement duties in failed or failing States.

It is not suggested that the long held and important prohibitions under the law of armed conflict with respect to the use of riot control agents as a "method of warfare" or using "expanding bullets" be removed. However, there is considerable merit to the argument that the underlying rationale for these prohibitions created more than a century ago be critically analyzed. The interpretation of how the customary law of armed conflict applies to complex security situations requires careful consideration of the more flexible application of law traditionally applied by many States. The law of armed conflict has not been rigidly or formally applied to those situations, but rather the "spirit and principles" of those laws have been followed. Given the continuing complexity of 21st century conflict the need to be flexible and search out humane approaches to applying force remains an important goal.

The extension of law of armed conflict norms to internal conflicts highlights the need for a flexible approach. As Lindsay Moir has noted many States that would be "happy to see an increase in the level of humanitarian protection and regulation for internal conflicts are unlikely to agree to the wholesale adoption in such cases of the rules for international armed conflicts. There remains a broad acceptance throughout the international community that internal and international armed conflicts are fundamentally different in character".[109] A similar challenge arises in attempting to apply law of armed conflict rules to other complex security situations such as occupation and the war on terror.

In the words of Thomas Franck "[t]here has always been a large measure of agreement that terrorism poses a new challenge to the rule of law. Now that it seems clear that the rule of law – in both its domestic and its international configurations – still applies, the next task is to make it more responsive to the onerous new circumstances in which it must operate".[110]

[109] Moir, *supra* note 10, at 128.

[110] T.M. Franck, "Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror", 98 *A.J.I.L.* 686, 688 (2004).

This ultimately will require all the parties who have an interest in the law of armed conflict, or international humanitarian law; however it is termed, to re-think some long held views on the conduct of operations particularly when military forces are required to also perform law enforcement functions. Included among the areas for analysis should be the use of less-lethal means such as chemical agents and "expanding" bullets in order to ensure that protection of uninvolved civilians and other non-combatants is not unduly handcuffed by rules designed for large scale inter-State conflict.

A COMPARISON BETWEEN THE SAN REMO MANUAL AND THE U.S. NAVY'S COMMANDER'S HANDBOOK

By Jane Gilliland Dalton[*]

The 1995 San Remo Manual[1] is the outstanding result of much hard work and dedicated effort on the part of a very distinguished group of legal and naval experts over a 6-year period. Even though it has been 10 years since the Manual was published, the Institute of International Humanitarian Law and the numerous scholars and naval experts who produced the Manual are to be commended. It is an excellent resource to which scholars and practitioners around the world refer for an in-depth understanding of the legal issues surrounding naval armed conflict. Accordingly, the comments in this paper, though they may be critical of some aspects of the Manual, do not in any way derogate from the dedication and scholarly analysis of those who worked so hard to create it.

This paper, of necessity, reflects current thinking in the aftermath of the terrorist attacks of 11 September 2001. Issues that one might have been inclined to gloss over or seek to reconcile in a non-controversial way have taken on greater clarity and focus since that horrific day. Neither the drafters of the San Remo Manual, nor the U.S. Navy editors of the Commander's Handbook,[2] had the perspective of those terrorist attacks and the ensuing legal issues – such as the status of detainees in the Global War on Terrorism; the application of the law of armed conflict to terrorists and terrorist attacks; the close scrutiny that is applied to claims of customary international law;

* Prof. Dalton is the Charles H. Stockton Professor of International Law at the United States Naval War College (Newport, Rhode Island). This paper is based on her remarks for the panel on the San Remo Manual at the Institute of International Humanitarian Law Conference in San Remo, Italy, 8 Sept. 2005. The author greatly appreciates the assistance provided by Mr. J. Baggett and the International and Operational Law Division (Code 10) of the Office of the Judge Advocate General of the Navy, and CAPT S.P. Malcolm, JAGC, USN, in conducting research and preparing the remarks which formed the basis for this paper. The views expressed herein are those of the author and are not necessarily those of the Naval War College, the United States Navy, or the Department of Defense.

1 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck ed., 1995); hereinafter: *San Remo Manual*.

2 The Commander's Handbook is printed in full in the *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 *Int'l L. Studies* 296 (U.S. Naval War College, A.R. Thomas & J.C. Duncan, eds., 1999); hereinafter: *Annotated Supplement*.

and the U.S. Navy's transformation from blue water to littoral operations and its future plans for sea basing.[3]

Accordingly, this paper will briefly address four issues of importance that become evident as one compares the San Remo Manual with the Commander's Handbook.

The first topic is the different approach the two publications take to the determination of what constitutes customary international law. The American Law Institute's 1986 Restatement of the Law, Third, on Foreign Relations Law provides that customary international law results from a "general and consistent practice of states" followed by them from "a sense of legal obligation" (or *opinio juris sive necessitatis*).[4] The Comments to the Restatement explain that the practice should reflect wide acceptance among the "states particularly involved in the relevant activity". Further, a practice that is generally followed but which States feel "legally free to disregard" does not contribute to customary law.[5]

For example, the United States has an active program to assert objections to the excessive maritime claims of other nations[6] – such as a nation that claims a 200NM territorial sea, or a nation that purports to require advance notification for the innocent passage of warships. Known as the Freedom of Navigation Program, it consists of two parts: (1) operational assertions which challenge the excessive claims, accompanied by (2) official *demarches* to the offending governments in which the United States explains

3 Sea basing is the U.S. Navy's answer to the concern that access to bases in foreign territory will be less predictable and more *ad hoc* than in the past. The sea base is envisioned as a system of systems – a flotilla of ships that serves as a staging and sustainment area for ground forces to launch ashore. The sea base may be used to launch forces in an attack during an international armed conflict, for non-combatant evacuation operations in a non-permissive environment, or to provide humanitarian support in response to a natural disaster. Though the details of the sea base are not fully formed, it will probably consist of a network of ships of various types including cargo ships, oilers, destroyers, cruisers, amphibious ships, aircraft carriers and submarines, depending on the mission assigned at any given time. For additional information on the sea base, *see* "Sea Basing: The Navy's New Way to Fight", *Virginian Pilot*, 8 March 2005; D. Eisman, "Will 'Sea Base' Idea Float?", *id.*; U.S. Congress, *The Future of the Navy's Amphibious and Maritime Prepositioning Forces* (Washington, D.C., Congressional Budget Office, Nov. 2004).

4 American Law Institute, *Restatement (Third), Restatement on the Foreign Relations Law of the United States* 101 (1986).

5 *Ibid.*, at 102.

6 This program is necessary because a State's "[i]naction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights". *Id.*

why the claim is impermissible.[7] A listing of the assertions and *demarches* is publicly available[8] and serves as incontrovertible evidence of State practice accompanied by *opinio juris* concerning navigational freedoms under the 1982 Law of the Sea Convention[9] and customary international law. Likewise, harking back to the United States' Civil War, Dr. Lieber's "Instructions for the Government of … Armies in the Field" were not just the product of great scholarship and humanitarian concerns about how the law of armed conflict ought to be applied. Rather, President Lincoln promulgated the instructions as General Orders No. 100, a lawful general regulation that soldiers were required to obey.[10] The Orders thus provide clear evidence of an executive directive that bound the nation's armies, and a clear example of State practice.

Contrast with those examples statements made by governments for policy reasons, politically-motivated activities or pronouncements, or actions pursuant to one's treaty obligations – none of which constitute State *practice* undertaken from a sense of non-treaty-based *legal obligation* that is necessary to establish customary international law. For example, United States Department of Defense Directive 5100.77, "DoD Law of War Program"[11] states that United States armed forces will "comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations". That Directive reflects a policy decision to apply the law of armed conflict to operations that do not involve international armed conflicts (such as noncombatant evacuation operations, peacekeeping operations, and maritime interception operations pursuant to United Nations Security Council resolutions) and does not indicate that the United States believes there is a legal requirement to do so. As became evident after 11 September 2001, President Bush was free to diverge from previous policy when he determined that the United States forces would not apply all aspects of the

7 *See, e.g., Annotated Supplement*, *supra* note 2, Annex A2-7, "US Freedom of Navigation Program", at 186-87; Table A2-1, "Restrictions on Warship Innocent Passage", at 202-203.

8 *See, e.g.:* http://www.defenselink.mil/policy/sections/policy_offices/index.html.

9 United Nations Convention on the Law of the Sea, 1982; hereinafter: UNCLOS. Repr. in *The Law of the Sea – Official Texts of the United Nations Convention on the Law of the Sea and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea with Index and excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations, New York, 2001).

10 "Instructions for the Government of Armies of the United States in the Field", repr. in *The Laws of Armed Conflicts* 3 (D. Schindler & J. Toman eds., 4th ed., 2004).

11 Department of Defense Directive 5100.77, "DoD Law of War Program", Dec. 9, 1998, available at: www.dtic.mil/whs/directives.

law of armed conflict, particularly the 1949 Third Geneva Convention on Prisoners of War,[12] to the terrorists captured in Afghanistan.

Even further removed as authoritative sources of customary international law are UN General Assembly resolutions, scholarly treatises and law review articles, and statements by non-governmental organizations – none of which constitute State practice. Military manuals, like the Commander's Handbook, present a complex issue. To determine whether a military manual is an authoritative statement of the government's position, one must ascertain to what extent the manual is viewed as authoritative within the nation concerned. For example, the recently-published United Kingdom Ministry of Defence Manual asserts that it is "a clear articulation of the UK's approach to the Law of Armed Conflict . . . stating publicly the UK's interpretation of what the Law of Armed Conflict requires".[13] Similarly, the German Commander's Handbook "outlines the legal parameters" on which "military actions are based under international and constitutional law".[14] In a slightly different vein, the U.S. Navy Commander's Handbook is a multi-Service (Navy, Marine Corps, and Coast Guard) warfare, or doctrine, publication. As such, "it is authoritative to the same extent as other Service publications but requires judgment in application".[15]

These relatively authoritative manuals should be distinguished, however, from single-service documents, draft publications, and workbooks or handbooks used as training resources but which have not been adopted as authoritative by the government concerned. The Annotated Supplement to the Commander's Handbook, for example, while it provides the legal analysis supporting the "black letter" provisions in the Commander's Handbook, is not part of the multi-Service doctrine publication adopted by the Navy, Marine Corps and Coast Guard. Further, as the UK Manual points out, "In this fast moving world, some issues cannot of necessity be stated in absolute terms", and "In the same fast moving world, the law itself evolves, and to that end this publication will be subject to periodic revision", with amendments to be prepared and published from time to time.[16] Finally, that a particular rule of law is stated in a military manual does not necessarily

[12] Geneva Convention Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135.

[13] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004), "Foreword"; hereinafter: *UK MoD Manual.*

[14] Kommandanten-Handbuch – Rechtsgrundlen Fur Den Einsatz Von Seestreitkraften (Bundessprachenamt – Referat SM 3, Auftragsnummer 2002U-01441), "Preface by the Chief of Staff of the German Navy", *on file with author*.

[15] DoD Definition of "multi-Service publication", available at: www.dtic.mil/doctrine/jel/doddict.

[16] *UK Mod Manual*, *supra* note 13, "Foreword".

represent how that government's forces will be directed to act in an actual armed conflict situation. All the foregoing is simply to say that State practice is by far the most authoritative source of customary international law. All other sources are neither definitive as to what the law is nor dispositive of what a particular nation considers the law to be.[17]

The San Remo Manual frequently relies on the less authoritative sources mentioned above for its commentary in support of the "black letter" paragraphs of the Manual. The Annotated Supplement to the Commander's Handbook, likewise, cites these sources, such as UN General Assembly resolutions, scholarly treatises, and manuals (including the San Remo Manual, for that matter). But the Annotated Supplement reflects actual State practice in greater detail and depth than the San Remo Manual commentary.

For example, the section in the Annotated Supplement dealing with mining during armed conflict is replete with examples of practice from World War I, World War II, Vietnam, the Iran-Iraq War, the 1990-1991 Gulf War, and the Suez Canal.[18] Equivalent sections in the San Remo Manual provide only brief references to World War II and the 1972 mining of Haiphong Harbor, and have no discussion whatsoever of State practice to support the "progressive" rules established for mining in the exclusive economic zone.[19] Likewise, the discussion in the Annotated Supplement on legitimate military objectives makes reference to official government statements made upon signature and/or ratification of Additional Protocol I, and on State practice during the American Civil War and the 1990-1991 Gulf War. The San Remo Manual, on the other hand, refers to no State practice in support of its rule concerning damage to submarine cables and pipelines.[20] It is this author's opinion that both the San Remo Manual and the Commander's Handbook would benefit from a comprehensive study of State practice in the maritime environment since World War II – especially taking into account post-9/11 maritime activities.

17 *See, e.g.,* W.M. Reisman & W.K. Leitzau, "Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict", in *The Law of Naval Operations*, 64 *U.S. Naval War College Int'l L. Ser.* 1, 8 (H.B. Robertson, Jr. ed., 1991) ("The content of manuals, while not absolutely probative that particular international norms are being effected at the national level, is a *condition sine qua non* for their implementation", and quoting the U.S. Military Tribunal at Nuremberg that while not in themselves a competent source of international law, "[army regulations], as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice".

18 *Annotated Supplement, supra* note 2, at 337-443.

19 *San Remo Manual*, *supra* note 1, at 109-10, 168-76.

20 *Annotated Supplement*, *supra* note 2, at 402-403; *San Remo Manual*, *supra* note 1, at 111.

A further example of the San Remo Manual's less rigorous approach to the sources of customary international law is its extensive reliance on Additional Protocol I.[21] The San Remo Manual identifies the Protocol as comprising international humanitarian law, without noting that one of the primary States "particularly involved in the relevant activity" – namely, the United States – is not a party thereto. The San Remo Manual recites the Protocol more than 70 times, despite its explicit recognition that Protocol I does not apply to naval warfare (except to the extent naval operations affect civilians and civilian objects on land)[22] and the frank acknowledgement by the editor-in-chief in the International Review of the Red Cross that "there are certain specificities of naval operations that need to be taken into account …".[23] In fact, at one point, the editor asserts that the Manual relies on "recent state practice *and* Additional Protocol I" as primary sources.[24] Admittedly, the United States has not been as clear concerning its position with respect to those provisions of Additional Protocol I that might be considered customary international law as it has been concerning the customary law status of the navigational provisions of the Law of the Sea Convention.[25] However, that one of the major States "particularly involved" is not a party to the Protocol should temper any references to or reliance on the Protocol in the San Remo Manual.

21 Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, *repr. in Documents on the Laws of War* 419 (A. Roberts & R. Guelff eds., 3rd ed., 2000).

22 *San Remo Manual*, *supra* note 1, at 5 and 62.

23 L. Doswald-Beck, "San Remo Manual on International Law Applicable to Armed Conflict at Sea", 309 *Int'l Rev. Red Cross* 583, 585 (1995).

24 *Ibid.,* at 590 (emphasis added).

25 *Supra* note 9. In 1983, President Reagan announced that the United Nations Convention on the Law of the Sea "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states", and that the United States would "accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight". Statement by the President, March 10, 1983, "United States Ocean Policy", *repr. in Annotated Supplement*, *supra* note 2, at 43. Until recently, it was thought that the statement by M. Matheson, Deputy Legal Adviser, United States Department of State, to a Humanitarian Law Conference in 1987 reflected the United States position concerning which provisions of Additional Protocol I were considered customary international law. M.J. Matheson, "Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", 2 *Am. U.J. Int'l. L. & Pol'y* 415 (1987). That assumption has since been called into question. *See* W.H. Parks, "Special Forces Wear of Non-Standard Uniforms", 4 *Chi. J. Int'l. L.* 493, n. 55 ("Mr. Matheson … expresses his personal opinion that 'certain provisions of Protocol I reflect customary international law or are positive new developments which should . . . become part of that law'").

The second topic of this paper deals with the scope of application of the law – when the rules apply as a matter of law and when they should apply as a matter of policy. Paragraph 1 of the San Remo Manual begins with the assertion that "The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used".[26] The Commentary to Paragraph 1 does not label this statement as a "progressive development", but it should do so. There are two incorrect assertions in Paragraph 1. First, the law of armed conflict applies, as a matter of law, only to international armed conflicts. Second, all conflicts between nations do not rise to such a level of juridical significance that the full panoply of the law of armed conflict applies "from the moment armed force is used".

The Commentary to Paragraph 1[27] is very straight-forward about why those two assertions are made. The word "international" was omitted so as not to "dissuade implementation of the … rules in non-international armed conflicts involving naval operations". The phrase "from the moment armed force is used" was intended to foreclose arguments that a certain magnitude of force or scope of conflict is required before the law of armed conflict applies. These are laudable goals, but the rule as stated does not correctly reflect current law. The better approach would have been for the San Remo Manual to state the actual rule in the "black-letter" text and then encourage implementation of the rule in other contexts in the Commentary.

The Commander's Handbook is careful to preserve the distinction between the *requirement* to apply the law of armed conflict during international armed conflicts and the *discretion* to apply it during non-international armed conflict. The Commander's Handbook makes the distinction very clear – it notes that not all situations are international armed conflicts and that law of armed conflict principles may be applied as a matter of policy to other situations.[28]

The distinction is particularly important in the context of counter-terrorist operations and has significant policy implications for the United States – particularly as concerns the use of certain weapons (hollow-point or

26 *San Remo Manual*, *supra* note 1, at 7 and 73.

27 *Ibid.*, para. 1.1, at 73.

28 *Annotated Supplement*, *supra* note 2, "6.1.2. Department of the Navy Policy", at 324-25, quoting Chief of Naval Operations Instruction 3300.52 and Marine Corps Order 3300.3 ("International armed conflicts are governed by the law of armed conflict as a matter of law. However, not all situations are 'international' armed conflicts. In those circumstances when international armed conflict does not exist … law of armed conflict principles may nevertheless be applied as a matter of policy"). *See also* S. Haines' comments on this subject in the paragraph entitled "Applicability of the Law of Armed Conflict", in his companion piece in this Volume of the *Israel Y.B. Hum. Rts*.

expanding ammunition); the use of riot control agents; the status and treatment of detainees; and the employment of civilians, such as civilian mariners on warships, in activities previously performed by military personnel.

Third, perhaps the most significant of the progressive developments in the San Remo Manual is the treatment of the relationship between the United Nations Convention on the Law of the Sea[29] and the law of armed conflict. The Preliminary Remarks to Part II of the San Remo Manual note that the Law of the Sea Convention provides a "peacetime regime" for the law of the sea, and then conclude that the *purpose* of Part II is to "adapt the traditional doctrines and principles, particularly those dealing with the relationship of belligerents and neutrals under neutral jurisdiction, to these new divisions of the sea".[30] But the San Remo Manual goes further – in addition to adapting the traditional law of armed conflict doctrines and principles to the divisions of the sea as found in the Law of the Sea Convention, it also adapts some of the doctrines and principles of the Law of the Sea (in particular, the "due regard" standard) to the conduct of hostilities under the law of armed conflict. This approach is clearly a progressive development, unsupported in the San Remo Manual by any references to State practice or *opinio juris*.

The Commander's Handbook, on the other hand, retains the classic distinction between Part I, the Law of (perhaps anachronistically today) Peacetime Naval Operations and Part II, the Law of Naval Warfare. Part I discusses the legal divisions of the oceans and airspace as reflected in the Law of the Sea Convention. The Commander's Handbook repeats the provisions of the Convention that guarantee traditional high seas freedoms, conducted with "due regard" for the rights of other nations in those areas. It does not specifically address how these concepts would be applied during an armed conflict. It reasserts the right of warships to operate anywhere beyond the territorial sea and explains that the exercise of the inherent right of self-defense could involve establishing "defensive sea areas" or "maritime control areas" on the high seas. Part II incorporates the concepts of internal waters, territorial seas, international straits, archipelagic waters, and archipelagic sea lanes, but frankly acknowledges that the application of the customary laws of neutrality is "at its most difficult" in the context of archipelagic waters.[31]

29 *Supra* note 9.

30 *San Remo Manual*, *supra* note 1, at 93-94.

31 *Annotated Supplement*, *supra* note 2, at 378. N. 73 continues: "The application of the customary rules of neutrality to the newly recognized concept of the archipelagic nation remains largely unsettled as a doctrine of international law". *Id.*

Part II of the Commander's Handbook also does not purport to apply the "due regard" standard to naval warfare in the contiguous zone, exclusive economic zone or on the high seas as does the San Remo Manual. For example, the San Remo Manual asserts that "Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the seabed, and ocean floor, and the subsoil thereof, beyond national jurisdiction".[32] It also applies the due regard standard to hostile actions within the exclusive economic zone or on the continental shelf of a neutral State, and imposes a requirement to have due regard to the protection and preservation of the marine environment.[33] While one might logically reason that applying the due regard standard to neutral exploration and exploitation of natural resources and preservation of the marine environment is a positive approach, it has simply been untested in actual State practice.[34] Further, it might be completely impractical to apply in the context of an armed conflict. It is easy to imagine a scenario where combat actions launched from a sea base miles offshore against a hostile State could affect the ability of a neutral nation to carry out exploration and exploitation in its exclusive economic zone, and could affect the neutral's preservation of the marine environment – at least during the conduct of hostilities.

[32] *San Remo Manual*, *supra* note 1, para. 36, at 110.

[33] *Ibid.,* para. 34, at 108-109. The Commander's Handbook also contains a due regard requirement for the protection and preservation of the natural environment, but that requirement is subject to military necessity ("as far as military requirements permit") and is couched in the context of the requirement to avoid unnecessary damage to the environment not necessitated by mission accomplishment or carried out wantonly. *Annotated Supplement*, *supra* note 2, at 405.

[34] The *UK MoD Manual* (*supra* note 13) adopts the due regard standard verbatim from para. 34 of the *San Remo Manual* concerning activities in the exclusive economic zone and the continental shelf, with the addition of a reference to vessels engaged in fishing. Concerning the high seas and the seabed beyond national jurisdiction, the *UK MoD Manual* truncates the due regard standard to a simple "due regard for the rights of others in their use of the high seas", without specifically citing neutrals' rights of exploration and exploitation. It is not clear what significance, if any, this difference was intended to convey. Tellingly, however, concerning marine areas containing rare or fragile ecosystems and belligerent mining in the exclusive economic zone, the *UK MoD Manual* declined to accept the *San Remo Manual* language, for fear of giving greater than warranted credence to provisions that do not reflect current law or practice. As S. Haines notes in his article in this Volume of the *Israel Y.B. Hum. Rts*., "the UK is concerned to avoid absolute suggestions that coastal States' activities within their zones of jurisdiction beyond territorial limits have necessary priority over traditional high seas freedoms protected under the current law of the sea". It is precisely that concern that causes this author to question the impact of imposing a law-of-the-sea-type due regard standard to belligerent operations in areas of high seas freedoms.

This author acknowledges, first, that the dilemma will not be easily resolved, and second, that the weight of opinion on this issue supports the position taken by the San Remo Manual. In perhaps the earliest analysis of the relationship between the Law of the Sea Convention[35] and the law of armed conflict, Professor Horace Robertson, who was one of the Rapporteurs of the San Remo Manual, concluded that the due regard standard "is equally applicable in time of armed conflict" as in peacetime, because "the juridical nature of the zone does not change with the transition from peace to war".[36] Writing in 2000, Mr. J. Ashley Roach notes that ". . . international recognition of the exclusive economic zone (EEZ) and the continental shelf now requires belligerents to have due regard for the rights of coastal states in those zones when conducting hostilities in sea areas between the territorial sea and the high seas and on the continental shelf".[37] To the extent military manuals provide authoritative statements of their governments' legal obligations,[38] both the United Kingdom and the German manuals adopt the due regard standard for naval operations conducted under the law of armed conflict.[39]

On the other hand, a major thrust of Professor Robertson's paper was aimed at disproving the arguments by some States that the regime of the exclusive economic zone permitted coastal States to control or prevent military operations in that zone. Accordingly, he quotes Ambassador Elliot Richardson to the effect that the high seas freedoms reserved to States in the exclusive economic zone were understood to be "qualitatively" and "quantitatively" the same as the traditional high-seas freedoms recognized by international law.[40] If that is the case, then perhaps the due regard standard imposes no additional duties or requirements than existed under customary law and practice. The Restatement of the Law, Third, published

35 *Supra* note 9.

36 H.B. Robertson, "The 'New' Law of the Sea and the Law of Armed Conflict at Sea", R*eadings on International Law from the Naval War College, 1978-1994,* 68 *U.S. Naval War College Int'l L. Ser.* 264, 286 (J. N. Moore & R.F. Turner eds., 1995) (first published as the *Naval War College Newport Paper* #3, Oct. 1992).

37 J.A. Roach, "Symposium: The Hague Peace Conferences: The Law of Naval Warfare at the Turn of Two Centuries", 94 *A.J.I.L.* 64, 67 (2000) (interestingly, Mr. Roach cites only the *San Remo Manual* and the Helsinki Principles in support of this proposition).

38 *See supra* notes 13-14, and accompanying text.

39 *UK Mod Manual, supra* note 13, paras. 13.6 and 13.21, at 350-51, 353-54; *German Commander's Handbook*, *supra* note 14, para. 256, at 139-40.

40 Robertson, *supra* note 36, at 286; ("[T]he freedoms in question . . . must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete – and allow for future uses no less inclusive – than traditional high-seas freedoms").

in 1986, simply avoids the issue. The Restatement makes it clear that the due regard standard is now viewed, in the peacetime context, as customary international law,[41] but also notes that it is not clear whether the rules concerning the law of the sea "will apply, and with what modifications, in case of a war".[42]

The reason for concern over this issue is that there exists no standard, agreed-upon definition of "due regard" – in particular, there is no guidance to provide policy makers or operational commanders with concrete advice concerning which activities are permitted, which are prohibited, and what, if anything, must be done differently under a due regard standard than would be done without the standard.[43] There is no State practice to which one can point as an example of implementing a due regard standard during armed conflict.[44]

To be sure, the due regard standard is used in many different contexts and international instruments, appearing as early as 1899 in the Annex to the Second Hague Convention on the Regulations Respecting the Laws and

41 *Rest. 3rd*, *supra* note 4, Vol. 2, para. 514, Comment (e), at 58, and Reporters' Notes 3, at 63 (citing the 1958 Convention on the High Seas "reasonable regard" standard and the I.C.J. decision of 1974 concerning Iceland and the United Kingdom, [1974] *I.C.J. Rep.* 3, 22, 29).

42 *Ibid.,* at 3, n. 1.

43 A member of the United Kingdom delegation to the Third United Nations Conference on the Law of the Sea implies that there is some subtle distinction between the "reasonable regard" standard of the 1958 Convention on the High Seas and the "due regard" standard of the Law of the Sea Convention, though he does not explain what the difference might be. P. Allott, "Power Sharing in the Law of the Sea", 77 *A.J.I.L.* 1, 11 (1983). The *Rest. 3rd* appears to accept the two terms as interchangeable, *supra* note 4, Vol. 2, para. 514, Reporters' Notes 3, at 63. During the drafting of the *San Remo Manual*, there was "substantial debate as to whether the operative standard for belligerents in carrying out their duties should be 'due regard' or 'respect' for the rights of neutrals". *San Remo Manual, supra* note 1, para. 12.2, at 84. The former term was chosen, partly because the term "respect" conveyed the sense of an "absolute and affirmative duty" and was thus "too onerous" and inconsistent with the balancing of rights and duties found throughout the Law of the Sea Convention (*supra* note 9). *Id.* Roach, *supra* note 37, at 68.

44 Prof. G. Walker analyzed the 1980-1988 Iran-Iraq War from the perspective of applying the due regard standard to naval warfare. He concludes there is no evidence of belligerents impairing neutrals use of fishing zones or exclusive economic zones and no evidence that submarine pipelines were attacked. He also concludes there is no evidence that the United States or other powers that sent forces to the Gulf failed to show due regard for proclaimed exclusive economic zones or fishing zones. It is not clear from the discussion, however, what actions, if any, States took to affirmatively meet the due regard requirements. G.K. Walker, *The Tanker War, 1980-88: Law and Policy* 252-54 (Naval War College, 2000).

Customs of War on Land.[45] In a context more akin to naval operations, the 1967 Outer Space Treaty requires that States Parties to the treaty conduct their activities in outer space "with due regard to the corresponding interests of all other States Parties to the Treaty".[46] Likewise, the contracting States to the 1944 Chicago Convention, which is not applicable to State aircraft, nevertheless "undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft".[47] So what does the standard mean in application? Due regard for the safety of navigation, in the air and sea context, seems relatively simple to implement – assisted as it is by the civilian air traffic control system established under the Chicago Convention and the Regulations for the Prevention of Collisions at Sea.[48] It surely does not mean prior consultation with other users of the oceans, evidenced by the fact that a prior consultation requirement is specifically written into the Outer Space Treaty as a condition additional to and separate from the exercise of due regard.[49] But what it means in actual practice in the context of an international armed conflict is difficult to determine.

For example, under the customary law of armed conflict at sea, a belligerent may control, and may even exclude altogether, neutral vessels and aircraft in the immediate vicinity of naval operations. A belligerent may control the communications of neutral vessels or civil aircraft whose presence in the area might endanger or jeopardize naval operations.[50] A belligerent may establish exclusion or war zones to warn neutral vessels and aircraft away from belligerent activities, so long as the zones do not

45 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, repr. in *The Laws of Armed Conflicts, supra* note 10, at 72 (Art. 19 – ". . . rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank").

46 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, 610 *U.N.T.S.* 205, Art. IX.

47 Convention on International Civil Aviation, 1944, 15 *U.N.T.S.* 295, Art. 3(d).

48 U.S. Department of Transportation, U.S. Coast Guard, "Navigation Rules, International – Inland", Commandant Instruction M16672.2D, March 25, 1999 (containing the International Regulations for Prevention of Collisions at Sea, 1972).

49 Outer Space Treaty, *supra* note 46, Art. IX ("If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space . . . would cause potentially harmful interference with activities of other States Parties . . . it shall undertake appropriate international consultations before proceeding with any such activity or experiment").

50 *San Remo Manual, supra* note 1, para. 108, at 183; *Annotated Supplement*, *supra* note 2, at 394.

unreasonably interfere with legitimate neutral commerce.[51] If these zones are established in the exclusive economic zone of a neutral nation, does the belligerent owe some additional duty of due regard for the neutral's exploration and exploitation of the exclusive economic zone or for the protection of the environment?

One possible answer to this question is that the "other rules" clause of the Law of the Sea Convention reserves primacy to the law of armed conflict for belligerent operations. The Preamble to the Convention affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[52] Since the Convention by its terms does not in any way purport to govern or address armed conflict, then the *lex specialis* of the law of armed conflict may be said to govern belligerent operations.[53] The "other rules" clause appears in several Articles of the Convention directly bearing on this discussion: Article 2(3) ("The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law");[54] Article 19(1) (innocent passage "shall take place in conformity with this Convention and with other rules of international law");[55] Article 34(2) ("The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part [Part III – Straits Used for International Navigation] and to other rules of international law");[56] Article 58(3) ("In exercising their rights . . . in the exclusive economic zone, States shall have due regard to … and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part");[57] and Article 87(1) ("Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law").[58] This approach is supported by the San Remo

51 *Annotated Supplement*, *supra* note 2, at 396.

52 UNCLOS, *supra* note 9, at 21.

53 *See, e.g.* G.K. Walker, "Information Warfare and Neutrality", 33 *Vand. J. Transnat'l L.* (Nov. 2000) 1079, 1152 ("Most commentators say these 'other rules' clauses refer to the [law of armed conflict]"). *See also* R. Wolfrum, "Military Activities on the High Seas: What Are the Impacts of the U.N. Convention on the Law of the Sea?", in *The Law of Armed Conflict Into the Next Millenium* (M.N. Schmitt & L.C. Green eds., 1998), 71 *U.S. Naval War College Int'l L. Ser*. 501,509-10 (". . . the provisions of the Convention are not meant to regulate the law of naval warfare," but concluding, "That the Third United Nations Conference on the Law of the Sea avoided issues relating to naval warfare does not preclude the Convention from having an impact thereon").

54 UNCLOS, *supra* note 9, at 23.

55 *Ibid.,* at 27.

56 *Ibid.,* at 32.

57 *Ibid.,* at 41.

58 *Ibid.,* at 53.

Manual itself, at least in one paragraph, when it says that "Nothing in this Section [Methods of Warfare] should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations".[59]

Accordingly, if it is accepted that the due regard standard is to be applied in the context of, and subordinate to, the law of armed conflict during belligerent operations at sea, then this author would conclude that the approaches taken by the San Remo Manual and the Commander's Handbook comprise a distinction without a difference. If that analysis is not universally accepted, then this author is unable to properly describe for the operational commander what constraints the due regard standard imposes on belligerent operations in the contiguous zone, exclusive economic zone, continental shelf and on the high seas. In any event, the Commander's Handbook is currently undergoing revision, and this issue will have to be addressed during that process. It is too early to predict how that analysis will be resolved in the end.

Just one more point on this topic of the relationship between the Law of the Sea Convention and the law of armed conflict: Article 37 of the San Remo Manual requires belligerents to take care to avoid damage to submarine cables and pipelines laid on the ocean floor "which do not exclusively serve the belligerents". The Commentary adds that "cables or pipelines exclusively serving one or more of the belligerents *might* be legitimate military objectives".[60] Few, if any, submarine communications cables could be characterized today as exclusively serving a belligerent, given the globalization of communications. The San Remo Manual provides no reason for abandoning the traditional definition of military objective or for substituting a new standard for the traditional "military advantage/collateral damage" analysis. The Commander's Handbook simply states that proper targets for naval attack include such military objectives as "lines of communication and other objects used to conduct or support military operations".[61] Under the Commander's Handbook, one applies the standard analysis to determine if an object is a military objective and, if so, whether its partial or total destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

The fourth area for discussion involves another issue related to military objectives – and that is the different approach taken by the San Remo

59 *San Remo Manual, supra* note 1, para. 108, at 183.
60 *Ibid.,* para. 37, at 111 (emphasis supplied).
61 *Annotated Supplement*, *supra* note 2, at 402.

Manual and the Commander's Handbook to the definition of a legitimate military objective.

Most readers will be familiar with the definition of military objective found in Article 52(2) of Additional Protocol I – which is the definition adopted by the editors of the San Remo Manual – "those objects which by their nature, location, purpose or use make an effective contribution to *military action* and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[62] The Commander's Handbook uses a slightly different construct – "those objects which by their nature, location, purpose or use effectively contribute to the enemy's *war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack".[63] There has been much discussion over the years about the difference between the two phrases – "military action" and "war-fighting or war-sustaining capability".

In fact, the drafters of the San Remo Manual considered using the phrase "war-sustaining" but decided that expression was too broad. They feared that "war-sustaining could too easily be interpreted to justify unleashing both the type of indiscriminate attacks that annihilated entire cities during [World War II] which were claimed to be necessary to eliminate Germany's and Japan's warmaking capacity, and attacks on civilians, who were said to be 'quasi-combatants' because of the general economic support they gave to the enemy".[64] This author believes this fear is wildly misplaced. There is enough State practice in post-WWII conflicts at this point in time to recognize that the phrase "war-sustaining" has not been used to justify indiscriminate attacks against cities or attacks on civilians who might be providing

62 Additional Protocol I, *supra* note 21, at 450 (emphasis supplied).

63 *Annotated Supplement*, *supra* note 2, at 402 (emphasis supplied).

64 L. Doswald-Beck, "Current Development: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea", 89 *A.J.I.L.* 192, 199 (1995). The characterization of attacks on cities during World War II as "indiscriminate" reflects a bias that does not take into account either the state of the law or of technology at the time. The strategic bombing campaigns in both theaters during WWII were based primarily on 2 underlying factors – 1) the war-fighting philosophy prevalent at the time, as expressed by military theorists such as Douhet and Mitchell, and 2) the limited accuracy and range of planes delivering the ordnance. The attacks were not deliberately indiscriminate, but rather reflected the state of military theory and the existing technology. The technology available at the time was, admittedly, primitive – resulting in enormous expenditures of time, money and resources – and resulted in not only high civilian casualties but also extremely high casualties among air crews as well. Thus began the quest for precision targeting – not only is it more humane for the civilian population; but also it is in a nation's best military interests to do so.

economic support to the enemy. Professor Horace Robertson – as previously mentioned, one of the Rapporteurs of the San Remo Manual – likewise disagrees. He comments that the suggestion that the Commander's Handbook formulation might justify attacks on entire cities "seems to be an exaggerated claim. Nowhere in the Commander's Handbook is there any suggestion that this phrasing would open the way for unrestricted attacks on cities or other population centers".[65] Further, this "fear" is drastically at odds with the revolution in targeting accuracy and State practice evidenced in conflicts in this and the last century. Attacking a military objective must be carried out in accordance with other law of war provisions, including those prohibiting indiscriminate attack and attacks designed to terrorize the civilian population. The rule of proportionality must also be factored into targeting decisions, and that rule alone would rarely, if ever, justify attacking entire cities.[66] The Commander's Handbook, as previously mentioned, is currently under revision. It is anticipated there will not be a significant change in the definition of "military objective" in the revised version.

In concluding this discussion, there is one final, fifth, issue to briefly discuss – and that is the San Remo Manual's treatment, in paragraph 171, of the use of encrypted communications on hospital ships – an issue the United States Government is facing currently. This issue is also difficult to resolve – given the clearly-expressed prohibition on the use of a "secret code" (read today as encrypted communications) on hospital ships in Article 34(2) of the

[65] H.B. Robertson, Jr., "The Principle of the Military Objective in the Law of Armed Conflict", in *The Law of Military Operations* (M.N. Schmitt ed., 1998), 75 *U.S. Naval War College Int'l L. Ser*. 197, 210. Prof. Robertson further points out that the discussion of this concept in the Commander's Handbook "does not differ materially from the authoritative interpretation of Article 52(2) by Prof. M. Bothe and others who suggest that ". . . a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party's overall war effort". *Id., quoting New Rules For Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 324 (M. Bothe, K.J. Partsch & W.A. Solf eds., 1982).

[66] It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The rule of proportionality holds, however, that incidental injury or collateral damage must not be excessive in light of the military advantage anticipated by the attack. Although it is not completely settled whether the rule of proportionality as found in Additional Protocol I (Arts. 51(5)(b) and 57(2)(a)(iii)) is a matter of customary international law, the basic concept is inherent in the principles of humanity and necessity upon which the law of armed conflict is based. *Annotated Supplement*, *supra* note 2, at 404.

Second Geneva Convention.[67] Paragraph 171 of the San Remo Manual correctly points out, particularly given the United Kingdom's experience with hospital ships in the Falklands campaign and the United States' experience in Operation Iraqi Freedom, that "in order to most effectively fulfill their humanitarian mission, hospital ships *should* be permitted to use cryptographic equipment".[68] This is one area in which the upcoming revision to the Commander's Handbook will no doubt reflect a "progressive" interpretation of current law, and it is helpful to have such an eminent publication as the San Remo Manual in accord with the United States' viewpoint.[69]

[67] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, repr. in *Documents on the Laws of War*, *supra* note 21, at 233.

[68] *San Remo Manual, supra* note 1, at 236.

[69] Also in accord is the *UK Mod Manual*, *supra* note 13, at 373.

THE UNITED KINGDOM'S MANUAL OF THE LAW OF ARMED CONFLICT AND THE SAN REMO MANUAL: MARITIME RULES COMPARED[1]

By Steven Haines[*]

I. INTRODUCTION

A not untypical question asked in examinations for degree courses dealing with the law of armed conflict goes something like this:

> The Laws of War at Sea are an outdated throwback to the 1856 Paris Declaration[2] and the tactical and technological realities of the late-nineteenth century maritime strategic environment. Discuss.

1 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) [hereinafter: *UK Manual*]; International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, L Doswald-Beck ed., 1995) [hereinafter: *San Remo Manual,* or *SRM*]. The *San Remo Manual* contains rules on conflict in the air as part of its comprehensive treatment of maritime operations, which are inherently "joint". However, this paper concentrates only on those rules that are covered in Ch. 13 of the *UK Manual* dealing with "Maritime Warfare" and does not set out to address those *San Remo Manual* rules included in the *Manual*'s Ch. 12 dealing with "Air Operations". This paper is a slightly modified version of one prepared for and presented at the International Institute for Humanitarian Law's Round Table on "The Application of International Humanitarian Law: The UN Security Council, Peacekeeping Forces and the Protection of Human Beings in Disaster Situations", San Remo, Italy, 8 Sept. 2005.

* M.A., Ph.D. (Aberdeen), LL.M. (London) is Head of the Department of Politics and International Relations at the University of London's Royal Holloway College. He is currently also Visiting Fellow in Law, Strategy and Military Operations at Cranfield University, Shrivenham. Between 1999-2003 he chaired the Editorial Board of the *UK Manual* and co-authored its Chapter on "Maritime Warfare".

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2 *See Documents on the Laws of War* 45-52 (A. Roberts & R. Guelff eds., 3rd ed., 2000). The 1856 Paris Declaration Respecting Maritime Law was agreed by the seven States attending the Congress of Paris, following the conclusion of the Crimean War, and reflected a previous agreement between Britain and France intended to mollify neutrals during that War. It was then rapidly acceded to by a further 44 States, many of which were minor Central European principalities soon to disappear as sovereign States following the unification of Germany in the wake of the 1871 Franco-Prussian War.

When Natalino Ronzitti compiled a collection of documents on the law of naval warfare in 1988, the Editor's introduction consisted of a spirited critique of the lack of adequate modern development in this important area of the law of armed conflict.[3] Ronzitti's concern was easily understood. Despite the occurrence of two world wars in the interim, the law had not developed in any significant way since the Hague Conference had attempted to codify and develop aspects of the laws of war at sea through a series of eight international conventions in 1907.[4] Over thirty years after the Hague Conference, when the German Navy's Captain Langsdorff took his pocket battleship Graf Spee into the South Atlantic and Indian Oceans in the first weeks of the Second World War, and when Commodore Henry Harwood[5] and Vice Admiral Sir Henry McCall[6] of the Royal Navy sought to trap him in Montevideo and the River Plate Estuary in December of 1939, they were all famously utilising the legal regime that those who had drafted the 1907 Hague Conventions would have well recognised.[7] As the Second World War developed into "total war" the naval war involved a number of departures from the apparently honourable conduct[8] of Langsdorff, Harwood and McCall, but in substance the accepted law relating to naval warfare was not modified as a consequence.[9] Since 1945 the only international agreement

3 N. Ronzitti, "The Crisis in the Traditional Law Relating International Armed Conflicts at Sea and the Need for its Revision", in *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentary* 1-58 (N. Ronzitti ed., 1988).

4 The full list of 1907 Hague Conventions dealing with war at sea is as follows: VI (On the Status of Enemy Merchant Ships), VII (On the Conversion of Merchant Ships to Warships), VIII (On the Laying of Automatic Submarine Contact Mines), IX (On Bombardment by Naval Forces), X (On the Protection of Wounded, Sick and Shipwrecked at Sea), XI (On the Exercise of the Right of Capture), XII (On an International Prize Court), XIII (On the Rights and Duties of Neutral Powers in Naval War). Only six of these retain their relevance; Hague Convention X was superseded by the 1949 Geneva Convention II and Hague Convention XII did not enter into force (*see Documents on the Laws of War*, *supra* note 2, at 67 and 95-138).

5 Commander of Force G, the South American Division, consisting of HM Ships *Exeter* and *Ajax* and HM New Zealand Ship *Achilles*.

6 British Naval Attaché, Montevideo (Uraguay).

7 *See* S.W. Roskill, *The War at Sea 1939-1945* (*Volume I: The Defensive*) 112-21 (H.M. Stationery Office, London, 1954); and D.P. O'Connell, *The Influence of Law on Sea Power* 27-39 (1975).

8 Only "apparently" because while the law was used by both sides it was probably only utilised as it was because wider political considerations rendered it prudent (neither Germany nor the UK wished to risk alienating the neutral States of Latin America by flouting the law in their waters). *See* the legal account of the Battle of the River Plate in O'Connell, *supra* note 7.

9 One early and related episode was the *Altmark* incident involving the *Graf Spee*'s tender. It was proceeding back to Germany, with British prisoners onboard, and passed through

relating exclusively to the subject has been 1949 Geneva Convention II[10] which merely served to replace 1907 Hague Convention X. Well informed students responding to the examination question above would, until recently, have almost certainly concluded their discussions with emphatic support for its quoted assertion.

The lack of any review of the law of naval warfare since 1945 became increasingly unsatisfactory as the twentieth century reached maturity. The establishment of the United Nations, the resultant modification and debate as to what is understood by "neutrality", the emergence of a new and radically extended treaty regime of coastal State jurisdiction (through the three UN Law of the Sea Conferences between 1958 and 1982), the use of naval forces to enforce UN Security Council resolutions since the first economic embargo operation off the port of Beira in the 1960s and 1970s, and significant developments in technology and naval weaponry (in particular ship launched missile systems and related sensors and communications systems), have all represented serious challenges to the legal *status quo*. It was this general backdrop that prompted the International Institute for Humanitarian Law in San Remo to initiate, in 1987, a process of informal review of the laws of war at sea that resulted in the drafting of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea [San Remo Manual, or SRM], published just over a decade ago, in 1995.

The San Remo Manual has been a significant milestone in the development of the law of armed conflict applicable at sea. Indeed, in describing the state of the law over the last 150 years or so one might usefully employ it as a point of reference as significant in a temporal sense as the 1856 Paris Declaration, the 1907 Hague Conference, and the Second World War. That is surely what many of those engaged in working up the manual between 1987 and 1995 expected it to become. When introducing the law of armed conflict at sea to his students, the present author refers to the Paris Declaration as a convenient starting point, moves to 1907 and then to the state of the law in 1939, before emphasising the lack of adequate development in thinking in the post-Second World War, or UN, era. He concludes by posing the question: "are we now in the San Remo era?" Just

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Norwegian territorial waters. It was pursued into internal waters as the Royal Navy breached international law, following Churchill's direct instructions, in its successful attempt to liberate the crews of the merchant ships that had fallen prey to the *Graf Spee*'s *guerre de course* operations. *See* O'Connell, *supra* note 7, at 40-44.

10 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, repr. in *Documents on the Laws of War*, *supra* note 2, at 221-42.

over a decade since its publication, it is certainly worth asking whether or not the San Remo Manual is an adequate legal framework for the conduct of maritime operations during conflict, as we leave the violent twentieth century behind and contemplate the nature of violent conflict in the twenty-first.

In attempting an answer to this, it is important not to ignore the ways in which the global strategic environment has changed in recent years. Naval or maritime operations are conducted in that environment, which is today different in important respects from that experienced in the 1930s as the world advanced inexorably towards global great power war. Law has to develop in response to the political and social environment in which it is applied if it is to remain both relevant and influential. Law relating to conflict at sea has to take account of the nature of maritime operations. In naval terms[11] we have witnessed significant shifts in emphasis and focus in the years since that great power conflict. While much of the body of the traditional laws of war at sea was devoted to the conduct of economic warfare, today that has much less of an influence on the crafting of naval or maritime doctrine. The major purpose of naval operations is no longer to constrain the economic activities of enemy belligerents. Today, the principal naval focus is on direct combat between naval forces and on power projection operations, either directly against enemy land targets or in support of friendly forces both entering and operating in a theatre of conflict ashore. It is worth reflecting on how this has affected the legal dimension of the maritime strategic environment.

The principal purpose of this paper is to highlight and explain the differences between the San Remo Manual and Chapter 13 of the UK

[11] The terms "maritime" and "naval" are often regarded synonymously but do have slightly different meanings in relation to military operations. "Maritime" forces consist of all those military forces that operate in the maritime environment. *British Maritime Doctrine* defines Maritime Forces as those "whose primary purpose is to conduct military operations at and from the sea. The expression includes warships, and submarines, auxiliaries, chartered shipping, organic aircraft, fixed seabed installations, fixed shore installations (such as batteries) for defence of seaways, shore based maritime aircraft and other shore based aircraft assigned to maritime tasks". *See* UK Ministry of Defence, *British Maritime Doctrine* 271 (3rd ed., The Stationery Office, London, 2004). It also includes marines and land forces deployed as part of a maritime amphibious force. "Naval" forces, on the other hand, implies those forming a part of the naval service of a belligerent – so an aircraft operated by a belligerent's air force may well be a part of the "maritime" force but would not be regarded as a 'naval' asset. Naval operations are those conducted by naval units. Maritime operations include those conducted by navies but also those conducted by air and land forces at sea or in what is described as the "littoral" (itself defined in *British Maritime Doctrine* (at 268) as "Coastal sea areas and that portion of the land which is susceptible to influence or support from the sea".

Manual. However, an important secondary purpose is to include additional comment on the future relevance of the San Remo Manual to naval/maritime operations as the strategic environment develops over time. What follows first describes the background to the production of the "Maritime Warfare" chapter before going on to comment in detail on the differences between it and the relevant parts of the San Remo text. As the discussion will demonstrate, much of the latter was simply repeated in the former. However, some of the San Remo articles were modified before their inclusion in the UK Manual[12] while some were excluded altogether. This is reflected in the structure of the paper, which deals first with the most significant differences and then goes on to explain the wording of those San Remo Manual rules that were adapted to reflect the UK position on their subject. Then, given the geo-strategic developments that have occurred since the mid-1990s and the shift in the emphasis of naval and maritime doctrine away from economic warfare towards power projection operations, it attempts to assess the future for the San Remo Manual.

In producing this paper the author has to cope with something of an identity crisis. He was a serving Royal Navy officer working within the Policy Area of the Ministry of Defence Central Staff when he chaired the UK Manual Editorial Board. The Board bore the responsibility for producing Her Majesty's Government's (HMG's) official statement on the body of law discussed in the manual. As its Chairman, the author had to steer the production of the text in a manner consistent with UK interests and was involved in an inter-departmental process of consultation and negotiation involving officials in, principally, the Ministry of Defence and the Foreign and Commonwealth Office. All involved had to take into account previous and current policy in relation to treaty negotiations as well as official legal advice provided during the conduct of relevant past operations. The resultant text is not, therefore, necessarily the author's personal view on the law. In the first parts of this paper, in which the text of the UK Manual is compared with that of the San Remo Manual, the explanation provided is an attempt to describe the official reasoning behind the differences. However, in the later comments of the paper the author allows free rein to his own personal views, which should certainly not be regarded in any way as reflecting the official view of the UK Ministry of Defence or other departments of HMG.

[12] Where this is the case the *San Remo Manual* is usually footnoted in the text of the *UK Manual* with the words "Adapted from the SRM".

II. THE BACKGROUND TO THE PRODUCTION OF THE MARITIME WARFARE CHAPTER OF THE UK MANUAL

Four years after the appearance of the San Remo Manual, in the summer of 1999, two then recent events had prompted a surge of effort within the UK to produce a new reinterpretation of the UK's position on the full body of law relating to armed conflict. The first was the UK's ratification of the 1977 Additional Protocols in January 1998; the second was NATO's action against Serbia over Kosovo in 1999. Ratification of the Additional Protocols brought with it an obligation and a substantial need urgently to amend the UK's officially promulgated legal advice. The Kosovo campaign highlighted the difficulties of mounting a major combat operation without adequate legal reference. This latter factor, in particular, prompted the then Vice Chief of Defence Staff, Admiral Sir Peter Abbott, to place responsibility for the UK Manual with the newly established Joint Doctrine and Concepts Centre (JDCC).[13]

When the JDCC assumed that responsibility, the then existing draft UK Manual consisted of a variety of draft chapters compiled over a number of years by military lawyers, who had also consulted with legal colleagues in the armed forces of a number of allied States.[14] Those drafts notwithstanding, it is somewhat surprising to reflect on the fact that the UK in the late 1990s had no officially extant manual dealing in any comprehensive manner with the law of armed conflict applicable at sea. It needs, perhaps, to be pointed out that the classic 1950s vintage UK Manual dealing with the law of armed conflict, drafted by Sir Hersch Lauterpacht and Gerald Draper, had been commissioned by the Army Board as a manual dealing with land warfare; it did not cover either maritime or air warfare

[13] The present author was aware of the need for the Manual to be completed and recommended that the JDCC, which he was then involved in establishing, should take on the task of driving the project forward. The possibility that the staffing of operational law matters affecting the development of current doctrine and future concepts (as distinct from that law directly affecting current operations – a Permanent Joint Headquarters responsibility) might be included in the responsibilities of the organisation also responsible for developing strategic and operational joint doctrine, was too good to miss.

[14] The Army had been wanting a replacement for its own manual (*see infra* note 15) since the 1977 appearance of the Additional Protocols. Various early drafts were produced but publication was delayed by the UK's inability to ratify the Protocols. Eventually the Army's draft became the core of a draft Joint Services Manual. The draft was effectively inherited by the present author and the JDCC from Colonel C. Garraway of Army Legal Services, whose efforts to get the land warfare elements into shape had been considerable and who remained on the Manual's Editorial Board. A new General Editor, Major General (Retd) A.P.V. Rogers (a former Head of Army Legal Services), was recruited under contract to carry the work forward under the Editorial Board's direction.

except insofar as they had an impact on war on land.[15] The Royal Navy's closest equivalent 'manual' was essentially merely a "handbook" that had appeared in successive editions over many years. The Guide to Maritime Law had originally been published within the Royal Navy with a "CONFIDENTIAL" security classification.[16] Its first revision after the Second World War had incorporated changes required by the coming into force of the four law of the sea conventions negotiated at the First UN Conference on the Law of the Sea in 1958. It was designed to be more a sea-going commander's brief handbook than a legal adviser's manual. By the mid-1990s this had been declassified and re-written to reflect developments in the law of the sea since the 1950s.[17] It contained only brief details of the essential rules relating to the law of armed conflict and was by no means an authoritative source of advice for use at all levels of command during the conduct of maritime operations.[18]

Some time before the UK ratified the 1977 Additional Protocols, in January 1998, a decision had already been taken which would effectively put right this shortcoming in promulgated legal advice on maritime operations during armed conflict. The decision was to build on the Army's original intention to produce its own successor to the Lauterpacht manual and, instead, produce a comprehensive joint service manual. The eventual outcome of that decision was the UK Manual, eventually published in 2004. By 1999, several chapters had already been drafted dealing with maritime operations. However, in reviewing all of the available draft chapters in 1999, the Editorial Board concluded that the draft maritime chapters were generally unsatisfactory in several respects, including structure, style and content. Rather than opt for a series of chapters dealing with different aspects of maritime operations, it was decided, if possible, to produce a single dedicated chapter. A significant part of the outcome of this review

15 The War Office, *Manual of Military Law Part III: The Law of War on Land* (HM Stationery Office, London, 1958).

16 It first appeared in 1929 under the title *Notes on Maritime International Law* and had the alpha-numeric designator "*CB3012"* – "CB" indicating its "charge book" security status.

17 It had also been re-designated as a mere "book of reference" - "*BR3012*".

18 The present author compiled an interim new edition of *BR3012* under the title *Commanders' Handbook on the Law of Maritime Operations* which was produced in electronic form and promulgated to the Fleet and relevant operational headquarters immediately before the commencement of hostilities against Iraq in 2003. This was able to make reference to an advanced (but unratified) draft of the new *UK Manual on LOAC*, which was also distributed for reference by in-theatre military lawyers during operations against Iraq. *BR3012* has since undergone further substantial review in the light of experience since 2003.

was a decision to draw substantially on the San Remo Manual in producing what eventually became Chapter 13 of the UK Manual dealing with "Maritime Warfare".

The decision to base the "Maritime Warfare" chapter of the UK Manual substantially on the San Remo Manual was, on the one hand, entirely to be expected. The San Remo Manual was rapidly established as an important reference on the subject as soon as it was published, together with its commentary, in 1995. The project to produce it had included a wide range of prominent naval officers and lawyers, many of whom, despite providing input in a "personal" capacity, were clearly involved because of the official positions they held in their own countries' armed forces or government departments. The British contributors included successive Royal Navy Chief Naval Judge Advocates (CNJA) Captain Jonathan Langdon, Captain Shaun Lyons and Captain Jack Baylis, all of whom attended the working sessions during their periods as CNJA. Sir Frank Berman, the Legal Adviser in the Foreign and Commonwealth Office was also an Associated Expert for San Remo. UK based academic input had been provided by Professor Christopher Greenwood, who was both a Rapporteur and an Author for the San Remo project. Greenwood was also the principal Academic Adviser to the UK Manual's Editorial Board. Finally, Commodore Jeff Blackett, the in-post CNJA in 2001, chose to invite Professor Vaughan Lowe to provide advice on the drafting of the "Maritime Warfare" chapter; Lowe had also been an Associated expert for San Remo. So it was understandable that the San Remo text be chosen as the basis of the "Maritime Warfare" Chapter.

However, the Editorial Board was also inclined to be cautious, once the "first working draft" had been produced by repeating virtually word for word the text of the San Remo Manual. Clearly it was necessary to question the status of the San Remo Manual and by far the most important starting point was to establish which elements of it were repeating treaty law and which were reflecting customary law. The San Remo Manual is described in its own introduction as "a contemporary restatement of the law, together with some progressive development which takes into account recent State practice, technological developments and the effect of related areas of the law".[19] Very obviously it is not, nor ever will be, a treaty, although elements of it do undoubtedly repeat rules contained in treaty law, in particular that contained in the 1907 Hague Conventions on maritime warfare. But nor is it simply an informal codification of the customary law relating to war at sea. Aspects of it may well be that, but it would be quite incorrect to assert that the San Remo Manual project was an attempt merely to identify the

[19] *San Remo Manual*, *supra* note 1, at ix.

customary law on the subject. It is important to stress this point because more recently it has been claimed that one of the reasons why the ICRC Customary International Humanitarian Law Study[20] did not cover aspects of maritime warfare was because this had already been achieved effectively through the work on the San Remo Manual.[21] The San Remo project relied on a mix of treaty law, interpretations of what constituted customary law at the time of its drafting, and ideas for ways in which the law might be developed to reflect modern conditions. It was important, therefore, for the Editorial Board of the UK Manual to select carefully and to take care not to include San Remo rules that were not already law or ran counter to UK interests.

Subsequent drafts of the "Maritime Warfare" chapter differed, therefore, from the precise text of the San Remo Manual and the full range of differences is dealt with in detail in the following section. Nevertheless, the Editorial Board was keen to acknowledge the importance of the San Remo Manual and the extent to which it had provided a basis for the final version of the "Maritime Warfare" chapter. A short passage explaining its importance was included in the Introduction to Chapter 13, as follows:

> The San Remo Manual is a valuable reference work and much of the present chapter reflects its content. When appropriate and possible the text of the San Remo Manual has been repeated in this chapter. However, where necessary the wording used in this chapter departs from the precise San Remo text either because that text does not reflect United Kingdom practice or because the San Remo text requires clarification or amplification.[22]

III. DIFFERENCES OF SIGNIFICANCE BETWEEN THE SAN REMO MANUAL AND THE UK MANUAL

Table 1 below lists all San Remo Manual articles and categorises them depending on their use or non-use in the "Maritime Warfare" chapter. As hinted above, Chapter 13 clearly relies heavily on the San Remo Manual

[20] *Customary International Humanitarian Law, Volume I: Rules* and *Volume II: Practice*, (ICRC, J-M. Henckaerts & L. Doswald-Beck eds., Cambridge University Press, 2005); hereinafter: *ICRC Customary Law Study*.

[21] *See, for example,* the comment contained in the Introduction to the *ICRC Customary Law Study,* at xxx: "It was decided not to research customary law applicable to naval warfare as this area of law was recently the subject of a major restatement, namely the *San Remo Manual* on Naval Warfare".

[22] *UK Manual*, *supra* note 1, at 348.

with most of its text repeated without any change necessary in the wording, with the exception of very minor editorial amendments of no substantive significance. While this paper does not include comment on those San Remo articles covered in the "Air Operations" chapter or elsewhere in the UK Manual, it is clear that a further significant number of articles are also repeated.

What follows is comment only on the subjects of those articles either excluded because of some measure of inconsistency with the UK position or amended in some substantial way prior to their inclusion. Only eight of the San Remo Manual articles were rejected completely for inclusion and these are dealt with first. This is followed by comment on the further eighteen articles which were included in amended form.

SRM Articles, the wording of which is repeated precisely in the Maritime Warfare chapter of the UK Manual[23]	13(b), (e), (g), (h), 14-17, 19, 20, 22-25, 27-29, 32, 37-46, 49-52, 61, 65, 66, 69, 78-94, 96, 97, 99-104, 106-109, 112-115, 117, 118, 120-124, 135-138, 140, 146-150, 152, 159, 161-164, 166, 169, 171-173.
SRM Articles whose wording was modified for inclusion in the Maritime Warfare chapter of the UK Manual	10, 30, 34, 36, 47, 60, 67, 95, 98, 105, 110, 119, 139, 160, 165, 167, 170.
SRM Articles covered in the Air Operations chapter of the UK Manual	13(f), (j), (k), (l), (m), 18, 53-58, 62-64, 70-77, 125-134, 141-145, 153-158, 174-183.
SRM Articles covered in other chapters of the UK Manual or the content of which is unnecessary to state	2-9, 13(a), (c), 31, 33, 59, 68, 168.
SRM Articles not included in the Maritime Warfare chapter due to their inconsistency with the UK position	1, 11, 12, 13(d), 21, 26, 35, 111, 116, 151.

Table 1: The Status of San Remo Manual Articles in the UK Manual[24]

[23] Although there may be minor editorial changes to the text to make it compliant with editorial policy for the *UK Manual.* However, these are editorial alterations to the text not intended to effect substantive alterations of meaning.

[24] In the commercially published hardback version of the *UK Manual* an editorial error led to the text containing reference to *SRM* Arts. 17, 18, 19, 20 and 22 being left out. The

A. Applicability of the Law of Armed Conflict

The Editorial Board rejected the wording of SRM Article 1 which states that the "rules of international humanitarian law (apply) from the moment armed force is used". Paragraph 3.1 of the UK Manual prefers to define the applicability of armed conflict thus: "The law of armed conflict applies in all situations when the armed forces of a state are in conflict with those of another state or are in occupation of territory". There are clearly circumstances falling short of armed conflict in which the armed forces of one State are used, but not against the armed forces of another, including when force is required for the purposes of law enforcement, which are characterised as "constabulary operations" in current British maritime doctrine.[25] The San Remo Manual in its Explanation behind SRM Article 1 makes reference to Common Article 2 of the 1949 Geneva Conventions, as well as to the ICRC Commentary on Geneva Convention II.[26] However, neither of these two references establishes the rule as described in SRM Article 1 and it is potentially misleading for the Explanation to use it in support. Particular law enforcement or constabulary operations will admittedly often occupy a position on the spectrum of force that abuts the point at which conflict might be deemed to have broken out, but it will not necessarily result in the outbreak of armed conflict. The law of armed conflict will not, therefore, necessarily apply.

B. Areas of Naval Warfare

The exhortation to belligerents, contained in SRM Article11, "to agree that no hostile actions will be conducted in marine areas containing rare or fragile ecosystems or the habitat of depleted, threatened or endangered

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official version of the manual, a loose leaf edition, published as *Joint Service Publication 383* (*JSP383*) and distributed within the British Armed Forces and government departments, had those articles included. They were inserted as Paragraphs 13.9A, B, C, D and E. A copy of these paragraphs is available on request from the JDCC, the address of which is included in the published *UK Manual*. However, they were also incorporated in the paperback edition of the manual published by OUP in 2005.

25 *British Maritime Doctrine* (*supra* note 11) defines the application of force for constabulary purposes as follows: "The use of military forces to uphold national or international law, mandate or regime in a manner in which minimum violence is only used in enforcement as a last resort and after evidence of a breach or intent to defy has been established beyond reasonable doubt. The level and type of violence that is permitted will frequently be specified in the law, mandate or regime that is being enforced. Also called policing".

26 *Geneva Convention II, Commentary* (ICRC, J.S. Pictet ed., 1960).

species or other forms of marine life" is neither customary law nor worded in a way that suggests any form of obligation whatever. The fact that the parties to a conflict are merely "encouraged to agree" and that no absolute obligation is being inferred, is fully acknowledged in the San Remo Manual explanatory section, which goes on to refer to it as a "soft law guideline".[27] The Editorial Board felt that the UK Manual should be a comprehensive treatment of the UK's legal rights and obligations during armed conflict and that statements more akin to policy should not ordinarily be included within its text. It is also the case that the UK is concerned to avoid absolute suggestions that coastal States' activities within their zones of jurisdiction beyond territorial limits have necessary priority over traditional high seas freedoms protected under the current law of the sea. While SRM Article 11 may well not contain any restrictive obligation, if the message it conveyed converted over time into practice then it may also develop customary credentials. The Editorial Board did not feel it to be in the UK's interests at this stage to provide any measure of endorsement and decided to leave the article out altogether.

The Editorial Board also chose to reject SRM Article 12, largely because it seemed superfluous. The need for belligerents to pay due regard to the rights and duties of neutrals in the latters' exclusive economic zone or in those waters above their continental shelves, is included in SRM Article 34 and repeated in the UK Manual at Paragraph 13.21. Other relevant neutral rights and duties are dealt with adequately in other parts of the San Remo Manual and then covered as well within Chapter 13; it therefore seemed quite unnecessary to repeat this general statement, even though it was not one with which the Editorial Board felt obliged to raise substantive objection.

C. Neutrality

In considering the definitions included in SRM Article 13, that defining "neutral'' ("any state not party to the conflict") was rejected as being insufficiently considerate of the nature of neutrality in the UN era. The explanation contained in the San Remo Manual acknowledges that the definition used in SRM Article 13 is that "traditionally used in international law" and goes on to relate how the issue was dealt with during its drafting process.[28] The principal issue for the San Remo participants was that of self-defence and the application of Article 51 of the UN Charter, which arguably

[27] *San Remo Manual*, *supra* note 1, at 83.
[28] *Ibid*., 87-88.

authorises States to take action to assist the supposed "victim" of aggression in ways that would breach traditional neutrality conditions. This is clearly one potential issue, although the San Remo Manual explanation dismisses it as not affecting its own text. However, the UN Charter generates one other concern over neutrality which the UK Manual's Editorial Board had to address. This is over the rights and duties of all States during an armed conflict that is being conducted as a consequence of a UN Security Council resolution under Chapter VII of the UN Charter. Briefly put: is it even possible to be "neutral" in a conflict being waged by one side, authorised by the UN Security Council, against another that has been judged by that body to have threatened international peace and security?

While the San Remo participants could perhaps quite easily dismiss the definition of "neutral" in the context of their own text, that was a luxury the UK Manual's Editorial Board could not afford. The members of the board had to address the full body of law relating to armed conflict and they were also producing an official document that would be likely to be quoted as an authorised source of UK practice for years to come.[29] It was extremely important that it contained an agreed position on neutrality, therefore. Indeed, early drafts of the manual included a separate chapter on "The Law of Neutrality" and it would have been quite inappropriate to proceed without reaching some conclusion as to the issues of self-defence and UN authorised enforcement operations. The "Maritime Warfare" chapter also acted as a spur for action on the subject as no area of conflict is so affected by the rights and duties of neutral States as war at sea. While a decision was made to dispense with a separate chapter on neutrality, it proved impossible to proceed with the drafting of Chapter 13 until some agreement had been reached within the Editorial Board that would be acceptable to the FCO and

[29] This is inevitably the case despite the inclusion in the *UK Manual*'s preface that "it does not commit Her Majesty's Government to any particular interpretation of the law". The law is as accurately described as it could be at 1 July 2004 (its date of publication) but, as the preface went on to add, while "every effort has been made to ensure the accuracy of the Manual at this date … it must be read in the light of subsequent developments in the law". Nevertheless, its content has a major significance that cannot be denied and the Editorial Board was clearly under a heavy responsibility to ensure its authority. In terms of practice, the *UK Manual* is clearly evidence of "verbal" as distinct from "physical" practice but is likely to be regarded as a significant source despite that. Given that its illustrious predecessor, the Lauterpacht manual from 1958, is still quoted as a source of the law, despite not having been updated since the late-1960s, the new manual's influence could be long standing, especially as it is due for regular review.

likely to get the eventual blessing of the Attorney General (whose approval was required before publication of the manual could go ahead).[30]

The Editorial Board met in the summer of 2001 in St Antony's College, Oxford and considered the issue in detail, coming up with a form of words that was then referred to the Legal Adviser in the FCO. Eventually the FCO Legal Advisers drafted what is now contained in Chapter 1 of the UK Manual. In dealing with the relationship between neutrality and the UN Charter it says:

> Since the end of the Second World War and the establishment of the United Nations, the traditional law of neutrality has been affected by and, to a large extent, superseded by the UN Charter. First, the conduct of armed conflict is subject to the limitations imposed by the Charter on all use of force. Secondly, UN member states are required to give the UN every assistance in any action it takes, and refrain from giving assistance to any state against which the UN is taking preventive or enforcement action. UN members are further bound to accept and carry out the decisions of the UN Security Council and join in affording mutual assistance in carrying out the measures decided upon by the Security Council under Chapter VII of the Charter.[31]

The difficulty that this conclusion produces, in relation to the San Remo Manual definition of neutrality, is that the UN Charter's implications are such that all States not directly involved in the fighting may well be obliged to be 'partisan' in complying with UN Security Council binding resolutions. What exactly is meant by "party to the conflict" and what actions taken by States are likely to be used to determine the extent to which they are or are not a "party"? It is certainly by no means the case that all States not actually contributing fighting forces for a UN authorised enforcement action will, by definition, be neutral. Indeed, they are legally obliged not to be. However, neutrality is not entirely moribund as a concept either; far from it in fact. When the UN Security Council has not yet reached any conclusion as to the precise source of a threat to international peace and security, two States may be engaged in a conflict (neither having been judged by the Security Council to be in the right or the wrong) while all others will be able to decide for

[30] The FCO is the lead government department for international law within HM Government. Ultimately the Attorney General had to agree to the publication of the *UK Manual* given its status, but did so, of course, with the caveat contained in the Preface and quoted *supra* note 29.

[31] *UK Manual*, supra note 1, at Para. 1.42.2.

themselves whether they become parties or remain neutral.[32] In such cases, neutrality will still be applicable in something close to its traditional sense.

Nevertheless, the eventual conclusion of the debate within the Editorial Board about neutrality was that it could not be very simply defined in the manner employed by the San Remo Manual. For that reason SRM Article 13(d) had to be rejected and replaced by the section on neutrality in Chapter 1, from which the above quote is taken.

D. The "24 Hour Rule"

The UK Manual in Paragraph 13.4 states that "the United Kingdom takes the view that the old rule which prohibited belligerent warships from remaining in neutral ports for more than 24 hours except in unusual circumstances, is no longer applicable in view of modern state practice". This is a refutation of SRM Article 21 and of Article 12 of 1907 Hague Convention XIII on the Rights and Duties of Neutrals (which the UK signed but never ratified[33]). A literal interpretation of the rule, as restated in the San Remo Manual, is that it would prohibit visits to any neutral port regardless of its geographic location relative to the region in which the conflict is being waged and regardless also of the influence that a port stay may have on a belligerent State's ability to conduct its operations against enemy armed forces. So, for example, during the recent war against Iraq, in theory British and US warships would have been forbidden from entering a neutral port in the Caribbean and remaining there for more than 24 hours for replenishment or repair. A visit of that sort would have had no impact at all on the conflict in the Gulf in 2003 and the rule is clearly quite unnecessary in that hypothetical circumstance. It is certainly not current UK State practice to restrict the ability of its warships to visit neutral States during UK involvement in conflicts in quite separate regions of the globe. During neither the Kosovo operations of 1999 nor the 2003 war against Iraq was such a policy adopted. If there is any sensible reason for maintaining the 24 hour rule, it must be related to the circumstances and to the geographical limits of the conflict during which it is to be applied. The very least that can be said about it, therefore, is that the rule ought to be reinterpreted in the light of modern conditions and State practice. In its current form it is contrary to UK

[32] The Iran-Iraq War is a recent example of such a conflict. Interestingly, the UK resisted suggestions that the belligerents might exercise traditional rights of visit and search. *See* Captain S. Lyons, "Naval Operations in the Gulf", in *The Gulf War 1990-91 in International and English Law* 155-70, at 160 (P. Rowe ed., 1993).

[33] *See* the table listing States party and details on reservations etc. in *Documents on the Laws of War*, *supra* note 2, at 136-37.

interests to continue to support it and its explicit dismissal in the text of the UK Manual represents a considered assessment that it should not currently be regarded as a customary obligation.

E. Notice of Passage

The Editorial Board rejected SRM Article 26 because it is not a legal obligation for neutral States to give warning of their warships exercising rights of passage. While the first sentence of Article 26 was included in the UK Manual in Paragraph 13.13, an additional paragraph (13.13.1) was incorporated as follows:

> There is no requirement for any ship, including warships, to give notice of intention to exercise rights of passage. However, there may be circumstances where it would be prudent to inform a state that a ship is undertaking such passage purely as a precautionary measure and without accepting that there is any legal obligation attached to the provision of that information.

F. Notification of Mining in Neutral EEZs and in the Waters above Neutral Continental Shelves

The Editorial Board did not include SRM Article 35 in the text of Chapter 13. To a large extent the article was regarded as superfluous given the obligation to notify in general incorporated in SRM Article 83 and repeated in Paragraph 13.55 of the UK Manual. However, SRM Article 35 went further than requiring mere notification by including also certain "relative duties" in relation to both economic activities and the protection and preservation of the marine environment within these areas. While this may sound eminently sensible, it is by no means clear that this is as yet a legal obligation and it was not felt either appropriate or possible at this stage to give support to the emergence of a customary norm through its repetition in UK verbal practice.

G. Ruses of War and Perfidy

Deception at sea has been a feature of naval history. Warships were entitled to disguise themselves if they so wished by, for example, wearing other colours. In contrast, aircraft have never been permitted to bear false markings. The UK position is that the disguising of ships to appear to be different (for example, by using different lights or no lights at all) is permissible subject to certain restrictions as to the type of vessel that can be

simulated.[34] The San Remo Manual deals with ruses of war in Article 110. This states that ruses are permitted but prohibits warships from actively simulating the status of various vessels listed in the Article. The San Remo list of vessels not to be simulated during a ruse differs somewhat from the list of vessels that are exempt from attack contained earlier in SRM Article 47. The authors of the "Maritime Warfare" chapter considered SRM Article 47 and 110 together and saw no reason why the lists should be different, preferring instead to regard them together. In dealing with ruses of war, the UK Manual refers us back to its own Paragraph 13.33 in which are listed those vessels exempt from attack. In this sense the San Remo Manual is not regarded as progressive enough and the Editorial Board was happy to establish the longer and more comprehensive list in UK verbal practice.

When it came to perfidy, however, it considered the San Remo Manual to go beyond treaty law. While stating in SRM Article 111 that "perfidy is prohibited", the explanation of that article contains reference to Article 37(1) of 1977 Additional Protocol I to the 1949 Geneva Conventions.[35] The impression given is that Article 111 directly reflects Article 37(1) of Additional Protocol I. However, strictly speaking this is not the case. In stating that "perfidy is prohibited" SRM Article 111 goes beyond the wording of Article 37(1) which states more precisely that "it is prohibited to kill, injure or capture an adversary by resort to perfidy". While it may be regarded as precision verging on pedantry, Article 37(1) leaves open the possibility that perfidy which does not involve killing, injuring or capturing an adversary may be permitted. The full text of the UK Manual's Paragraph 13.83 is as follows:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead it to believe it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:
>
> a. Exempt civilian, neutral or protected United Nations status;
>
> b. Surrender or distress by eg, sending a distress signal or by the crew taking to life rafts.

[34] *UK Manual*, *supra* note 1, at 365, n. 96.
[35] *San Remo Manual*, *supra* note 1, at 186.

H. Prize

One issue that attracted robust critical comment at the launch conference for the UK Manual was that of its treatment of prize law. In SRM Article 116 there is an unsurprising statement that prize is "subject to adjudication". In SRM Article 151, adjudication is again mentioned, this time in relation to the destruction of vessels when their taking as prize is prevented by the military circumstances at the time. However, the authors of the "Maritime Warfare" Chapter of the UK Manual rejected reference to adjudication in SRM Article 116 and left out SRM Article 151 altogether. Instead, when referring to SRM Article 116 they included a note to the effect that:

> The United Kingdom has not used prize courts for many years and is unlikely to do so in the future. Where a vessel is captured by United Kingdom armed forces it may be deemed to be the property of Her Majesty's Government.[36]

However, as Yoram Dinstein pointed out forcefully at the UK Manual's launch conference,[37] there is a long history of prize being subject to adjudication by prize courts. While 1907 Hague Convention XII on the Establishment of an International Prize Court never entered into force, this failure did not negate the general rule that domestic prize courts should sit in judgement over prize. The United Kingdom has been a major influence on the development of prize law over the centuries. As Colombos records:

> The origin of the English Prize Court is intimately connected with the Admiral's Court, and as far back as 1357, an example occurs where a claim by some Portuguese merchants in respect of goods taken as prize by English captors is described as having been "judicially prosecuted" before the Admiral.[38]

A relatively recent addition to the literature on prize gave a detailed account of the naval prize system in operation during the Revolutionary and Napoleonic Wars in the late-eighteenth and early-nineteenth centuries.[39] This

[36] *UK Manual*, *supra* note 1, at 366, n. 103.

[37] The *UK Manual* was officially launched by the Attorney General, Lord Goldsmith QC, at a Conference on "United Kingdom Perspectives on the Law of Armed Conflict", at St Antony's College, Oxford, on 1 July 2004.

[38] C.J. Colombos, *The International Law of the Sea* 795 (6th ed. 1967).

[39] *See* R. Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793-1815* (1998). Hill is a retired Royal Navy Rear Admiral who went on to become the Chief

British practice was a fundamental influence on the development of the international law relating to prize and there is no question that it has been generally accepted as a norm of international law that naval prize be subject to domestic adjudication.

The brief statement in the UK Manual, rejecting the likelihood of further prize courts being convened in the UK, is, therefore, not surprisingly controversial. Since the publication of the UK Manual, the present author, who chaired its Editorial Board and was one of the authors of its "Maritime Warfare" chapter, has become increasingly conscious of the extent to which this issue is not explained as fully as it perhaps ought to be in the UK Manual.[40] To clarify the current legal situation in the UK, it should be acknowledged that Section 27 of the Supreme Court Act 1981 provides for the High Court to sit as a Prize Court and to exercise jurisdiction in relation to the Prizes Acts dating from 1864 to 1944, as well as other matters relating to the high seas. Having said that, the traditional practice that such a court, if ever convened, might apportion prize money to those naval officers and men involved in seizing foreign shipping, is most unlikely to be applied. That practice is anachronistic and it is frankly inconceivable within the UK today that certain public servants would be allowed to benefit financially from performing their official duties to the extent that the traditional prize process allowed.[41] As will be clear from comments below on economic warfare at sea, this author regards the whole issue of "prize" as largely academic and essentially of historic interest only, but it is important that the UK Manual reflects the law as it is and a minor amendment to it, clarifying the position, would seem wholly appropriate.

Executive of the Middle Temple, one of the Inns of Court in London. A noted naval strategist and historian he has also had a long interest in maritime legal matters.

40 And fully accepts his own responsibility for the controversy generated by the inclusion of the inadequate footnote in Ch. 13!

41 The closest approximation to "prize" money that has until recently been awarded to naval personnel, is salvage money awarded when British warships have assisted vessels in distress during peacetime under the "contractual" arrangements covered by the Lloyd's Open Form. Awards of salvage money were not unusual during the author's own period of service in the Royal Navy (although, sadly, he never qualified for any himself!). However, it is understood that none has been awarded for over ten years, perhaps because no occasion has arisen during that time involving British warships assisting vessels in distress under the terms of the Lloyd's Open Form.

IV. AMENDMENTS TO SAN REMO MANUAL ARTICLES INCLUDED IN THE UK MANUAL

Eighteen of the San Remo articles were included in the UK Manual but had their wording and substantive meaning altered in some way, either in amplification or because a slight difference of meaning was required for them to reflect the UK's position on the law.

In relation to the areas of naval warfare, the UK Manual is substantially the same as the San Remo Manual, although SRM Article 10 was reworded and expanded upon in clarification. The point was particularly made that the continental shelf and the exclusive economic zone are both a part of the high seas and, even in the case of neutral States' such zones, belligerents retain the right to conduct hostilities therein.[42]

In including SRM Article 30, dealing with transit and archipelagic sea lanes passage, the UK Manual also includes the words "normal modes of continuous and expeditious transit".[43]

In including SRM Article 34, dealing with the EEZ and the continental shelf, the UK Manual adds mention of vessels engaged in fishing.[44]

In place of the wording of SRM Article 36, dealing with the high seas and the sea-bed beyond national jurisdiction, the UK Manual merely states that "Hostile actions on the high seas shall be conducted with due regard for the rights of others in their use of the high seas".[45]

The two articles SRM Article 47 (dealing with enemy vessels exempt from attack) and 110 (dealing with deception, ruses of war and perfidy) have been used/modified to produce a comprehensive list of vessels that are exempt from attack and which cannot be used in relation to ruses of war.[46]

In dealing with instances in which enemy merchant vessels may be regarded as legitimate military objectives, the UK Manual adds to SRM Article 60 the need to consider the circumstances as well as the actions being taken.[47]

The UK Manual expands the introduction to SRM Article 67, dealing with neutral merchant vessels, thus: "Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of

42 *UK Manual, supra* note 1, Para. 13.6.
43 *Ibid.*, Para. 13.17.
44 *Ibid.,* Para. 13.21.
45 *Ibid.*, Para. 13.22.
46 *See also* the discussion above under "Perfidy and Ruses of War".
47 *UK Manual*, *supra* note 1, Para. 13.41.

military objectives. They may, depending on the circumstances become military objectives if they".[48]

In addition to the SRM Article 95 wording on effective blockade, the UK Manual adds amplification thus: "… and is of significance because of the need to distinguish between legitimate blockading activity and other activities (including visit and search) that might be carried on illegitimately on the high seas under the guise of blockade".[49]

In including SRM Article 98 dealing with merchant ships running a blockade, the UK Manual adds the words "if they are military objectives".[50]

In including SRM Article 105, dealing with zones, the UK Manual adds the following words before those in the San Remo Manual: "Security zones may be established by belligerents as a defensive measure or to impose some limitation on the geographical extent of the area of conflict. However …".[51]

In including SRM Article 119, dealing with visit and search of merchant vessels, the UK Manual adds the words: "… thereby obviating the need for visit and search. This does not imply that the vessel's consent is required for the exercise of visit and search if that is deemed necessary".[52]

In including SRM Article 139, dealing with the capture of enemy vessels and goods, the UK Manual deletes the reference to adjudication (see comments above on prize).[53]

The UK Manual includes in its entirety SRM Article 160, dealing with zones created for humanitarian purposes, but then adds a separate paragraph in amplification.[54]

The content of SRM Article 165, dealing with protected persons, is effectively covered by UK Manual paragraphs 13.119, 13.119.1 and 8.3.1.

In including SRM Article 167, dealing with civilians, the UK Manual adds a reference to 1977 Additional Protocol I.[55]

In including SRM Article 170, dealing with hospital ships, the UK Manual adds the following: "Crew members of hospital ships may carry light individual weapons for the maintenance of order and for their own protection".[56]

48 *Ibid.*, Para. 13.47.
49 *Ibid.,* Para. 13.67.
50 *UK Manual*, Para. 13.70.
51 *Ibid.*, Para. 13.77.
52 *Ibid.,* Para. 13.92.
53 *Ibid.,* Para. 13.102.
54 *Ibid.,* Para. 13.114.1.
55 *Ibid.*, Para. 13.121.
56 *Ibid.,* Para. 13.124.

V. ADDITIONAL COMMENT ON HOSPITAL SHIPS

While this paper is essentially about the differences between the San Remo Manual and the UK Manual, it would be especially inappropriate not to mention one significant area of agreement between the two. This is in relation to hospital ships. The UK Manual repeats SRM Article 171, despite this being inconsistent with Article 34(2) of 1949 Geneva Convention II. The Geneva rule states that "hospital ships may not possess or use a secret code for their wireless or other means of communication". In contrast the UK Manual includes SRM Article 171, as follows:

> In order to fulfil most effectively their humanitarian missions, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.

During the Falklands conflict between the UK and Argentina in 1982, the Royal Navy found it impossible for its hospital ships to operate effectively without maintaining some measure of secure communications between themselves and other units in the deployed task force. One particular problem was related to achieving rendezvous for transfer of personnel at sea. Broadcasting the position of the hospital ship would inevitably compromise the position of any warships needing to transfer personnel. The only practical solution to this problem was to allow encrypted communication, but to restrict hospital ships' use of encryption to that necessary for essential communication directly related to their humanitarian missions. Without encryption hospital ships could not fulfil that function. It was the Editorial Board's view that there was a modern humanitarian imperative to breach the Geneva rule and it agreed therefore with the San Remo rule that reflected that line.

VI. SUMMARY COMPARISON

The above analysis of the differences between the San Remo Manual and the UK Manual demonstrates very clearly that the latter has relied very heavily on the former. Of the 183 articles that make up the San Remo Manual, a total of 94 were included unaltered and 18 were included with modified wording. Only nine relevant San Remo articles were rejected outright from the "Maritime Warfare" Chapter. Of the remainder, 49 were excluded because they dealt with subjects more appropriately covered in Chapter 12 on "Air Operations", and 13 were not included because their subjects were dealt with elsewhere in the UK Manual. So, on a numerical analysis of articles alone,

only a very small percentage of the San Remo Manual was rejected completely by the UK Manual's Editorial Board. While the analysis will not, strictly speaking, be either complete or accurate until a similar exercise is undertaken in relation to air operations, this represents a significant endorsement of the collective efforts put in by the 150 experts who contributed to the San Remo process between 1987 and 1995. As a major maritime power the United Kingdom is an important judge of the current state of this vital element of the body of law regulating armed conflict in the international system and this level of acceptance has to be regarded as significant.

Issues that prevented a 100% endorsement have been dealt with above and do not substantially undermine the San Remo Manual's overall position as a long overdue and extremely important contribution to both the restatement and progressive development of the law. Nevertheless, it is good that we are invited to consider what should now be done to move the process of development forward. For one thing, the San Remo Manual is not perfect. The areas of divergence between it and the UK Manual highlighted in this paper so far are clearly important ones. Their existence means that the UK, for one, could not conclude that the totality of the San Remo rules should be regarded as customary law, for example. Other similar comparisons will add to an overall impression and the contribution of other major maritime powers to this process will also be important means of assessing the current state of the law. Indeed, the most likely means by which the law will be developed is through State practice, both verbal in the form of official manuals dealing with the law of maritime operations, and physical in the form of actual conduct during operations. Allowing the San Remo Manual to continue to have the influence that it has had so far is one way of proceeding. The progressive adoption of the San Remo rules is already underway, as the experience of the UK Manual illustrates. Indeed, this is the route most likely to be favoured by governments, especially those of the major maritime powers.[57] Suggestions that the San Remo process of over a decade ago should now be repeated and a second revised edition of the resultant manual produced, are assessed as being unlikely to meet with official enthusiasm.

[57] This view is reflective of J.A. Roach, "The Law of Naval Warfare at the Turn of Two Centuries", in 94 *A.J.I.L.* 64-77, 76-77 (2000). Roach, a prominent US official (who was also involved in the San Remo process), refers to conclusions reached by, among others, the Russian and Netherlands governments and by C. Greenwood (Academic Adviser to the *UK Manual* Editorial Board).

VII. THE FUTURE OF ECONOMIC WARFARE

What has been said in this paper so far is perhaps best described as a mainstream approach to the law of armed conflict applicable at sea. It probably appears as a balanced, pragmatic and, in fundamental terms, a largely uncontroversial discussion of the subject; it is certainly not radical. This is not at all surprising given the author's policy related background and his involvement in the development of the UK Manual. However, there is a more progressive side to his academic approach and from this point on the paper will step into more controversial territory. While what came before is reflective of the author's former role as a staff officer within the Ministry of Defence, what follows should certainly not be regarded as reflecting either the current or the likely future views of the British Government. It is included to stimulate serious discussion about where the law should go in the future and the extent to which it should reflect the perceived realities of the contemporary and developing global strategic environment.

In the introduction to this paper mention was made of the famous confrontation between the Graf Spee and the Royal Navy's South Atlantic Division in the first weeks of the Second World War. The orders under which Captain Langsdorff was acting when he took his ship into southern waters were related to Germany's aim of attacking the United Kingdom's ocean trading activities. In interdicting, stopping and sinking British shipping Langsdorff was conducting a form of warfare that had substantial precedents in previous maritime campaigns stretching back through modern history. This aspect of maritime warfare was traditionally regarded as a perfectly legitimate means of affecting the enemy's ability to sustain its war effort at home. It was a natural feature of great power warfare, albeit a far from invariably effective means of achieving victory. Notwithstanding the illegitimacy of Germany's decision to wage aggressive war (a *jus ad bellum* issue), when it came to the conduct of those operations mounted in support of that aggression their legitimacy must be judged in relation to the *jus in bello* – the laws of war at sea. The Graf Spee's activities were conducted largely within the bounds of legal acceptability, with the rights and duties of both belligerents and neutrals generally respected by her captain. Expressed in simple terms, those British merchant vessels that the Graf Spee encountered on the high seas were legitimately challenged, ordered to stop, boarded, evacuated and then legitimately sunk rather than taken as prize. The crews were all treated with the respect that was their due, were taken onboard the pocket battleship and subsequently transferred to the Altmark,

the Graf Spee's auxiliary, for eventual onward transportation back to Germany.[58]

There are two related means in particular of waging traditional economic warfare at sea. The first is that already mentioned, involving the legitimate interdiction of enemy merchant shipping as well as contraband being shipped under neutral flag. The region of operations is the high seas as well as the territorial waters of the belligerents. The second means is blockade, which has the same intent but is more obviously associated with the blocking off of enemy ports. The legal acceptability of both high seas *guerre de course* operations and the blockade of ports of entry is very well established in international law. This fact is reflected in the San Remo Manual, with a total of twenty six articles dealing with visit, search and capture of merchant vessels, both belligerent and neutral[59] and a further twelve articles devoted to blockade.[60] This is a substantial proportion of the whole manual. And yet one has to question both the general acceptability and the utility of these means of waging war over sixty years since they were last employed to any substantial degree in the total war conditions prevailing during the Second World War.

Economic warfare has not disappeared, of course. But it has arguably changed in character and in terms of the precise methods used and the means by which it is legitimised. The inclusion of economic sanctions in Chapter VII of the UN Charter is clear proof of the modern acceptability of economic warfare, even if we shun that phrase to describe it. It is a relatively easily prescribed method of putting pressure on States whose activities are judged by the Security Council to be a threat to international peace and security. Since the economic sanctions were imposed against Rhodesia during the late-1960s and early-1970s we have also had the employment of naval forces on something that on first sight may look suspiciously like a blockade, but which is more correctly referred to as a "maritime embargo operation". So operations are mounted at sea, the purpose of which is to put States under pressure of sanction. However, these types of operation receive no mention in the San Remo Manual, which is more concerned with traditional means of applying economic pressure.

This seems something of a pity as those traditional methods seem now to be somewhat out of fashion. The idea that it would today be generally

[58] The *Altmark* was eventually intercepted by British naval forces in Norwegian territorial waters on passage to its German base port. As already noted (*supra* note 9), the Royal Navy breached international law by entering the territorial and internal waters of a neutral State (Norway) to intercept the vessel.

[59] *San Remo Manual*, *supra* note 1, Arts. 112-24, 135-40, 146-152, 93-104.

[60] *Ibid.*, Arts. 93-104.

acceptable for belligerent warships to trawl the oceans in search of belligerent merchant shipping and, when finding it, to destroy it, for the simple reason that it was not convenient to escort it back to their own ports as prize, is close to absurd. There is a need to be able to interdict shipping on the high seas but this is today more properly legitimised either through the UN Security Council or by way of bilateral agreements between flag States born of circumstances that are fundamentally different from those that lie at the heart of traditional guerre de course.[61]

If we take the issue of blockade one has to conclude that, while it remains theoretically an option in certain circumstances, it is by no means the favoured one. Indeed, it may even have become absent from practice. Practice is at times difficult to pin down and when it comes to that related to war we have to face the prospect that customary law cannot develop unless wars are fought to provide physical evidence. With blockade, however, there is recent evidence born of war that is potentially extremely significant. During the Kosovo operation in 1999 there was concern in NATO capitals about the possibility of Serbia being supplied with essential goods (especially oil) through the Montenegro port of Bar on the Adriatic coast. An armed conflict was in train and blockade would have been a perfectly legitimate operation to mount under the current, or traditional, law of armed conflict.[62] However, there was a marked reluctance on the part of many within NATO, first to admit that the Alliance was actually in a state of war with Serbia and, second, that belligerent blockade was an acceptable way of controlling access to Bar. Attempts were made to construct a "consent

[61] A pertinent current example is the series of agreements initiated by the US under the general heading of "The Proliferation Security Initiative" (or PSI), announced by President G.W. Bush in Krakow, Poland, on 31 May 2003, which is a measure intended to provide conditions for conducting high seas board and search operations to prevent the oceanic transportation of materials associated with weapons of mass destruction. However, this has not so far been backed by specific UN Security Council authorisation and relies for the moment on the effective consent of flag States. Other examples of legitimate interdiction possibilities authorised by way of treaty law are the arrangements included in the 1988 Vienna Convention on the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances and those meant as a response to terrorism on the high seas contained in the 1988 IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the so-called *SUA Convention*). Strictly speaking, the operations likely to be mounted in accordance with such agreements are more appropriately described as "peacetime" law enforcement (or "constabulary") by nature; they are not associated with traditional belligerency and are, therefore, neither mentioned nor covered in the *San Remo Manual*.

[62] Contrary to the views of some; *see, for example*, P. Sands, "Oil Blockade Threatens International Law of the Sea", published by Reuters 28 Apr. 1999, and available through *American Society of International Law Insight*.

embargo regime", a rather wasted effort in pursuit of a flawed idea. Under the circumstances, to be effective in a consensual sense, the regime would have required the approval of the flag State of those ships intent on entering the port; something that was so unlikely as to be inconceivable. The rather obvious inadequacy of the proposed consent regime to deal with the Bar problem did not prevent staffs in ministries of defence and foreign affairs in NATO capitals expending considerable effort to put the arrangement in place (although efforts did cease once Belgrade acquiesced seventy eight days into the Alliance's air campaign). So, on the most recent occasion when blockade would have been entirely fitting as a means of warfare, there was not only no effective support for it within NATO, but staff were engaged in frantic efforts to find a way of avoiding its use.[63]

This has to be regarded as significant in terms of developing State practice. Although no official statement has ever supported the suggestion that any State felt itself under a legal obligation not to employ blockade, it was the general unacceptability of it that was the root cause of the reluctance to do so. If practice is difficult to pin down, *opinio juris* is even more so. That accepted, the Bar episode will nevertheless remain extremely significant in relation to blockade. Indeed, it is strongly suggested that blockade has, for all intents and purposes, been effectively superseded by economic embargo operations. To be fully effective those operations must be legally applicable to all, cannot be based merely on consent, and will, therefore, almost invariably have to be authorised by the Security Council. It might seem odd that the San Remo Manual does not mention economic embargo operations at all. However, it is strangely logical because, of course, UN embargo operations are not necessarily a feature of "armed conflict". So, while this form of naval operation, designed to control access to ports, is now common, it is understandable that there is no mention of it in the San Remo rules. Nevertheless, it must be said that this omission is rendered perverse by the inclusion of several articles dealing with the apparently undesirable belligerent blockade.

If both traditional guerre de course operations and blockade are becoming markedly unacceptable, one needs to question their legitimacy in legal terms.

63 This author was serving in the Ministry of Defence in London at the time and (although not working in a legal advisory capacity or directly involved in staffing the issue) was asked by operational planning staff for his views on what to do about Bar. His suggestion was to employ belligerent blockade as this would be both legitimate and effective. He was surprised, and not a little frustrated, by the marked reluctance in Whitehall to go that route and by the vain attempts to put in place the consent embargo regime. His conclusion was that if blockade was not even politically possible in those circumstances, one had seriously to question its modern relevance.

One also needs to question the San Remo Manual's treatment of them and of economic warfare in general.

The world has changed in particular ways in the last half century. The United Nations, despite its shortcomings, has had a profound affect on perceptions of legitimacy. Changes in the nature and complexion of the modern international system have also had an inevitable influence on the ways that navies are employed. There can be little or no doubt about this; one only has to examine what navies have actually done in recent years to see that this is so. One difficulty that we experience in dealing with these changes in the context of the laws of armed conflict, is that much of modern naval activity (indeed much of all military activity) is conducted in the grey area between peace and war. We are finding it extremely difficult to draw a clear line of distinction between something we call "armed conflict" and something else that falls short of it. If one looks at military doctrine there is often now not only a willingness but a perceived imperative to deal with circumstances that are neither war nor peace. The need to conduct operations in fluid circumstances makes the application of laws with strictly defined limits of applicability, extremely difficult for those actually conducting operations. However, there is often reluctance, especially, it must be said, amongst lawyers who have a specialist interest in the laws of armed conflict, to come fully to terms with this new strategic environment.

The community of practitioners and scholars working on the law of armed conflict applicable at sea seem often to be an innately conservative group. There is a body of law there, it is important that it be protected and that nothing be done substantially to change the legal *status quo*. One frequent argument deployed against suggestions that activities such as blockade and guerre de course should be dispensed with, is that, while they may not be entirely relevant today, they may prove useful at some point in the future. And yet, if the law remains the same it arguably risks looking rather quaint and irrelevant.

To a significant degree, one's view on this issue depends on one's interpretation of the current and likely future nature of the global security environment. Traditional economic warfare at sea has been conducted in the context of great power rivalry and recourse to war. The most recent example of such was the Second World War. If great power warfare is likely in the future then it would be prudent to retain the option to conduct traditional economic warfare at sea. However, it is by no means clear that great power war is likely. Indeed, the arrival of the nuclear age, and the destructive capacity of nuclear weapons, has resulted in a fundamental shift in perceptions as to what is rational in relation to the conduct of great power rivalry.

International relations scholars are admittedly not united on this issue. Traditional and offensive Realist interpretations of the international system are increasingly being challenged, not least by more defensive Neo-Realist interpretations.[64] Offensive Realism, through which States aim to maximise their power in the quest for security, certainly provides a sound explanation of traditional great power rivalry. Traditionally, great powers were not generally inclined to maintain the political *status quo* but were driven to maximise their own power, either in absolute terms or at least relative to that of their rivals.[65] Through this perspective, war is regarded as a rational policy option in the pursuit of security. While it may seem odd to us today that recourse to war could be a clear and rational option in the pursuit of security, it is useful to reflect that it was this assumption that provided the basis for Clausewitz's famous dictum that war is merely the continuation of politics by other means. However, Neo-Realists, most notably Kenneth Waltz, have argued forcefully that, while Realism remains the essential default position for the conduct of international politics, the rational imperative in the nuclear age is to opt for a defensive approach in which the aim is to achieve security through the maintenance of the political status quo.[66] Great power war is no longer the rational option because of the destructive power of nuclear weaponry. In a recent response to the Neo-Realists (especially Waltz), John Mearsheimer, has argued the case once again for the relevance of Offensive Realism. The present author certainly agrees with Mearsheimer that great power rivalry based on an offensive approach makes great power war most likely. However, he disagrees profoundly with Mearsheimer that Offensive Realism remains a rational choice for great powers in rivalry with others possessing an effective nuclear capability.[67] If some form of Realism is indeed the key to international

64 *See* B.C. Schmidt, "Competing Realist Conceptions of Power", in 33 *Millenium J. Int'l Studies* 523, in particular 525-28 (No. 3, 2005) for a brief summary of the different Realist approaches to Power.

65 For a robust recent argument in support of Offensive Realism *see* J.J. Mearsheimer, *The Tragedy of Great Power Politics* (2001). Another prominent Realist who would disagree profoundly with the views expressed in this paper is C. Gray; *see* in particular his very recent *Another Bloody Century: Future Warfare* (2005).

66 *See for example* the recent summary of this position in M. van Creveld, "The Waning of Major War", in R Vayrynen, *The Waning of Major War: Theories and Debates* 97-112 (2006). The arch Neo-Realist Kenneth Waltz is so convinced of the rationally defensive nature of modern realism in the nuclear era that he even supports nuclear proliferation as a means of driving Offensive Realism from the international system (*see* his arguments in S.D. Sagan & K.N. Waltz, *The Spread of Nuclear Weapons: A Debate Renewed* (2003)).

67 In essence we are concerned here with war between the regionally hegemonic USA (and its allies) and other great powers like China and Russia. (For an excellent recent analysis of the pattern of power shaping the current international system, *see* B. Buzan, *The United*

politics (and this is far from fully convincing within the current and increasingly complex international system) then it is Realism of a defensive nature that is the most rational and, therefore, the most likely. Defensive Realists regard great power war as largely a historical phenomenon. It follows that they would also regard traditional economic warfare at sea as most unlikely.

The San Remo process was long overdue. However, by concentrating on the laws of armed conflict applicable at sea, it did not bring the much wider body of the law of naval operations fully into the contemporary era. It looked backwards to 1856 and 1907, and to the era of great power warfare, rather than forwards to the modern era of naval operations conducted within an international system in which war between the great powers is considered to be most unlikely. If the cautious approach to the development of the law is to prevail, at least for the moment, then a second revised edition of the San Remo Manual is neither necessary nor very likely. If, on the other hand, we feel it is time to bring the law relating to naval operations right up to date to reflect the absence of great power warfare, the issue of economic warfare must be addressed, with mention of belligerent blockade and *guerre de course* – and associated prize law – being confined to the archives.

States and the Great Powers: World Politics in the Twenty-First Century (2004.) While tension may well exist, the chances of this developing into the type of full scale war in which traditional economic warfare at sea becomes a feature, is most unlikely. Even in the unlikely event of it doing so, the chances of the traditional rules of economic warfare being complied with are even less likely. They certainly did not long survive intact into the Second World War.

HOW TO UPDATE THE SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA

*Wolff Heintschel von Heinegg**

INTRODUCTORY REMARKS

The 1994 San Remo Manual[1] (or SRM) has met widespread approval as a contemporary restatement of the principles and rules of international law applicable to armed conflicts at sea. In view of the fact that many of its provisions are but a compromise between the differing views within the group of international lawyers and naval experts some of its provisions may be far from perfection. Still, this has not prevented a considerable number of States from adopting most of the San Remo rules in their respective manuals or instructions for their naval armed forces.[2] Against that background it is somewhat surprising that there is an increasing number of both operators and lawyers, criticizing parts of the San Remo Manual as outdated and as an unreasonable obstacle to the success of their operational or strategic goals. They, *inter alia*, refer to the provisions on measures short of attack and on methods and means of naval warfare, especially on blockade and operational zones. In their view, those provisions neither meet the necessities of modern operations, e.g., maritime interception operations (MIO) or non-military enforcement measures decided upon by the UN Security Council, nor do they offer operable solutions to the naval commander.[3]

Of course, the San Remo Manual does not prioritise military or operational necessity. Rather it imposes legal restrictions on naval

* Prof. Dr. iur., Europa-Universität Viadrina Frankfurt (Oder), (Germany); Stockton Professor of International Law for 2003/4 at the United States Naval War College, Newport, Rhode Island (U.S.A.).

1 International Institute of International Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter: *SRM*). *See also* the *Explanations to the Manual: San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck ed., 1995).

2 U.S. Navy, *The Commander's Handbook on the Law of Naval Operations - NWP 1-14M*, 1997 (hereinafter: *NWP 1-14M*); UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Ch. 13 (Oxford, 2004), (hereinafter: *UK Manual)*; German Navy, *Commander's Handbook* (Kommandanten-Handbuch) (Bonn, 2002), (hereinafter: *GN Manual*).

3 *See*, *inter alia*, the articles by S. Haines and by J.G. Dalton in this Volume of the *Israel Y.B. Hum. Rts.*

commanders that may prove inconvenient in view of the means available and in view of the task of the respective mission. The said criticism, however, goes beyond such general complaints about legal rules. It is based upon the belief that whenever it comes to interference with other States' shipping that interference would be permissible only if it is in accordance with the law of naval warfare, *i.e.*, with the provisions of the San Remo Manual. Then it would be difficult, indeed, to maintain that, e.g., MIO within the framework of the Global War on Terror are legal. It would be similarly difficult to explain the legality of measures enforcing an embargo if they had to be judged in the light of the law of blockade alone.

However, the said criticism is based upon an erroneous understanding of the law of naval warfare, of its scope of applicability and, thus, of the San Remo Manual. Maritime interception operations aimed at combating transnational terrorism[4] or the proliferation of weapons of mass destruction[5] and related components do have a legal basis that is independent from the law of naval warfare. The same holds true with regard to enforcing an embargo – either with or without the authorization of the UN Security Council.[6] Therefore, neither the law of naval warfare nor the San Remo Manual as its most recent restatement pose an insurmountable obstacle to such operations. The San Remo Manual's provisions apply exclusively to situations of international armed conflicts.[7] MIO and other maritime operations have to be based upon that body of law only if they occur in the course of an armed conflict between two or more States.

However, the said criticism does not seem to be absolutely unjustified insofar as the San Remo Manual may indeed no longer properly reflect contemporary State practice or meet the realities of modern maritime and naval operations. Moreover, some of its provisions seem to be quite

4 *See* W. Heintschel von Heinegg, "Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality", 34 *Israel Y.B. Hum. Rts*. 151-78 (2004).

5 *See* W. Heintschel von Heinegg, "The Proliferation Security Initiative – Security vs. Freedom of Navigation?", 35 *Israel Y.B. Hum. Rts*. 181-203 (2005).

6 In that case the legal basis is the respective Security Council's decision based on Ch. VII of the UN Charter. While some navies, in their rules of engagement, also refer to rules and principles of the law of naval warfare this is due to the fact that there exist no specific rules on the conduct of enforcement measures authorized by the Security Council. Therefore, they rely on the law of naval warfare as a general guidance only. This practice does not give evidence of an *opinio juris* that the respective States consider the law of naval warfare to be applicable in a formal sense.

7 *See SRM*, *supra* note 1, para. 1. Note, however, that this provision is not correctly reflecting customary international law as rightly pointed out by S. Haines (in this Volume of the *Israel Y.B. Hum. Rts*.).

ambiguous and, thus, may be misinterpreted. This lack of legal clarity could ultimately render obsolete the great progress achieved by the San Remo Manual.

Therefore, it is time to take a fresh look at the San Remo Manual. The task this author has been entrusted with is to identify those of the San Remo Manual's provisions that ought to be reconsidered or modified[8] and to evaluate the persuasiveness of some of the critical arguments that have been put forward against the San Remo Manual.

I. DEFINITIONS

At first glance, the list of definitions in paragraph 13 of the SRM seems to be comprehensive and reflective of customary law. The latter is certainly true in principle.[9] Still, this does not necessarily mean that all the definitions continue to reflect contemporary State practice.

A. Civilian Mariners and Private Contractors on Board Warships

There is a tendency in State practice to crew warships with civilians or at least to make use of civilian contractors who work on board warships.[10] In many cases, the contribution of civilian contractors is essential for the operation of the ship or of its weapons systems. Hence, the question arises whether the presence of civilian mariners or of civilian contractors affects the legal status of the ship concerned. The ability to exercise belligerent rights remains reserved for warships.[11] Warships are authorized to engage in offensive military activities, including visit and search, blockade, interdiction and convoy escort operations. Auxiliary vessels are expressly

8 The issues of arming hospital ships and of the use of secure communications on board hospital ships are dealt with by Heintschel von Heinegg, *supra* note 4.

9 For identical definitions *see UK Manual*, *supra* note 2, MN 13.5; *NWP 1-14M*, *supra* note 2, paras. 2.1.1, 2.1.3, 2.2.1; *GN Manual*, *supra* note 2, MN 83 *et seq*.

10 For a long time, the Royal Navy has used civilian personnel to provide ship's services including food service, cleaning, and laundry. The US Navy also experimented with the concept of augmenting warship crews with civilian mariners supplied by Military Sealift Command (MSC). Three years ago MSC identified fleet command and control ships as platforms that can be transferred to MSC and staffed with civilian mariners. The *USS CORONADO* had been chosen as the "pilot program" for this initiative. In addition, there is very often a considerable number of private contractors on board warships who are maintaining and/or operating electronic and weapons systems.

11 *NWP 1-14M*, *supra* note 2, paras. 2.1 & 7.6.1; *UK Manual*, *supra* note 2, MN 13.5 & 13.91; *GN Manual*, *supra* note 2, MN 200 *et seq*. & 280. *See further* Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, paras. 1002 & 1015 (Bonn, 1992); hereinafter: *German Manual*).

prohibited from exercising belligerent rights.[12] There are convincing arguments according to which civilians on board warships should perform neither crew functions nor other functions related to the operation of the ship and its weapons or electronic systems. Such activities should indeed remain reserved for State organs proper. It should be noted, however, that the definition of warships in paragraph 13(g) of the SRM and in customary international law does not necessarily rule out the use of civilian mariners and civilian contractors. According to that definition the warships must be manned by "*a* crew that is under regular armed forces discipline". In contrast, the 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships,[13] in Article 4, provides that "*the* crew" of a converted merchant ship "must be subject to military discipline". While the use of the definite Article in Hague Convention VII rules out the (further) use of civilian mariners, the indefinite Article in the definition of warships justifies the conclusion that not necessarily all crew members must be under regular armed forces discipline. Leaving aside the ensuing question of the permissible proportion of civilian mariners (or private contractors) in comparison to sailors and officers proper it, thus, becomes clear that the manning of warships with civilian mariners does not affect the legal status of the ship as long as the other criteria are met and as long as a certain portion of the crew remains under regular armed forces discipline. Of course, these findings are without prejudice to the legal status of civilian mariners and of civilian contractors. If captured they could, with good reason, be considered unlawful combatants and prosecuted for direct participation in hostilities. The latter problem could be solved by conferring a special legal status on civilian mariners and private contractors. Still, it would certainly contribute to legal clarity if paragraph 13(g) of the SRM were supplemented by an explanatory statement with regard to the presence of civilians on board warships.

B. Unmanned Vehicles

Paragraph 13 of the SRM lacks a definition of unmanned – aerial or underwater – vehicles.[14] This issue is raised here because their legal status

[12] *See, e.g., German Manual*, *supra* note 11, para. 1016.

[13] Repr. in *Documents on the Laws of War* (A. Roberts & R. Guelff eds., 2001).

[14] While there is a growing use of unmanned aerial vehicles (UAVs) for reconnaissance and for combat operations (UCAVs) there are but a few scholarly works on the legal questions involved in their use. Unmanned submarine or underwater vehicles (UUVs) that are used for purposes other than counter mine operations have not been dealt with at all by legal writers because most of the information on such vehicles is still classified.

may well be of importance with regard to the rights and duties of neutral States. An unmanned vehicle is either an integral part of a warship's weapons systems or otherwise controlled from a military platform. If that military platform is a warship or a military aircraft the UAV, UCAV or UUV, according to the position taken here, necessarily shares the legal status of that platform and it, thus, enjoys sovereign immunity as long as it is operated in high seas areas or in international airspace. Accordingly, neutral States would under no circumstances be allowed to interfere with them.

II. REGIONS OF OPERATIONS

The provisions of the San Remo Manual on the Regions of Operations are evidently influenced by the 1982 UN Convention on the Law of the Sea. The adaptation of the rules on the regions of operations to the contemporary law of the sea is by all means a realistic, and the only operable, approach to reconcile the interests of belligerent and neutral States. Of course, this delicate compromise is continuously challenged by excessive maritime claims.[15] Creeping jurisdiction may unsettle that compromise and may, ultimately, render obsolete that part of the San Remo Manual. Therefore, States should take all necessary measures to preserve the achievements of both, the 1982 UN Convention on the Law of the Sea and of the San Remo Manual.[16] Still, the provisions of the San Remo Manual on the regions of operations are far from perfect.

Those provisions reflect the approach underlying the 1982 UN Law of the Sea Convention not only with regard to the determination of "neutral waters"[17] but also with regard to the obligations of belligerents at sea to pay due regard to the legitimate rights of coastal States – when operating within their EEZ – and of third States – when operating in high seas areas.[18] The present author is aware of the fact that during the drafting process of the San Remo Manual there was a controversy about the exact meaning of the due regard principle and that its inclusion in the manual was a compromise

[15] For an overview *see* J.A. Roach & R.W. Smith, *United States Responses to Excessive Maritime Claims* (2nd ed., 1996). A regular update is provided in the Maritime Claims Reference Manual, available at: http://www.dtic.mil/whs/directives/corres/html/20051m.htm (last visited on 15 Jan. 006).

[16] *E.g.*, the U.S. Freedom of Navigation Program, established in 1979, continues as an active tenet of national policy. Probably the biggest success of the program, from the perspective of public international law, was the U.S. – USSR agreement of Jackson Hole which followed the so-called "bumping incident" in the Black Sea.

[17] *SRM*, *supra* note 1, para. 14.

[18] *Ibid*., paras. 34 & 35.

decision.[19] Nevertheless, there should be a little further guidance as to its exact meaning. Unless specified, the due regard principle will only be paid lip service or – even worse – it will be abused by coastal States in order to camouflage acts of unneutral service.

The same holds true with regard to paragraph 15 of the SRM which states that "within and over neutral waters […] hostile actions by belligerent forces are forbidden". Paragraph 16 contains a – non-exhaustive – list of activities that are covered by the term "hostile actions". This enumeration predominantly refers to traditional naval operations during armed conflict. Of course, the term "hostile action" as well as one of the activities listed – "use as a base of operations" – would be broad enough to also cover other activities, e.g., the use of means for electronic warfare (EW), target acquisition, or reconnaissance purposes. Such an interpretation would, it is maintained here, certainly be in accordance with customary international law. However, the examples following that term could cast doubt on whether such activities would also be covered by the prohibition of using neutral waters and neutral airspace as a base of operations. One way of avoiding such cases of doubt would be the deletion of all examples. In order to contribute to legal clarity, however, it seems preferable to add to the examples listed a formulation similar to that of Article 47 of the 1923 Hague Rules[20] that provides:

> A neutral state is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observations of the movements, operations or defenses of one belligerent, with the intention of informing the other belligerent.
> This provision applies equally to a belligerent military aircraft on board a vessel of war.

Such a clarification also seems appropriate with regard to combat rescue operations in neutral territory. Such rescue operations are not specially protected under the law of armed conflict. Rather they are to be considered military operations that would, thus, also fall into the category of "hostile action".

19 *See* the Explanations, *supra* note 1, para. 34.3, at 109.

20 Hague Rules of Aerial Warfare, 1923, repr. in *Documents on the Laws of War*, *supra* note 13.

III. THE AERIAL ELEMENT – UNDERESTIMATED

Modern naval operations are not conducted in a purely maritime environment any longer. Naval battles proper more or less belong to the past. Today naval forces operate jointly with other forces, especially with air forces.[21] Being an integral part of these joint operations naval forces can no longer be considered bound by only one set of rules specifically and exclusively designed for them. Moreover, even if naval operations were confined to the maritime environment they would always imply the use of aircraft and of missiles because these assets are among the most effective weapons against enemy naval forces.

Of course, the San Remo Manual does not follow the limited approach of the treaties of 1907[22] or of 1936.[23] Its provisions are not limited to naval platforms but also relate to military aircraft, civil aircraft, and to missiles.[24] Thus, the San Remo Manual has broadened – or at least clarified – the scope of the term "law of naval warfare" which covers not only ship-to-ship but also ship-to-air and air-to-ship operations, including the use of missiles, as well as "prize measures", and the protection of vessels, aircraft, objects and persons at sea, on land, and in the air.

While the San Remo Manual addresses many of the issues arising from the interaction of naval and air warfare, its provisions sometimes give reason to assume that naval warfare still has been regarded in isolation. At least one cannot entirely escape the impression that the aerial element of maritime

[21] Naval air components contribute to and enhance (sea) power projection. Before and during armed conflict their tasks include the establishment and maintenance of air superiority and conducting a variety of air interdiction operations. This, however, only in a very generic way describes the missions assigned to naval aircraft, fixed or rotary wing, in the course of an armed conflict. For regularly updated fact sheets on U.S. Navy weaponry *see*: http://www.chinfo.navy.mil (last visited on 18 Jan. 2006).

[22] Hague Conventions of 1907: No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; No. VII Relating to the Conversion of Merchant Ships into War-Ships; No. VIII Relative to the Laying of Automatic Submarine Contact Mines; No. IX Concerning Bombardment by Naval Forces in Time of War; No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War; No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War. All repr. in *Documents on the Laws of War*, *supra* note 13.

[23] *Procés-verbal* relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 1930, 6 Nov. 1936, repr. in *Documents on the Laws of War*, *supra* note 13. For a short analysis *see* E.I. Nwogugu, "Submarine Warfare – Commentary", in *The Law of Naval Warfare* 353-65 (N. Ronzitti ed., 1988).

[24] *SRM*, *supra* note 1, paras. 13, 18, 23-30, 45, 53-58, 62-66, 70-78, 106, 108-109, 112, 115-17, 125-34, 141-45, 161, 163, 165-66, 174-83.

operations as well as the possible impact of aircraft on naval operations has been dealt with only marginally.

With paragraph 45 stating that "surface ships, submarines and aircraft are bound by the same principles and rules", the San Remo Manual starts from the premise that when it comes to methods and means of naval warfare, there is no need to distinguish between the vehicles or platforms employed. In view of the basic principles of the law of armed conflict that apply to all methods and means of warfare this approach seems to be logical and cogent. Still, the question remains whether this approach will lead to operable and viable provisions for the conduct of modern maritime operations. The Manual's rules on mine warfare and on blockade, e.g., do not seem to meet that test. The same holds true with regard to those rules dealing with enemy and neutral aircraft.

A. Aerial Threats

Aircraft have always posed, and continue to pose, a considerable threat not only to naval platforms. Accordingly, especially the conditions rendering civil aircraft legitimate military objectives need to be reconsidered. An aircraft approaching naval surface forces can inflict damage to a warship by the use of comparably cheap and non-sophisticated means. Moreover, it may gain and transmit information that is vital to the success of the military operation in question. The drafters of the 1923 Hague Rules[25] understood this and, accordingly, agreed upon Articles 33, 34, and 35[26] that would have enabled belligerents to deal with those threats adequately.

[25] *Supra* note 20.

[26] Art. 33:

> Belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own state, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft.

Art. 34:

> Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state or (3) in the immediate vicinity of the military operations of the enemy by land or sea.

Art. 35:

> Neutral aircraft flying within the jurisdiction of a belligerent, and warned of the approach of military aircraft of the opposing belligerent, must make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.

Spaight, who is hesitant to accept the 1923 Hague Rules relating to the treatment of civil aircraft suitable for adoption[27] doubts whether Article 34 would prove operable in practice for the following reasons:[28]

> Item (1) of the Article contemplates a contingency which is improbable; enemy non-military aircraft are hardly likely to venture into the jaws of the enemy's jurisdiction. The term 'operations' in item (3) of the same Article is unduly restricted. If a belligerent warship saw an enemy private aircraft suddenly approaching at high speed, surely it would be entitled to repel the aircraft by gunfire even if no operations were in progress in the locality? The reference to the 'immediate vicinity' of a 'jurisdiction' – a new test in international law – may lead to difficulties in interpretation; it will not be an easy test for the officers concerned to apply in practice. The framing of both Articles in a positive, instead of the usual prohibitory, sense leads to lack of precision. The quite unchallengeable right of a belligerent to fire upon a non-military aircraft which disobeys his signal or order to stand off or change its course does not seem to be safeguarded, at any rate in the open sea when 'operations' are not in progress.

Spaight therefore suggests substituting Articles 30, 33, and 34 with the following formulation:[29]

> A non-military aircraft may not be fired upon in flight, unless
> (1) It disobeys a belligerent's signals or orders; or
> (2) It enters an area notified by him as one of military activity in which aircraft circulate at their peril and are liable to be fired upon without warning.

Spaight's criticism is not necessarily valid any longer. On the one hand, it is not improbable that civil aircraft continue to fly within the jurisdiction of the respective enemy. On the other hand, the term "immediate vicinity of operations" has obviously gained some support and, moreover, has to be distinguished from self-defence situations obviously (also) envisaged by Spaight. While we will return to these concepts it needs to be emphasized here that Spaight, despite his criticism, agrees that aircraft – enemy or

[27] J.M. Spaight, *Air Power and War Rights* 409 *et seq*. (3rd ed., 1947), concludes: "For the present, little seems to be gained by an attempt to analyse them. They were, and are, rather long shots or dips into a distant future".

[28] *Ibid*., at 402.

[29] *Id.*

neutral – pose a considerable risk and that the belligerents are entitled to counter that risk if necessary by the use of armed force.

Other than Spaight and the 1923 Hague Rules[30] the San Remo Manual obviously underestimates that threat and imposes upon belligerents obligations of abstention that will hardly meet the test of reality. Therefore, paragraph 63(f) of the SRM is too restricted. According to that provision an enemy civil aircraft is a legitimate military objective if it, *inter alia*, is "armed with air-to-air or air-to-surface weapons". This excludes, as emphasized in the explanations, "light individual weapons for defence of the crew, and equipment that deflects an attacking weapon or warns of an attack".[31] But it remains an open question of what weapons can be qualified as falling into the categories of paragraph 63(f). Moreover, this formulation leaves out of consideration the possibility that the aircraft as such is used as a weapon. The way modern warships are constructed would not enable them to sustain a hit by an aircraft. In this context one should not think of "Kamikaze" aircraft used as a pattern of an unsuccessful military tactic or strategy. What needs to be considered are scenarios similar to that of the *USS Cole* incident.[32]

B. Mine Warfare

One consequence of the equation of warships and aircraft is that the latter would also be obliged to "record the locations where they have laid mines".[33] States disposing of advanced military equipment may be in a position to comply with that obligation – e.g., by equipping air delivered mines with a system that would transmit their location without the enemy belligerent profiting from the respective signals. The majority of States will, however, hardly be in a position to acquire such systems. As the practice of World War II demonstrated the recording of minefields laid by aircraft is a most difficult undertaking[34] and the respective obligation does not seem to

[30] For a discussion of these provisions *see also* L. Oppenheim, 2 *International Law* (*Disputes, War and Neutrality*) 530 (7th ed. by H. Lauterpacht, 1963).

[31] Explanations, *supra* note 1, para. 63.6, at 153.

[32] For the details of the USS Cole incident *see* the DoD USS Cole Commission Report of 9 Jan. 2001, available at: http://www.defenselink.mil/pubs/cole20010109.html (last visited on 17 Jan. 2006). *See further* CRS Report for Congress, "Terrorist Attack on USS Cole: Background and Issues for Congress", 30 Jan. 2001, available at: http://news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf (last visited on 17 Jan. 2006).

[33] *SRM*, *supra* note 1, para. 84.

[34] *See*, *inter alia*, R. Ostertag, *Deutsche Minensucher: 80 Jahre Seeminenabwehr* 128 (1986).

reflect customary international law.[35] Closely related is the problem – at least for a considerable number of States – of how to provide "safe alternative routes for shipping of neutral States"[36] in case the mining is executed by military aircraft. The mine-laying belligerent will, in many cases, only be in a position to identify the mine area as such but not routes through the minefield that would be sufficiently safe. No considerable difficulties arise with regard to the obligation laid down in paragraph 85 of the San Remo Manual.[37] E.g., the US, when mining Haiphong, made it possible for merchant vessels lying there to leave the harbor by daylight. The mines delivered by aircraft were activated three days after their delivery.[38]

C. Blockade

It is true that in the past blockades were a method of economic warfare at sea. However, today a blockade will regularly be an integral part of a genuinely military operation. Therefore, the lack of a definition of the concept of blockade in the San Remo Manual could give rise to some unnecessary misunderstandings.[39] Such a definition could read as follows:

> Blockade is a method of naval warfare by which a belligerent prevents vessels and/or aircraft of all nations from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.

The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. It should be emphasized that a blockade is the only method of naval warfare by which belligerents may interfere with enemy exports.

But even if exclusively directed against the enemy's economy, there will always be a strategic element because thus the enemy's capabilities of resistance will necessarily be weakened.[40] Regardless of the distinction

35 Spaight, *supra* note 27, at 494 *et seq*.

36 *SRM*, *supra* note 1, para. 88.

37 "Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States".

38 *See* H.S. Levie, *Mine Warfare at Sea*, at 117 *et seq*., 147 (1992).

39 Therefore, this author is in disagreement with S. Haines' article in this Volume insofar as he maintains that blockade is to be considered a pattern of *guerre de course*.

40 For the differences between economic and strategic blockades *see* Oppenheim, *supra* note 30, at 769 *et seq*.

between economic and strategic blockades there is today general agreement that a blockade need not be enforced exclusively against seagoing vessels but that it may also be enforced against aircraft.[41] Moreover, and in view of the importance of aerial reconnaissance, a blockade may be maintained and enforced "by a combination of legitimate methods and means of warfare",[42] including military aircraft.[43]

The San Remo Manual's provisions on blockade, however, lack any express reference to aircraft. Of course, an interpretation of paragraphs 96[44] and 97[45] justifies the conclusion that a blockade may be enforced and maintained by military aircraft, too. In most cases these aircraft belong to a warship that will serve as their base.[46] It is, however, also possible that the aircraft entrusted with the enforcement of a blockade are deployed on airfields on land. Still, while there seems to be general agreement on the lawfulness of the enforcement of a blockade by military aircraft, two questions remain unanswered. (1) Is the presence of a warship or its operational control of the military aircraft necessary for a blockade to be lawful or may a blockade be enforced by aircraft (and mines) alone? (2) What criteria have to be met in order for the blockade to be effective if it is maintained and enforced by aircraft?

In most cases the aircraft entrusted with the enforcement of a blockade need not be dependent upon a warship, *i.e.*, they are not necessarily under the operational control of a warship. However, the answer to the first question becomes a little complicated if one takes into consideration the following scenario: A merchant vessel or a neutral warship may be damaged or in another distress situation. Therefore it will have to access the blockaded coast or port but the blockade is maintained by mines and aircraft only. How will the blockading power be able to comply with its obligation to allow ships in distress entry into the blockaded coastline if no warship is in the

41 *See*, *inter alia*, *NWP 1-14M*, *supra* note 2, para. 7.7.1; Oppenheim, *supra* note 30, at 781; E. Castrén, *The Present Law of War and Neutrality* 301 (1954). *Further* R.W. Tucker, *The Law of War and Neutrality at Sea* 283 n. 1 (1957): "The extension of blockades to include the air space over the high seas remains a development for the future. It is next to impossible to declare with any degree of assurance what procedures may govern blockade by air. Certainly, there are grave difficulties in assuming that the practices of naval blockade can be applied readily, by analogy, to aerial blockade". Note, however, that *Tucker* does not doubt the legality of a blockade if applied and enforced against air traffic.

42 *SRM, supra* note 1, para. 97.

43 Oppenheim, *supra* note 30, at 780 *et seq*.; Castrén, *supra* note 41, at 300 *et seq*.

44 "The force maintaining the blockade may be stationed at a distance determined by military requirements". The term "force" is broad enough to also cover military aircraft.

45 *Supra,* text accompanying note 41.

46 *See* Castrén, *supra* note 41, at 409 *et seq.*

near vicinity?[47] Accordingly, there is at least one argument against the legality of a blockade that is enforced and maintained without any surface warship present in, or in the vicinity of, the blockaded area.

As regards the second question, one may be inclined to point at the well-established rule according to which the "question whether a blockade is effective is a question of fact".[48] While it is clear that "effectiveness" can no longer be judged in light of the state of technology of the 19th century[49] and while the view is widely held that effectiveness continues to be a constitutive element of a legal blockade[50] it may not be left out of consideration that there are no criteria that would make possible an abstract determination of the effectiveness of all blockades. In this context, Castrén postulates:

> Aircraft in the blockaded area may leave the area when there are other aircraft on patrol duty so that the blockade remains in force the whole time. The activities of aircraft even in connection with a naval blockade are effective only to the extent that they do in fact dominate the air.[51]

It is maintained here that this position is correct. In any event, aircraft will be used for the enforcement of a blockade only if the respective belligerent has gained air superiority. Otherwise the use of aircraft would be too dangerous.

A further aspect regarding blockade as dealt with in the San Remo Manual is whether this method of naval warfare is necessarily restricted to vessels or whether it may also be enforced *vis-à-vis* aircraft. Again, the provisions of the San Remo Manual are silent on this issue. The "explanations" reveal that the legal and naval experts, in the context of the

47 *See also* the Explanations, *supra* note 1, para. 97.1, at 178.

48 *SRM*, *supra* note 1, para. 95.

49 F. Kalshoven, "Commentary on the 1909 London Declaration", in *The Law of Naval Warfare*, *supra* note 23, at 274 maintains: "[...] developments in the techniques of naval and aerial warfare have turned the establishment and maintenance of a naval blockade in the traditional sense into a virtual impossibility. It would seem, therefore, that the rules in the Declaration on blockade in time of war are now mainly of historical interest". This position is certainly not shared by those States having published manuals for their respective navies or by other authors. *See* J. Stone, *Legal Controls of International Conflict* 508 (1954): "The realities of the present century require the British long distance blockade to be viewed as a long term transformation of the traditional law of blockade, rather than as mere reprisals, or mere breach of the traditional law". *Further* Oppenheim, *supra* note 30, at 796 *et seq*.

50 *See NWP 1-14M*, *supra* note 2, para. 7.7.2.3; *UK Manual*, *supra* note 2, MN 13.67; *GN Manual*, *supra* note 2, MN 293 *et seq*.

51 Castrén, *supra* note 41, at 409.

effectiveness of a blockade, considered that question only indirectly.[52] While it may be correct that a (purely) naval blockade may not be considered to have lost its effectiveness for the sole reason that a considerable small number of aircraft continue to land within the blockaded area this is but one aspect. Although traditionally blockades have been viewed as a method of naval warfare proper there is no reason why it may not be extended (or even restricted) to aircraft.[53] In this context the argument that "transport by air only constitutes a very small percentage of bulk traffic"[54] is not absolutely convincing. The blockaded belligerent State, either alone or together with its allies, may dispose of a considerable air fleet. As the example of the "blockade of Berlin" shows – although the cargoes only served humanitarian purposes – a considerable percentage of bulk traffic can be transported by air over a considerable period of time.

IV. METHODS AND MEANS OF NAVAL WARFARE

Despite the lack of a definition and despite the disregard of the aerial elements the provisions of the San Remo Manual on blockade certainly reflect customary international law.[55] Whether this also holds true with regard to the provisions on zones[56] is far from settled. Of course, it seems that, in principle, zones have become a recognized method of naval warfare[57] – and it is quite probable that the San Remo Manual has contributed to that development. Still, as already stated elsewhere,[58] the

52 Explanations, *supra* note 1, para. 95.2, at 177: "The Round Table considered whether the fact that aircraft could still land within the territory of the blockaded belligerent would affect the effectiveness of a sea blockade. This was found not to be the case, as, on the one hand, transport of cargo by air only constitutes a very small percentage of bulk traffic and, on the other hand, the fact that transport over land could take place without affecting this criterion".

53 *See supra* text accompanying notes 41 *et seq*.

54 Explanations, *supra* note 1, para. 95.2, at 177.

55 Those rules were codified in the 1856 Paris Declaration Respecting Maritime Law (repr. in *Documents on the Laws of War, supra* note 13). Moreover, they have been included into military manuals. *See NWP 1-14M*, *supra* note 2, para. 7.7; *UK Manual*, *supra* note 2, MN 13.65 *et seq*.; *GN Manual*, *supra* note 2, MN 291 *et seq*. Moreover, they have been recognized by the International Law Association in para. 5.2.10 of the Helsinki Principles on the Law of Maritime Neutrality. *See* the Final Report of the Committee on Maritime Neutrality, in International Law Association, *Report of the 68th Conference* 496 *et seq*. (Taipei, 1998). While it is true that in post-WW II State practice blockades have only played a minor role, it is, therefore, untenable to maintain that the law of blockade has been rendered obsolete by desuetude.

56 *SRM*, *supra* note 1, paras. 105 *et seq*.

57 *UK Manual*, *supra* note 2, MN 13.77 *et seq*.; *NWP 1-14M*, *supra* note 2, para. 7.9 ; *GN Manual*, *supra* note 2, MN 302 *et seq*.

development. Still, as already stated elsewhere,[58] the Manual's provisions on zones remain rather obscure, especially in respect of the purpose such zones may serve. This, however, is not the only criticism of the Manual's provisions on methods and means of naval warfare.

A. Precautions in Attack

The Manual's rules on precautions in attack are directly taken from the 1977 Additional Protocol I (AP I). In principle, this does not necessarily pose problems – even though AP I is far from being recognized by all States of the world. It would be futile to reopen the famous dispute between Meyrowitz[59] and Rauch[60] on whether and to what extent the provisions of AP I apply to naval warfare at all. It is maintained here that, according to Article 49(3) of AP I, a special body of rules applies to ship-to-ship, ship-to-air, and to air-to-ship attacks as long as such attacks do not affect civilians or civilian objects on land. Article 49(4) of AP I also makes that clear.[61] Accordingly, Articles 58 and 59 of AP I are inapplicable to naval warfare as treaty law. Whether and to what extent they are customary in character is not quite settled.[62] Moreover, it is far from clear whether paragraph 46 of the SRM offers operable solutions for the conduct of hostilities at sea. The use of the concept of "feasibility" certainly mitigates some of the difficulties. Still, if naval operations are conducted in sea areas with dense maritime

58 *See* Heintschel von Heinegg, *supra* note 4.

59 H. Meyrowitz, "Le Protocole Additionel I aux Conventions de Genève de 1949 et le Droit de la Guerre Maritime", 89 *R.G.D.I.P.* 245-98, 254 *et seq*. (1985):

> Cette différence, répétons-le, est fondamentale et absolue. *Fondamentale*, en ce qu'elle découle de l'éssence respective du droit de la guerre terrestre et du droit de la guerre maritime, cette différence découlant elle-même de la différence entre les données de la guerre sur terre et celles de la guerre maritime. *Absolue*, parce qu'elle interdit de transposer les règles de l'une à l'autre.

60 Rauch maintains that the provisions of Part IV, Sec. I, AP I apply to all measures of naval warfare directed against merchant vessels, E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* 57 *et seq*. (1984); *further* E. Rauch, "Le droit contemporain de la Guerre Maritime", 89 *R.G.D.I.P*. 958-76 (1985).

61 *See*, *inter alia*, M. Bothe, "Commentary on the 1977 Geneva Protocol I", in *The Law of Naval Warfare*, *supra* note 23, at 761; S.V. Mallison & W.T. Mallison, "Naval Targeting: Lawful Objects of Attack", in *The Law of Naval Operations,* at 259 *et seq*. (H.B. Robertson Jr. ed., 1991).

62 *GN Manual, supra* note 2, MN 321, and *UK Manual*, *supra* note 2, MN 13.32, both repeat the wording of para. 46 *SRM*. However, in *NWP 1-14M*, *supra* note 2, there is no express reference to precautions in attack.

traffic, like in the Persian Gulf, it could become nearly impossible to determine "whether or not objects which are not military objectives are present in an area of attack".[63] The *Vincennes* incident may be indicative of the difficulties involved.[64] Legal rules that are merely being paid lip service will certainly not pass the test of practice.

B. Naval Bombardment

Attacks against targets on land (naval bombardment) are not being dealt with explicitly in the San Remo Manual. This is partly due to the fact that the participants regarded this subject as already covered by the respective provisions of AP I.[65] It should be kept in mind, however, that not all States are bound by the Protocol. Then the question arises whether the provisions of the 1907 Hague Convention IX[66] constitute customary international law.

Even if that question is answered in the affirmative,[67] it remains unsettled how to deal with aircraft launched from warships attacking targets on land. According to Article XLI of the 1923 Hague Rules, "aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels". This could imply that the rules applicable to warships engaged in naval bombardment also apply to aircraft launched from them. Then, however, such aircraft would be allowed to attack military objectives in non-defended localities.[68] While Article 59(1) of AP I prohibits attacks of such localities "by any means whatsoever", *i.e*., including aircraft, that would not be prohibited under Articles 1 and 2 of Hague Convention IX. Castrén takes the position that Hague Convention IX "must probably be understood to concern warships only, and not aircraft even when collaborating with them".[69] If however, Article XLI of the 1923 Hague Rules is a correct statement of customary law, warships and military aircraft launched from warships would be bound by the same rules.

63 *SRM*, *supra* note 1, para. 46(a).

64 For the details *see* D. Evans, "Vincennes – A Case Study", 119 *U.S. Naval Institute Proceedings* 49-56 (Aug. 1993); N. Friedman, "The Vincennes Incident", 115 *ibid.* 74-78 (May 1989).

65 While this view is shared by most writers O'Connell seems to take the position that naval bombardment is governed by both, Hague Convention IX and AP I. *See* D.P. O'Connell, 2 *The International Law of the Sea*, at 1130 *et seq*., 1139 (I.A. Shearer ed., 1984).

66 *Supra* note 22.

67 *See, inter alia*, E. Spetzler*, Luftkrieg und Menschlichkeit* [Air Warfare and Humanity], at 127 *et seq*. (1956).

68 Obviously, this is the position taken by Spaight, *supra* note 27, at 221 *et seq*. For an early criticism *see* M.W. Royse, *Aerial Bombardment*, at 162 *et seq*. (1928).

69 Castrén, *supra* note 41, at 402.

Apart from the wording of the provisions mentioned a further argument in favor of that view is the ability of modern aircraft to discriminate and to conduct surgical strikes by means of high precision ammunition.

Still, it should not be left out of consideration that for a locality to be entitled to protection against attacks Article 59(2) of AP I, and the probably corresponding rule of customary law, provides that four conditions must be met:

(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) no activities in support of military operations shall be undertaken.

Accordingly, even if fixed military installations or establishments remain in the respective port or town this would not justify an attack "by any means whatsoever" if no hostile use is made of them. Then, regardless of the binding force of AP I, an attack would probably be contrary to the law of armed conflict because the object in question would not make an effective contribution to military action and its neutralization would not offer a definite military advantage. Be that as it may, a clarification of the rules applicable to naval bombardment including the use of aircraft and missiles launched from warships should be taken into consideration.

C. Deception (and Surrender)

The San Remo Manual's rules on deception are too vague and, thus, do not provide the necessary guidance for naval commanders. On the one hand, it is rather difficult to distinguish "active simulation"[70] from "passive simulation". The capabilities of modern technologies could open a vast gray area and, consequently, could render the provision obsolete. On the other hand, there should be a definition of legitimate ruses amended by a non-exhaustive list of permitted ruses that should be drafted with a view to modern technologies. The traditional examples given for permissible ruses of naval – especially *Count Luckner* and the Cruiser *Emden* – have a romantic charm but they certainly are too remote from the realities of

[70] *SRM, supra* note 1, para. 110.

modern naval operations.[71] In a highly electronic environment and with over-the-horizon or beyond-visual-range capabilities, the hoisting of the true flag prior to an attack does not seem to make much sense any longer. However, ruses remain an important pattern of modern naval warfare. Therefore, there is a growing need for specific rules enabling naval commanders to distinguish between permissible ruses and prohibited acts of perfidy. While the latter aspect has been clarified in the San Remo Manual, the former aspect is left in the dark. It needs to be emphasized in this context that it is not always sufficient to draw the necessary conclusions from the prohibition of perfidy. For example, actively feigning the status of a protected vessel is prohibited by paragraph 110 of the SRM and the corresponding customary law.[72] This finding, however, is without prejudice to the admissibility of feigning neutral status by the use of civilian radars or other electronic equipment. According to the position taken here, the use of civilian navigational radars (and thus taking advantage of the respective emissions) is to be considered a permissible ruse of naval warfare if the radar is switched off immediately prior to the launching of an attack. It may well be, however, that this position is not shared by all. It should be recalled that, in 1983, the World Administrative Conference for the Mobile Services adopted Resolution No. 18[73] on the identification of vessels and aircraft of States not participating in an international armed conflict, recommending the use of adequate transponders and that –

> the frequencies specified in No. 3021 of the Radio Regulations may be used by ships and aircraft of States not parties to an armed conflict for self-identification and establishing communications. The transmission will consist of the urgency or safety signals, as appropriate, described in Article 40 followed by the addition of the single group 'NNN' in radiotelegraphy and by the addition of the single word 'NEUTRAL' pronounced as in French 'neutral' in radiotelephony. As soon as practicable, communications shall be transferred to an appropriate working frequency […].

71 *See* M.T. Hall, "False Colors and Dummy Ships: The Use of Ruse in Naval Warfare", 40 *Naval War College Rev.* 52-62 (1989). *See also* Tucker, *supra* note 41, at 139, who, in 1957, still believed that flying a false flag was of most practical importance.

72 *UK Manual*, *supra* note 2, MN 13.83; *NWP 1-14M*, *supra* note 2, para. 12.1; *GN Manual*, *supra* note 2, MN 406 *et seq*.

73 Repr. in 238 *Int'l Rev. Red Cross* 58 *et seq*. (Jan.-Feb. 1984).

It would, of course, be a considerable progress if the protection of neutral vessels were enhanced. However, that proposal is not suited for achieving that aim. As Fenrick has rightly pointed out, the resolution

> … appears to have been issued by a forum unfamiliar with law of armed conflict issues and without consultation with national officials responsible for such matters. Ships and aircraft using such procedures may assume they are entitled to protection when in fact they are not. The fact that a ship or aircraft is registered in a state not party to the conflict does not, in and of itself, mean that it is not a legitimate military objective.[74]

Therefore, it would certainly add to legal clarity and legal certainty if the rules on permissible ruses were amended by a non-exhaustive list of examples.

A problem closely related, but not limited, to ruses and perfidy is the surrender of warships and military aircraft. The provision of the San Remo Manual referring to the surrender of warships[75] certainly reflects customary international law.[76] Still, in a modern battlefield environment visual identification is rather the exception than the rule. Therefore, an effort should be undertaken to specify the different possibilities of how warships and military aircraft can surrender at all. The more so since the San Remo Manual lacks a provision on enemy aircraft exempt from attack which have surrendered. It may, indeed, be difficult to verify whether a military aircraft has surrendered.[77] If, however, surrender has been offered *bona fide*, an attack on it would be contrary to basic rules of the law of armed conflict.

74 W.J. Fenrick, "Introductory Report: Military Objectives in the Law of Naval Warfare", in *The Military Objective and the Principle of Distinction in Naval Warfare* 40 (W. Heintschel v. Heinegg ed., 1991).

75 *SRM*, *supra* note 1, para. 47(i).

76 *UK Manual*, *supra* note 2, MN 13.33; *GN Manual*, *supra* note 2, MN 324 *et seq.*; *NWP 1-14M*, *supra* note 2, para. 8.2.1.

77 In *NWP 1-14M*, *supra* note 2, para. 8.2.1, it is emphasized: "Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected".

V. MARITIME NEUTRALITY

Probably, the law of neutrality is one of the most disputed aspects of public international law. The diversity of views on that subject makes it almost impossible to establish the continuing validity of that body of law, its scope of applicability, and its contents. The drafters of the San Remo Manual have been heavily criticized for having adopted a rather traditional approach to the law of maritime neutrality.[78] It is maintained here, however, that this criticism is unfounded.

A. Obsolete by Desuetude or Irrelevant Under the Jus ad Bellum?

Although the said uncertainties persist, there is general agreement that there is a need for protecting States not taking part in an international armed conflict as well as their nationals, the vessels flying their flags and the aircraft bearing their markings.[79] Moreover, there is similar agreement on the need for obligations of neutral States, of their nationals, and of their merchant shipping and civil aviation with a view to effectively preventing the escalation of an ongoing international armed conflict.[80] However, there is no consensus on how these objectives ought to be pursued.

According to a widely held view the traditional law of (maritime) neutrality is incompatible with the *jus ad bellum*.[81] The proponents of that view claim that the traditional rules have been extensively modified by the UN Charter. Therefore, they maintain, States not parties to an ongoing international armed conflict are entitled to take a position of "benevolent"

78 *E.g.*, by S. Haines in this Volume.

79 Castrén, *supra* note 41, at 500 *et seq*.; Tucker, *supra* note 41, at 206 *et seq*.; Oppenheim, *supra* note 30, at 675 *et seq*.; Y. Dinstein, "Neutrality in Sea Warfare", 3 *Encyclopedia of Public International Law* 558 *et seq.* (R. Bernhardt ed., 1997).

80 *Id. Further:* S. Oeter, *Neutralität und Waffenhandel* 129 *et seq*. (1992); D. Schindler, "Aspects Contemporains de la Neutralité", 121 *Receuil de Cours* 263 (1967/II); M. Bothe, "Neutrality at Sea", in *The Gulf War 1980-1988*, at 205 *et seq.* (I.F. Dekker & H.H.G. Post eds., 1992).

81 Schindler, *supra* note 80, at 261 *et seq*.; K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", in *Manual of Public International Law* 840 *et seq*., (M. Sorensen ed., 1968); P.C. Jessup, "Should International Law Recognize an Intermediate Status Between War and Peace?", 48 *A.J.I.L.* 98 *et seq*. (1954); Q. Wright, "Rights and Duties Under International Law", 34 *A.J.I.L.* 238 *et seq*. (1940); F.R. Coudert, "Non-Belligerency in International Law", 29 *Va. L. Rev.* 143-51 (1942); A. Gioia, "Neutrality and Non-Belligerency", in *International Economic Law and Armed Conflict* 51 *et seq*. (H.H.G. Post ed., 1994); O. Bring, "Comments", in *The Gulf War 1980-1988*, *supra* note 80, at 244.

neutrality if one party to the conflict has violated the *jus ad bellum*.[82] Indeed, under the right of collective self-defence States are entitled to participate in an international armed conflict on the side of the victim of aggression. If they may assist the victim militarily then, *a fortiori*, they must be entitled to discriminate against the aggressor and to assist the victim State by any means short of war. In theory, this is certainly correct. However, the concept of benevolent neutrality is operable only if the Security Council has authoritatively determined the aggressor. This is expressly recognized in paragraphs 7 and 8 of the San Remo Manual.[83] However, if the Security Council is unable or unwilling to act under Chapter VII the benevolent neutral's right will compete with the right of the aggrieved belligerent to take appropriate counter measures in order to induce the neutral State to comply with the traditional rules. The better view is, therefore, to apply the laws of (maritime) neutrality to such situations because only in this way the object and purpose agreed upon – protection of neutrals and prevention of an escalation of the armed conflict – can be achieved.

Moreover, the concept of benevolent neutrality has no foundation in State practice. The proponents of that view ignore the fact that, since 1945, third States assisting one belligerent to the disadvantage of the other never referred to the right of collective self-defence.[84] Rather, they either advanced contractual obligations, or they claimed that their assistance did not cover military ("lethal") items,[85] or they simply acted clandestinely.[86] Hence, State practice since 1945 is not apt "for proving that a new legal status of non-belligerency has emerged as a concept of law. It would be all too easy to

[82] *Id.*; *see further* Oppenheim, *supra* note 30, at 651.

[83] Para. 7: "Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States: (a) are bound not to lend assistance other than humanitarian assistance to that State; and (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State".
Para. 8: "Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council".

[84] *See* Oeter, *supra* note 80, at 136.

[85] *E.g.,* the British Government, during the Iran-Iraq War (1980-1988), stated that it would not deliver "lethal equipment" to Iraq but added that it would nevertheless "attempt to fulfill existing contracts and obligations". *See* 56 *B.Y.B.I.L.* 534 (1985).

[86] It suffices here to mention the Iran-Contras Affair. *See* A.T. Leonhard, "Introduction", in *Neutrality – Changing Concepts and Practices* 4 (A.T. Leonhard ed., 1988).

avoid duties of neutrality by just declaring a different status".[87] The fact that in many instances "non-belligerents" endeavored to conceal their assistance indicates, if not proves, that they had not based their conduct on a corresponding *opinio juris*.

Hence, that practice as well as military manuals[88] and the ILA's Helsinki Principles[89] support the view that the traditional rules of the law of maritime neutrality as codified in the 1907 Hague Convention XIII[90] have neither become obsolete nor have they been extensively modified. Therefore, the respective provisions of the San Remo Manual continue to reflect customary international law.

B. Continuing Value of the Laws of Maritime Neutrality

The main reason why most States continue to pledge allegiance to the laws of maritime neutrality is the intrinsic value of its principles and rules. On the one hand, this body of law serves the interests of neutral States by protecting them, their nationals, their merchant shipping and their aviation against the harmful effects of ongoing hostilities.[91] On the other hand, it guarantees that legitimate belligerent interests are not jeopardized by neutral States, their nationals, their merchant shipping and aviation unduly interfering in the war-fighting and war-sustaining effort.[92]

It should, however, not be left out of consideration that the applicability of that law in its entirety is not triggered automatically as soon as an international armed conflict is in existence. This only holds true with regard to those rules of the law of maritime neutrality that are essential for safeguarding its object and purpose (*essentialia neutralitatis*). There is widespread agreement that the following rules of the law of maritime neutrality become applicable to every armed conflict at sea, irrespective of a declaration of war or of a declaration of neutrality:

– protection of neutral waters,[93]

87 Bothe, *supra* note 80, at 207.

88 *NWP 1-14M*, *supra* note 2, Ch. 7; *GN Manual*, *supra* note 2, Ch. 3; *UK Manual*, *supra* note 2, MN 13.9 (note that MN 13.9 has been supplement by MN 13.9 A to E).

89 *Supra* note 56.

90 *Supra* note 22.

91 *See* the references *supra* note 79 *et seq*.

92 *Id*.

93 Hague Convention XIII, *supra* note 22, Arts. 1, 2, and 5; *UK Manual*, *supra* note 2, MN 13.8 *et seq*.; *NWP 1-14M*, *supra* note 2, paras. 7.3.2, 7.3.4; *GN Manual*, *supra* note 2, MN 236, 243; *SRM*, *supra* note 1, paras. 15-17; Helsinki Principles, *supra* note 55, paras. 1.4, 2.1.

– the obligation of neutral States to terminate violations of their neutral status,[94] and
– the prohibition of unneutral service.[95]

It needs to be emphasized that, despite allegations to the contrary,[96] the 24-hours rule[97] also belongs to those *essentialia neutralitatis*. If a neutral State does not, on a non-discriminatory basis, prohibit access to its territorial sea and its internal waters by belligerent warships,[98] a passage or sojourn exceeding 24 hours (unless unavoidable on account of damage or stress of weather) would amount to the use of neutral waters as a sanctuary. If the neutral State does not terminate that violation of its neutral status, the aggrieved belligerent will be entitled to take appropriate counter measures.[99] The ensuing potentialities for escalation are obvious. The fact that the respective international armed conflict takes place in areas remote from the neutral waters in question is irrelevant. While the aggrieved belligerent may not be in a position to enforce the neutral State's obligations by directly interfering with its warships or military aircraft, it would certainly be entitled to take other measures in response to that violation of international law. Even if the aggrieved belligerent does not react at all, this does mean that

94 Hague Convention XIII, *supra* note 22, Art. 8; *UK Manual*, *supra* note 2, MN 13.9E; *NWP 1-14M*, *supra* note 2, paras. 7.3 and 7.3.4.1; *GN Manual*, *supra* note 2, MN 232; *SRM*, *supra* note 1, para. 22.

95 The term "unneutral service" refers to a conduct of neutral merchant vessels which is in support of the enemy belligerent, e.g., the carriage of contraband. *See only* Dinstein, *supra* note 79, at 564 *et seq*. With regard to the prohibition of unneutral service *see* Arts. 45 & 46 of the 1909 London Declaration; *NWP 1-14M*, *supra* note 2, para.7.4; *UK Manual*, *supra* note 2, MN 13.84 *et seq*.; *GN Manual, supra* note 2, MN 258 *et seq*.; *SRM*, *supra* note 1, paras. 112 *et seq*.; Helsinki Principles, *supra* note 55, paras. 5.2.1 *et seq*.

96 *See UK Manual, supra* note 2, MN 13.4: "[…] the United Kingdom takes the view that the old rule which prohibited belligerent warships from remaining in neutral ports for more than 24 hours except in unusual circumstances, is no longer applicable in view of modern state practice".

97 The 24-hours rule is expressly recognized in Hague Convention XIII, *supra* note 22, Art. 12; *NWP 1-14M*, *supra* note 2, para. 7.3.2.1; *GN Manua*l, *supra* note 2, MN 236 *et seq*.; *SRM*, *supra* note 1, para. 21; Helsinki Principles, *supra* note 55, para. 2.2. *Further :* Dinstein, *supra* note 79, at 559 *et seq*.; P. Parfond, "Le statut juridique des navires de guerre belligérants dans les ports neutres", *Rev. Maritime* 867 *et seq*. (1952).

98 Hague Convention XIII, *supra* note 22, Art. 9; *NWP 1-14M*, *supra* note 2, paras. 7.3.2 and 7.3.4; *UK Manual*, *supra* note 2, MN 113.9B; *GN Manual*, *supra* note 2, MN 245. *Further:* Tucker, *supra* note 41, at 240; Oppenheim, *supra* note 30, at 727 *et seq*.; Castrén, *supra* note 41, at 519 *et seq*.

99 *See* the references *supra* note 94.

there is no such violation unless the aggrieved belligerent's conduct amounts to acquiescence.

Of course, the 24-hours rule implies some inconveniences for belligerent warships and auxiliaries especially if their visit in a neutral port is unrelated to the ongoing international armed conflict. However, the object and purpose of the 24-hours rule is not limited to the protection of the belligerents, it also contributes to the protection of neutral States. If neutral States wish to remain under the protection of the law of maritime neutrality, they are under an obligation to apply and to enforce the 24-hours rule. It should not be forgotten either that this rule may prove a most valuable tool in pursuing belligerent goals as the case of the *Graf Spee* clearly demonstrates.[100]

VI. MEASURES SHORT OF WAR

A final criticism of the San Remo Manual relates to its section on "measures short of attack", *i.e.*, prize law. Especially the UK has long taken the view that this part of the law of naval warfare and neutrality at sea has been considerably modified by the *jus ad bellum*. This approach must be rejected. The provisions of the San Remo Manual on prize measures certainly reflect customary international law. There are, however, two aspects, that should be reconsidered.

A. Prize Law – Modified by the Jus ad Bellum?

The San Remo Manual – as well as the military manuals of some navies – starts from the premise that the *jus ad bellum* and the *jus in bello* are two distinct parts of international law.[101] In view of the basic principle of the equal application of the *jus in bello*[102] the San Remo Manual does not distinguish between the aggressor and the victim of aggression, unless the UN Security Council has acted under Chapter VII of the Charter of the United Nations.[103] Accordingly, it allows all parties to an international

[100] For an in-depth analysis of the *Graf Spee* incident *see* D.P. O'Connell, *The Influence of Law on Sea Power* 27 *et seq*. (1975).

[101] *See SRM*, *supra* note 1, paras. 3 *et seq*. Further : *NWP 1-14M*, *supra* note 2, para. 5.1; *GN Manual*, *supra* note 2, MN 218.

[102] For a detailed analysis of this principle *see* H. Meyrowitz, *Le principe de l'égalité des belligérants devant la droit de la guerre* (1970). *See also* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 4 (2004).

[103] *SRM*, *supra* note 1, paras. 6 *et seq*.

armed conflict at sea to make use of the full spectrum of methods and means of naval warfare, including measures short of attack.[104]

According to the UK Manual, however, "the conduct of armed conflict at sea is subject to the limitations imposed by the UN Charter on all use of force". Therefore, in "a conflict of limited scope, […] a belligerent state is constrained, to a greater extent than the rules set out in the present chapter might suggest, in the action that it may lawfully take against the shipping or aircraft of states not involved in the conflict".[105]

This position is far from new. The UK government has maintained it since the 1980s – and has been heavily criticized for it. According to the position taken here, this criticism is well-founded. The British position would, if adopted by other States, lead to a most unfortunate lack of legal clarity and it would enable some malevolent States to arbitrarily deny the legality of measures taken by a belligerent against the shipping and aviation of States not parties to an ongoing international armed conflict.

Firstly, this position is not shared by the UK's allies who are unwilling to limit the spectrum of methods and means provided by the law of naval warfare.[106] Obviously, those allies maintain that it will be up to them to decide whether and to what extent they will interfere with neutral shipping and aviation when engaged in an international armed conflict. And indeed the question arises as to who, other than the belligerent State, is competent to decide what is "necessary and proportionate to the achievement of the goal for which force may be used". Of course, in case of an authoritative decision by the UN Security Council based upon Chapter VII of the UN Charter, a belligerent may be prevented from making use of the full spectrum provided by the law of naval warfare. However, if there is no such decision by the Security Council it is generally recognized that the belligerent States alone are entitled to decide whether they will interfere with neutral shipping and aviation. The affected neutral States will be limited to a legal evaluation of the concrete measures taken, *i.e.*, they may judge their legality in light of the law of naval warfare and the law of maritime neutrality.[107] The right to judge, in a legally binding manner, the legality of the initial decision to

[104] The same approach underlies *NWP 1-14M*, *supra* note 2, and in *GN Manual*, *supra* note 2.

[105] *UK Manual*, *supra* note 2, MN 13.3.

[106] *Supra* note 104.

[107] Evidence can be found in the practice of States during the Iran-Iraq War. The attacks on neutral merchant vessels were condemned by the UN Security Council (UN S.C. Res. 552, 1 June 1984) and by the member States of the European Community; *see Bull. of the European Communities Commission* 7 (No. 9, 1980); 3 *European Political Co-operation Documentation Bull.* 93 (No. 2, 1987), and Vol. 4, at 173 *et seq.* (No. 1, 1988).

resort to, e.g., visit and search has been conferred upon the UN Security Council. Therefore, statements by neutral States on the legality of measures short of attack based upon rules other than those of the *jus in bello* (including the law of maritime neutrality) are to be considered merely political in character.

Secondly, this position may lead to an arbitrary application of the law of naval warfare. In this respect, the British conduct during the Falklands War (1982) and during the Iran-Iraq War (1980-1988) may serve as an example.[108]

As is well known, during the Falklands War the British government, on 28 April 1982, announced a Total Exclusion Zone (TEZ).[109] According to the wording of that proclamation the UK was prepared to attack every ship encountered within the limits of the TEZ. In light of the jurisprudence of the Nuremberg Tribunal and of customary international law the legality of the TEZ, or of attacks performed therein, would have been more than doubtful.[110] It may well be that the proclamation was intended rather to deter than to serve as a legal basis for attacks on neutral shipping. It may well be that it was, after all, nothing but a – permissible – ruse of war. Taken at face value, however, and in view of the fact that the British government tried to justify the TEZ by referring to the right of self-defence, the British conduct during the Falklands War could also justify the following conclusion: If the British Government considers it necessary for its self-defence it may decide to go beyond what is provided for by the law of naval warfare by establishing and enforcing a "free-fire-zone".

During the Iran-Iraq War the British Government chose the same approach. That time, however, it did not lead to a widening but rather to a

[108] For a detailed analysis of that practice *see* W.J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare", 24 *Canadian Y.B. Int'l L.* 91-126 (1986). *Further:* R.P. Barston & P. Birnie, "The Falkland Islands/Islas Malvinas Conflict – A Question of Zones", 7 *Marine Policy* 14-24 (1983); A. Vaughan Lowe, "Commentary", in *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare*, at 241 *et seq*. (A. de Guttry & N. Ronzitti ed., 1993).

[109] "The exclusion zone will apply not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The zone will also apply to any aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within the zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British forces". 53 *B.Y.B.I.L.* 542 (1982).

[110] However, Fenrick, *supra* note 108, at 112 *et seq*., maintains that the British TEZ was legal in view of the fact that it was established in a remote sea area and that neutral ships were not attacked.

restriction of the spectrum of measures provided by the law of naval warfare. After Iranian forces had stopped the British merchant vessel *Barber Perseus* the Foreign Office, on 28 January 1986, declared:

> [...] under Article 51 of the United Nations Charter a State such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict [...].[111]

Hence, the British Government claimed the right to judge the legality of belligerent measures not in light of the law of naval warfare alone but also in light of Article 51 of the UN Charter.

In other words: If party to an international armed conflict, the British Government, by referring to its inherent right of self-defence, considers itself entitled to enlarge the spectrum of methods and means under the law of naval warfare. If not party to an international armed conflict the British government denies that very right to the belligerents but claims to be entitled to judge and declare what is necessary and proportionate for the belligerents' self-defence.

Hence, the British position will not lead to operable and practicable solutions. Of course, in theory it is always possible to identify a breach of the *jus ad bellum*. However, it may not be left out of consideration that the prohibition of the use of force is an integral part of the UN system of collective security.[112] If the UN Security Council is not in a position to authoritatively determine the limits of the right of self-defence in a given case, it remains with the parties to the conflict to determine and decide which measures are necessary. The only operable legal yardstick providing practical solutions will then be the *jus in bello*. Moreover, the British position is irreconcilable with the principle of the equal application of the *jus in bello*. The continuing validity of that principle is confirmed by State practice since 1945 and by the Preamble to the 1977 Additional Protocol I. Accordingly, there is an overwhelming international consensus that the *jus in bello* does not discriminate between the – alleged – aggressor and the – alleged – victim of aggression. Moreover, that position may prove counterproductive for British interests in case the UK is party to an international armed conflict at sea. The use of prize measures by the Royal

[111] Statement by the Minister of State, Foreign and Commonwealth Office, Jan. 28, 1986, House of Commons Debates, Vol. 90, col. 426; printed in 57 *B.Y.B.I.L.* 583 (1986).

[112] *See only* Y. Dinstein, *War Aggression and Self-Defence* 80 *et seq.* (3rd ed., 2001).

Navy, as provided for in the UK Manual,[113] could be qualified as illegal by other States that may refer to this very statement.

B. Prize Measures and the Necessity of Prize Courts

In view of the fact that, under customary international law, belligerents, by resorting to prize measures, are entitled to interfere with enemy and neutral merchant shipping and aviation,[114] it is indispensable to provide for the establishment of prize courts. There is no evidence in State practice or in legal writings that the traditional maxim "*Toute prise doit être jugée*" has become obsolete by desuetude.[115] Rather, pre- and post-World War II practice and scholarly statements give ample proof that the maxim remains in force.[116]

C. Aspects to be Reconsidered

It has been shown in the foregoing that the provisions of the San Remo Manual on prize measures indeed restate the customary rules and principles on the subject matter. Still, the question remains whether those rules sufficiently take into account practical requirements.

On the one hand, there seems to be an unjustified discrimination between warships and military aircraft. As regards the rules applicable to military aircraft conducting visit and search operations, the San Remo Manual unnecessarily denies military aircraft the same rights as warships. While paragraphs 139 and 151 allow, "as an exceptional measure", the destruction of enemy and of neutral merchant vessels, there is no such exception for enemy or neutral civil aircraft. It should be kept in mind that, according to Articles 57 to 59 of the 1923 Hague Rules,[117] the destruction of such aircraft would be permissible if certain conditions are met beforehand.[118]

113 *UK Manual*, *supra* note 2, MN 13.84 *et seq*.

114 *NWP 1-14M*, *supra* note 2, para. 7.4; *GN Manual*, *supra* note 2, MN 258 *et seq*.; Helsinki Principles, *supra* note 55, paras. 5.2.1 *et seq*. *See further* W. Heintschel von Heinegg, "Visit, Search, Diversion and Capture in Naval Warfare: Part I, The Traditional Law", 29 *Canadian Y.B. Int'l L.* 283 *et seq*. (1991); "Part II, Developments since 1945", 30 *ibid*., 89 *et seq*. (1992).

115 P. Reuter, *Etude de la règle: 'Toute prise doit être jugée*' (1933).

116 *See* the references *supra* note 114. *See further* Dinstein, *supra* note 79, at 566.

117 *Supra* note 20.

118 As already mentioned, these conditions are similar to those laid down in the *SRM* on the destruction of "prizes". Note that Spaight, *supra* note 27, at 394 *et seq*. and 409 *et seq*. doubts whether the 1923 Hague Rules would be operable.

Moreover, the San Remo Manual, in paragraph 128, obliges belligerents "to adhere to safe procedures for intercepting civil aircraft as issued by the competent international organisation", *i.e.*, to the ICAO "Manual Concerning Interception of Civil Aircraft".[119] While it is true that "the ICAO manual contains detailed procedures for interception"[120] it may not be left out of consideration that its provisions are designed for interception operations in times of peace. It is, therefore, far from settled whether and to what extent the detailed procedures laid down in that Manual are operable in times of armed conflict.

On the other hand, a further alternative to visit and search should be considered. Modern armed forces dispose of multi-sensors enabling them to identify certain cargoes, like chemicals or explosives.[121] Therefore, as an alternative to visit and search conducted in the traditional way, a belligerent may very well be satisfied with verifying the innocent character of cargo on board neutral merchant vessels and civil aircraft by merely "scanning" the vessels or aircraft with such sensors. Of course, whether the use of sensors is practicable and sufficient will depend upon the circumstances of each single case.

CONCLUDING REMARKS

The San Remo Manual has contributed in an invaluable manner to a clarification of the law applicable to naval warfare and maritime neutrality. The vast majority of its provisions are a contemporary restatement of customary international law. Since those provisions almost perfectly balance the interests of belligerents and of neutrals alike, everything feasible should be undertaken to safeguard the tremendous achievement of the year 1994.

We do, however, live in a time of rapid technological development that certainly has a deep impact upon military doctrine and on the conduct of hostilities. Disregarding that development and the way modern armed conflicts are fought would marginalize the San Remo Manual and could even make it obsolete. While thanks to Yoram Dinstein considerable efforts are being undertaken to fill the Manual's gaps with regard to the aerial issues involved the other issues addressed here should be thoroughly scrutinized and ultimately solved. The best way of adapting the San Remo Manual to the said developments would be to reconvene, under the auspices of the International Institute of International Humanitarian Law and of the

[119] *See also* Annex 2 to the Chicago Convention, International Standards, Rules of the Air.

[120] Explanations, *supra* note 1, para. 128.1.

[121] For a most recent description of the capabilities of such sensors *see Jane's Defence Weekly* 23 *et seq*. (14 Apr. 2004).

International Committee of the Red Cross, a group of experts with a view to adopting an informal declaration that would not substitute but merely amend or clarify the parts of the San Remo Manual.

INTERNATIONAL TERRORISM AND SELF-DEFENCE

By Daniel Janse[*]

INTRODUCTION

The difficulties surrounding a discussion of the phenomenon of terrorism are due to a multitude of factors. This analysis will try to shed light on some of the aspects related to the legal ramifications, and implications, of international terrorism.

The reason for conducting this analysis is to explore further the legal aspects of international terrorism. Specifically the analysis will focus on the application of the law of self-defence to international terrorism. As is evident from the following analysis the *jus ad bellum* is quite adequate in coping with most, if not all, legal aspects – in terms of enforcement measures – related to the combat of international terrorism. Undoubtedly this seems to be the case in the field of counter-terrorism action involving the military use of force.[1]

It is self-evident that in the post September 11 world, in which we all currently live, the *jus ad bellum* component of international law, *i.e.*, the remedy of self-defence and the laws related to the resort to force, has gained in importance, in international relations, in international law discourse and in other branches of society which are concerned with issues pertaining to the international legal order. Historically, and to a high degree up until recently, international terrorism has been addressed chiefly in the sphere of international criminal law, particularly through the adoption of international treaties in this area.[2] Hence, throughout the years, the international legal order has, so far, managed to produce some twelve different conventions dealing with different manifestations of international terrorism with a view to eliminating the phenomenon as such from the international scene.[3]

* LL.B., LL.M, Faculty of Law, University of Stockholm (Sweden).

1 *See* Preface of "International Law and the War on Terror", in 79 *Int'l L. Studies* (F.L. Borch & P.S. Wilson, 2003).

2 *See* M.N. Shaw, *International Law* 1048 *ff.* (5th ed., 2003).

3 *See e.g.*, Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; UN International Convention against the Taking of Hostages, 1979; UN International Convention for the Suppression of Terrorist Bombing, 1997; UN International

Although, it must be said, none of these conventions provide a satisfactory elaboration of a legal concept of terrorism, they have still provided rudimentary legislative instruments for a regulation of terrorism from the perspective of international law. The international legal order, through its institutional framework at the United Nations, has thus not until very recently been able to define international terrorism with any high level of clarity. The adoption of a comprehensive international convention on terrorism, if this can be achieved in the coming years, will probably redress this deficiency in the international legal order. If terrorists can carry out such atrocities as the "9-11" outrage, then clearly enforcement action, including the use of military force, should be at the heart of a viable, and effective, counter-terrorism strategy.

I. THE CONCEPT OF TERRORISM

The concept of international terrorism in international law discourse is not easily distilled. The reasons for this are many. One explanation for this state of affairs is that different writers on international law tend to put their emphasis, in an analysis of terrorism, on different aspects related to this phenomenon. Moreover, different writers put very different types of terrorist acts under the notion "terrorism". For example, some writers concur with the view that the concept of terrorism should mainly regulate what has been labeled "State terrorism". This particular form of terrorism describes a condition where a regime inflicts severe acts of arbitrary violence upon a defenseless population, or segments thereof, such as, for example, the dictatorships of Hitler and Nazi Germany, Stalin and the Soviet Union, Saddam Hussein and Baathist Iraq.[4]

Other writers support the view that a legal regulation of terrorism should primarily focus on so-called "individual" or "group" terrorism, *i.e.*, terrorist offences committed by essentially private subjects.[5] The foremost example of this type of terrorism is the political assassination, *i.e.,* the murder of a national leader or head of State (or other public leader).[6] Today this form of terrorism also encompasses the notorious terrorist bombings that deliberately target innocent civilians, thus completely disrupting societal and world

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Convention for the Suppression of the Financing of Terrorism, 1999. For a full list of the various conventions dealing with terrorist offences *see*: http://untreaty.un.org/English/Terrorism.asp.

4 *See* R.A. Friedlander, "Terrorism", in IV *Encyclopedia of Public International Law* 845 (R. Bernhardt ed., 2000).

5 *Id.*

6 *Id.*

order. Most writers, however, in their examination of terrorism tend to focus on both of these forms of terrorism. Thus, the concepts of "State terrorism" and "non-State terrorism" are both included, at least initially, in a discussion of terrorism.[7] The particular species individual or group terrorism, *i.e.*, terrorism committed by private individuals or groups, will be at the center of this discussion. Hence, the similarly important subject of "State-terrorism" will not be expounded upon in this work. The reason for this choice is that State-terrorism, as opposed to private-terrorism is not regulated in any treaty. Thus, there is, at present a lack of conventions regulating this form of terrorist activity.

Further, it can be argued that the species State-terrorism is, from a systematical and legal point of view, better categorized under the concept "State-aggression", and that, accordingly, the term terrorism should be reserved for acts of terror committed by private groups.[8] However, in general, the conclusions derived from this analysis could, in principle, apply also in relation to State-terrorism. Although it must be stressed that, in not very few cases of private terrorism, the acts, which are committed by essentially private terrorist armed bands, can either be directly or indirectly related to a State.

The terrorism in the post-war era is characterized by its extreme violence, its indiscriminate, inhumane and perfidious use of armed force in different national jurisdictions. The perpetrators of these atrocities are, in our time, increasingly committed by non-State entities. Moreover, very often (or almost regularly) these terrorists target innocent and unsuspecting civilian victims, in complete disregard of the laws of war and peace.

II. THE HISTORY OF THE UNITED NATIONS' WORK AS REGARDS INTERNATIONAL TERRORISM

The history of the United Nations' activities related to the disturbing phenomenon of terrorism leaves much to be desired.[9] The different discussions at the UN in its various institutions are saturated with relativism

7 *See* G. Guillaume, "Terrorism and International Law", 53 *Int'l. & Comp. L.Q.* 537 *ff.* (2004).

8 *See* A.C. Arend & R. J. Beck, *International law and the Use of Force: Beyond the UN Charter Paradigm* 142 (1993).

9 For substantiation *see e.g.* UN G.A. Res. 3034 (1972). *See also* D. König, "Terrorism", in *United Nations – Law, Policies and Practice* 1220, 1221-23 (R. Wolfrum ed., 1995). All material derived from United Nations organs, *i.e.*, resolutions, conventions *etc*. are available at the United Nations web site: http://www.un.org/ at: http://www.un.org/documents/. All electronic resources were last visited 1 Feb. 2006.

in approach and ambivalence towards the illegitimate role of terrorism in international relations. The different committees during the years, which have been working on elaborating comprehensive legislative instruments proscribing acts of terrorism, have not been able to, decisively, settle all aspects and problems related to international terrorism.

The line of reasoning of various delegates indicates the relativism in approach to international terrorism. Thus, on the one hand, a particular terrorist is labeled a "genuine" terrorist, whereas, on the other hand, in similar circumstances, a particular terrorist is considered a "guerilla warrior" or "freedom fighter", notwithstanding the terrorist's use of terrorism as a means of pursuing a particular criminal agenda. If the issues related to international terrorism are ever to be settled, this relativism towards the phenomenon must be abandoned. For the advocates of the relativist position *vis-à-vis* the crime of terrorism, the pronouncement by renowned British Prime Minister Margaret Thatcher merit consideration: "crime is crime is crime".[10]

The line of argumentation, advocated by the relativist position towards international terrorism, cannot, and should not, have a place in international law discourse. Hence, the relativist position must be considered completely inappropriate, and unsound, as far as criteria for legal reasoning are concerned.

The relativist stance towards terrorism has been advocated, especially, by countries which belong to the so-called "third world" and, in recent years, particularly by countries from the Arab world or predominantly Islamic countries.[11] These important and influential, groups of the world community have thus, to some degree, been able to thwart the adoption of legal instruments aiming at the elimination of terrorism from the international arena. However, at present, this position is on the decline, and in the committees which are elaborating upon issues pertaining to international terrorism, some important documents have been produced.[12] Still, bearing in

[10] *See:* http://news.bbc.co.uk/1/hi/uk_politics/1888444.stm. This remark was made at a news conference in Saudi Arabia in 1981, where she rejected any view that there could be political justifications for IRA terrorism.

[11] *See* König, *supra* note 9, at 1221.

[12] *See, e.g.,* UN G.A. Res. 59/46 (2004) entitled "Measures to eliminate international terrorism". In art. 1 of this Resolution the General Assembly "strongly condemns all acts, methods and practices of terrorism in all its forms and manifestations as criminal and unjustifiable, wherever and by whomsoever committed". It continues, in art. 2, by stating that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them".

mind the history of the UN in respect of international terrorism, the relativistic position can presumably again become part of the standard UN-reasoning in these issues. Moreover, in the committee which is currently working on finalizing a comprehensive convention on terrorism, a convention which is intended to settle completely the legal issues related to international terrorism from the perspective of the international legal order, the negotiation process has been stranded on the crucial, and intractable, issue of agreeing on a definition of terrorism.[13]

III. INTERNATIONAL TERRORISM – THE QUESTION OF DEFINITION

There is not in international law, or for that matter in social sciences discourse, a lack of definitions of international terrorism *per se*.[14] Rather, the problem is obtaining a definition of international terrorism, which will gain universal support or, at least, broad support among the States comprising the international community. This is a desired condition given the transnational character of international terrorism. A core of any legal concept, *i.e*., the *actus reus* and the attached *mens rea* of the offence of terrorism can be elaborated as follows. Terrorism consists of illegal, or illegitimate, acts of violence perpetrated with the intention to instill fear, *i.e*., to "terrorize", particular subjects, *e.g*. a State, a social group, individuals *etc*., where the victims are chosen either randomly or because of mere association with the target entity.[15] Another central feature of terrorist crimes is that they are deliberate, *i.e.,* the violent acts are perpetrated intentionally, the terrorists being aware of the consequence of their particular act. It should be noted, however, that the tendency, in international law, is to concentrate the

[13] *See:* http://www.un.org/terrorism/gadoc.htm: Ad Hoc Committee established by G.A. Res. 51/210 (1996). This Committee is currently working on developing a comprehensive legal framework of conventions dealing with international terrorism. For the slow progress in this setting *see* G. Hafner, "Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly", 97 *A.J.I.L.* 147, 156 *ff*. (2003).

[14] *See* A.P. Schmid & A.J. Jongman, *Political Terrorism. A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature* (1988). In this work, the authors discuss *109* different definitions on terrorism, relevant to the social sciences. In the study, the frequency of specific elements pertaining to the respective definitions are examined (*ibid*., 5 *ff*.). The elements with a frequency above 30% are, in declining order of frequency, as follows: violence/force, political, fear or "terror", threat, psychological effects and anticipated reaction, victim-target differentiation, planned and systematic action. Other notable elements in the definitions (although with less frequency) are the organization as a group, the innocence of victims, the incalculability and suddenness of violence.

[15] *Cf*. Guillaume, *supra* note 7, at 540 *ff*.

regulation of international terrorism on the illegality of the act, without paying attention to the particular motives of the perpetrator of the terrorist act.[16]

Although none of the international conventions adopted so far include a definition of terrorism, one of them contains an elaboration of the elements of a terrorist offence. Hence, in Article 2(1)(b) of the 1999 International Convention for the Suppression of the Financing of Terrorism a generic definition of terrorism is elaborated.[17] According to this rule, an offence, under the convention, constitutes, *inter alia*, an "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act". The central attributes of contemporary terrorism, *i.e.,* the targeting of civilians or acts resulting in death or serious bodily harm to individuals, the use of intimidation and compulsion *etc*. for particular purposes are all contained in this definition. The stress on the target entity, *i.e.,* the use of the term "civilian", is in line with contemporary international law which tends to regard individual human rights as a matter of primary international concern.

In contemporary society terrorist acts are, in most cases, committed against civilians. Thus, terrorists intentionally target civilian objects with the sole purpose of destroying societal order and stability. This element, *i.e.,* the striking at unarmed civilians – or non-combatants – can thus be said to be one of the central distinguishing-marks of contemporary terrorism. Hence, so called "suicide bombers" or "suicide attackers" which target predominantly civilians, *e.g*., individuals or groups at cafés, shopping malls, civil-society institutions, urban centers, in Tel Aviv, Baghdad, New York, London and other locations, are all acts which clearly, and undisputedly, fall within the ambit of a crime of terrorism.[18]

The connotation "international" terrorism means, in general, that the terrorist offence affects several national jurisdictions, as opposed to terrorism, which is committed within a State, *i.e.,* "domestic" terrorism. A terrorist attack from the outside, *i.e.,* where there is a certain international element is without question equated to an "armed attack" in the meaning of

16 *See* S. Rosenne, *The Perplexities of Modern International Law* 144 (2004).

17 *Supra* note 3. The Convention is also available at: http://untreaty.un.org/English/Terrorism.asp.

18 *See* A. Cassese, "Terrorism is Also Disrupting: Some Crucial Legal Categories of International Law", 12 *E.J.I.L.* 993, 994-95 (2001). *See also* Rosenne, *supra* note 16.

Article 51 of the Charter, thus triggering the remedy of self-defence.[19] Hence, it must be concluded that a terrorist attack activates the provision in Article 51 and, accordingly, the remedy of self-defence contained in that rule become available – as an option – to the State suffering the terrorist attack.[20]

IV. LEGAL CLASSIFICATION OF ACTS OF INTERNATIONAL TERRORISM

Acts of international terrorism such as, for example, terrorist bombings against civilian targets in a country, committed by private groups residing in another country are clearly a violation of the international obligation proscribing the illegitimate use of force.[21] A State, which is the victim of such illegitimate use of force, may resort to necessary, and proportional, counter measures in the form of the remedy of self-defence.[22] Furthermore terrorist offences, and especially armed attacks committed by terrorists, can, in principle, be subsumed under the category "armed attacks" in Article 51.[23] Moreover, acts of international terrorism are, in general, also international crimes, *i.e.,* offences under any of the various international conventions prohibiting different manifestations of terrorist activity.[24] Lastly, international terrorism can, apart from its international law ramifications, be adjudicated under the different national legislations which proscribe terrorist acts. Hence, it is clear that terrorism can be approached through a binary, or

19 *See* Y. Dinstein, "Humanitarian Law on the Conflict in Afghanistan", 96 *Am. Soc'y Int'l L. Proc.* 23 (2002).

20 *See* UN S.C. Res. 1368 and 1373 (2001). In the Resolutions the Council confirmed the availability of self-defence against terrorist attacks. As has been rightly pointed out by Rosenne this recognition, by the Council, confirms "that the Charter does not displace the right to resort to armed force in self-defence in circumstances not contemplated by the Charter"; *see* Rosenne, *supra* note 16, at 146.

21 *Cf.* G.A. Res. 42/22 (1987). In para. 6, it is stated that "States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, *terrorist* (emphasis added) or subversive acts … in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts".

22 *See* Rosenne, *supra* note 16, at 130, 146-48.

23 *See* T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* 54, 67 (2002).

24 *Cf. Restatement (Third), Restatement of the Foreign Relations Law of the United States,* § 404 "Universal Jurisdiction to Define and Punish Certain Offenses", 254, at 257 ((American Law Institute, 1987). The different conventions that regulate specific terrorist offences can be found at: http://untreaty.un.org/English/Terrorism.asp. *See also* Shaw, *supra* note 2, for a discussion of the different international conventions concerning terrorism, with further references.

multiple, perspective from the perspective of international law. Thus, terrorist acts can, as a matter of principle and, depending on the circumstances surrounding the particular case, be classified as, on the one hand, an "armed attack" according to Article 51 in the Charter, and, further, on the other hand, be considered an international crime according to, *e.g.*, the 1997 International Convention for the Suppression of Terrorist Bombing.[25] A legal classification according to the former does not, in principle, rule out a simultaneous legal classification according to the later and *vice versa*.[26] In the same situation different national legislations can have simultaneously jurisdiction for the particular terrorist act. Thus, provided that the circumstances which enable cooperation are present, the international legal order and different national legal orders can supplement each other in the adjudication, and handling, through all legal means, of international terrorist crimes, and terrorist offences.

V. THE ROLE OF THE SECURITY COUNCIL – RESOLUTIONS 1368 AND 1373

The Security Council of the United Nations, an organ assigned with the primary responsibility (Article 25 of the Charter) in the area of international peace and security, can (*i.e.,* has, as a matter of principle, *de jure* capacities in this respect[27]), if it decides to live up to its stated role as the "guardian" of world peace, determine that international terrorism constitutes a threat to the peace.[28] After such determination the Council has the legal right, or rather option, to decide what measures it deems appropriate in relation to the particular situation before it. This is the so called "enforcement action" function vested with the Council's broad capacities (Articles 39-50).

Following the terrorist attacks in the U.S. in 2001, the Council, in accordance with its mandate, decided, in its Resolutions 1368 and 1373, to become active, *i.e.*, make use of its powers, in counter-terrorism action.

Thus, in Resolution 1373, the Council, while acting under Chapter VII (which entails a binding decision), stipulated that member States are required, *i.e.,* are legally obliged, to, *inter alia*:

– take the necessary steps to prevent the commission of terrorist acts;

25 *Supra* note 3.

26 *See* S.D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter", 43 *Harv. Int'l L. J.* 41, 49 (2002).

27 *See* Art. 25 and Ch. VII (Arts. 39-51) of the UN Charter.

28 *See* A.J. Frowein & Krisch, "Chapter VII. Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", in *The Charter of the United Nations: A Commentary* 701 *ff.* (B. Simma ed., 2002).

– refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
– deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide sanctuaries for terrorists;
– prevent and suppress the financing of terrorist acts;
– ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such acts.

These stipulations have the form of true legislative functions and are part of the current Council agenda to create legal standards on central issues pertaining to the international legal order.[29]

In this Resolution the Council further concluded that acts of international terrorism constitute a "threat to international peace and security". The Council also reaffirmed the "inherent right" of self-defence in response to terrorist attacks. Thus, we are probably witnessing the formation of a rule in international law, a rule which provides the right of self-defense as a legitimate remedy against terrorist attacks. This conception of the law had previously been contested, but it now seems to be settled by the explicit pronunciations of the Council in Resolutions 1368 and 1373.[30] In order to monitor the implementation of the requirements contained in Resolution 1373, the Council established a Counter Terrorism Committee. According to the Resolution States are advised to submit reports to the committee on measures taken to implement the Resolution. If implemented properly, this Resolution provides a very ambitious legal framework for a viable counter-terrorism agenda.

VI. THE LAW ON SELF-DEFENCE IN THE CHARTER

In current international law the "self-help" remedy[31] of self-defence is explicitly incorporated in Article 51 of the UN Charter.[32] This particular

29 *See ibid*., at 709.

30 *See* Y. Dinstein, *War, Aggression and Self-Defence* 206-207 (4th ed., 2004).

31 The classification of the right of self-defence as a remedy is done by various writers. *See for example,* Rest. 3rd , *supra* note 24, § 905, "Unilateral remedies", 383 *ff. See also* B.O. Bryde, "Self-Defence", in IV *Encyclopedia of Public International Law* 261 (R. Bernhardt ed., 2000), classifying self-defence as a "provisional remedy" (at 362).

32 Art. 51 has the following text:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

treaty has universal adherence by States. Moreover, the Charter's rules on the use of force are also binding as customary international law.[33] Given the relative inactivity of the UN system of "collective security", at least until recently, international relations have continued to be determined by the unilateral use of force by States. Hence, in an examination of international controversies concerning the lawfulness of the use of force in inter-State relations, the analysis must start from a careful reading of the stipulations contained in Article 51. The essence of the self-defence rule in Article 51 is the recognition of a remedy of self-defence in the event of an armed attack or, more debatable, where there is an imminent risk of such an attack.[34] Thus the notion of "armed attack" represents the key notion in the rule in Article 51.[35]

It is quite evident, if one studies the preparatory works of the Charter, that the committee drafting the rule in Article 51 did not in any substantial and systematic way contemplate all relevant aspects of self-defence when creating the legal rule contained in Article 51.[36] However, Article 51 is the central and, perhaps, the only rule of self-defence that exists at present and, more importantly, it is the sole rule on the remedy of self-defence which has universal recognition by all States of the world community. Hence, the distinct wording of Article 51 and its central requisites, however intended, must be approached, and considered, with a view to finding the correct – and thus binding meaning – and interpretation, of the general law of self-defence in international law.

The question of whether, and to what extent, the rule contained in Article 51 will continue to be *relevant* in international relations depends, *inter alia*, on the adaptation of this rule, and other central rules of international law, to new environments and different actors. The modeling of the rule on self-defence in light of current patterns of threats or use of force by non-State actors, will determine whether the Charter rules on the use of force will be of relevance or not in the coming years. Hence the adjustment of international

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international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

33 *See* A. Randelzhofer, "Article 51", in *The Charter of the United Nations: A Commentary* 788, 792 *ff.* (B. Simma ed., 2002).

34 *See* R. Ago, "Addendum to Eight Report on State Responsibility", [1980/2] I *Y.B. Int'l L.Comm'n* 13, 53.

35 *See* Randelzhofer, *supra* note 33, at 794.

36 *See*, *e.g.*, 12 *Documents of the United Nations Conference on International Organization* 680 *ff.* (1945); 17 *ibid.*, 286 *ff.*

law to cope with asymmetrical threats such as, for example, international terrorism committed by non-State actors will prove whether the *jus gentium*, *i.e.,* the law of nations, is capable of adaptation and is, in fact, a dynamic system of law.

It is important to stress, again, one basic point, a point which far too often is forgotten and omitted in a discussion of self-defence, namely that the remedy for self-defence is meant as an *exception* to the general rule prohibiting the use of force in inter-State relations.[37] This nature of the right of self-defence is evidenced by the specific location of the rule on self-defence in the Charter system. The exceptional nature of this right is thus emphasized by the placing of the rule in Article 51, *i.e.,* following the regulation on enforcement measures by the Council and the general prohibition on the use of force in Article 2(4). However, for States which are subjected to continued and repeated armed attacks by their enemies, and without the Council intervening to stop those breaches of internationally recognized norms, the categorization of the self-defence rule as an "exception" does not correspond to the function of the remedy as such, for the particular State. For States which are the victims of persistent aggression, the normative effect of this exception is, to say the least, uncertain. On the contrary, for those victims of continued aggression, the military apparatus must – in order to deliver national security to the citizens of the State in question – be involved in countless, and exhaustive, defensive measures – in the form of self-defence – aimed at bringing an end to the continuing armed attacks by the adversary.

Traditionally, the rule contained in Article 51 has been interpreted as a right to respond in self-defence against an attack committed *by* a State.[38] However this construction was more due to historic factors than a real legal limitation intended for all time. At the time of the adoption of the Charter, *i.e.,* in the year 1945, armed attacks were in most instances committed by, and against, States. In such a setting, *i.e.,* a State to State conflict *scenario*, a discussion of possible attacks by entities other than states was of marginal importance and, indeed, unnecessary and irrelevant to consider at that time.

In our time, where terrorist atrocities, particularly armed attacks by terrorists, are legion, the need for a reassessment of the regulation on self-defence and its possible application to this specific species of threats is indeed pressing and relevant to consider as a matter of law. Through a careful reading of Article 51 one detects that the wording does not contain,

[37] *See* Bryde, *supra* note 31, at 362. *See further* S.A. Alexandrov, *Self-Defense Against the Use of Force in International Law* 104 (1996).

[38] *See* J.L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", 41 *A.J.I.L.* 872, at 878 (1947).

either explicitly or implicitly, any limitation as to the particular kind of attacker.[39] This can only mean that, as a matter of principle, the conclusion must, from a logical point of view, be that Article 51 provides the remedy of self-defence in response to an armed attack, be that an armed attack by a State or an armed attack by some other entity or person.[40] Furthermore, the question of whether the scope of the armed attack condition in Article 51 extends to armed attacks by non-state actors seems to be settled by the affirmative decision of the Council in Resolutions 1368 and 1373.[41]

A. The "Armed Attack" Requisite in Article 51

The wording "armed attack" (in French: *agression armée*) is one of the most central concepts in Article 51 concerning the regulation on the law of self-defence. Unfortunately the Charter does not, in any clear and structured manner, define and elaborate upon central terms and concepts, such as, e.g., "act of aggression", "armed attack", or "threat to the peace".

A clear and unambiguous definition of, for example, the concept of self-defence, would thus, apart from increasing the general effectiveness of the rule in question, quash States' attempts to legitimize the use of force by them in purported self-defence. This would also serve the wider purpose of world order and stability in international relations. Such an undertaking, *i.e.*, the elaboration of the species of self-defence as, *inter alia*, an act related to the wider category of unilateral acts, and criteria for the application of self-defence *in casu* is indeed necessary, if not urgent, if the concept of self-defence is to retain its significance, and status, as a genuine *legal* concept.[42]

In the analysis of Article 51 one should not forget the concept of armed attack and the centrality of this notion in any discussion of self-defence. Given the creativity of attackers, or for that matter the similar creativity of the industrial military enterprises, in developing new weapons and new modes of attack and response, the armed attack requisite in Article 51 should be construed as covering all kinds of armed attacks.[43] Thus, the terrorist

[39] *See* T.M. Franck, "Terrorism and the Right of Self-Defense", 95 *A.J.I.L.* 839, 840 (2001).

[40] *See* R. Wedgwood, "Responding to Terrorism: The Strikes Against Bin Laden", 24 *Yale J. Int'l L.*559, 564 (1999).

[41] *See* Dinstein, *supra* note 30, at 207.

[42] *Cf.* D. Bowett, *Self-Defence in International Law* Preface (1958). *See also* Ago, *supra* note 34, *passim*.

[43] This view (*i.e.*, the proposition that the "armed attack" requisite should be interpreted flexible) seems to, at least in principle, be adhered to by the International Court of Justice. Thus, in its ruling in the *Tehran Case*, the Court characterized the takeover, by Iranian terrorists, of the U.S. Embassy in Tehran as an "armed attack"; Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] *I.C.J. Rep.* 3, at 29 (para. 57).

attacks of the 11th of September, attacks in which civilian aircraft were used as projectiles in attacking completely civilian objects, should accordingly, be considered an armed attack under the "armed attack" requisite in Article 51.

The Security Council, in its Resolutions 1368 and 1373, also seems to regard those attacks as falling within the realm of the armed attack' requisite in Article 51, thus enabling the victim State to respond in self-defence against the source of the terrorists. As has been rightly pointed out by Gray, this reference to self-defense is of greater significance than might appear if taken in isolation, because the Security Council does not commonly make any express reference to the right of self-defence in its resolutions.[44]

If we recall that the exercise of a right of self-defense is autonomous, *i.e.*, States operate autonomously in their own self-defence, and the only requirement is that they report on their actions to the Council, we realize that there is no reason for the Council to pronounce anything in relation to cases where the circumstances justifying measures in self-defence are present. An examination of Council practice will also reveal that normally the Council does not make any express reference to the right of self-defence in its Resolutions. Only in cases where the circumstances legitimizing responses of self-defence are absent will the Council feel inclined to give its express condemnation of the claimed act of self-defence. Consequently when the Council stresses the right of self-defence against international terrorism, this can only be regarded as an additional justification for the exercise of self-defence against terrorism. If, on the contrary, the Council in a particular case would condemn a specific act allegedly taken in self-defence, this condemnation would serve as proof of the illegality of the specific act in question.[45] Hence, the involvement of the Council in this particular event, and specifically the explicit pronunciations of the Council on the aspect of self-defence, renders the legal remedy of self-defence against international terrorism with a more rigid legal ground of justification. This finding by the Council provides ensuing measures in self-defence with a clear character of legality. Thus, Resolution 1368 provides important evidence as to the legality of acts of force in this respect.

This position is further supported by pronunciations of various elements of the world community in this direction.[46] In any event, the attacks by the terrorists *inside* the planes were, one can assume, most certainly of the "armed attack" character – otherwise the terrorists would not have succeeded in hijacking the planes in the first place.

44 *See* C. Gray, *International Law and the Use of Force* 165 (2nd ed., 2004).
45 *Cf.* Y. Dinstein, *War, Aggression and Self-Defence* 187 *ff.* (3rd ed., 2001).
46 *See* UN G.A. Res. 56/1, 12 Sept. 2001.

Acts of terrorism illustrated by the notorious suicide bomber are easily classified as armed attacks. They are certainly armed – with bombs – and the terrorists are firmly determined to commit an attack with human casualties. A terrorist attack can thus, without much intellectual effort, logically and with little effort be subsumed under the armed attack requisite in Article 51's wording.[47] Thus, the terrorist attacks on the U.S. embassies in Kenya and Tanzania on August 7, 1998 should, accordingly, be classified as armed attacks in the sense of Article 51, thereby allowing the U.S. (and other States) to respond in legitimate self-defence.[48] It is important to bear in mind that, according to the regulation in Article 51, there is not a formal requirement to attribute the specific armed attack to a State.

B. The Authority of the Security Council under Article 51

The most important limitation on the right of self-defence in Article 51 is the authority of the Council to take action in respect of this right.[49] The regulation in Article 51 explicitly vests a concurring competence on the Council in issues related to self-defence.[50] Thus, in the first part of the text in Article 51, it is stipulated that nothing shall impair the inherent right of self-defence in case of an armed attack. The text then continues by stipulating "until the Security Council has taken the measures necessary to maintain international peace and security". This competence of the Council is an aspect of that particular organ's mission to bear the primary responsibility for the maintenance of international peace and security.[51]

The competence of the Council is reinforced by the duty of the State, which is acting in self-defence, to report "immediately" to the Council on its defensive measures (Article 51). The reporting obligation is also, provided that it is respected by the State acting in self-defence, meant to enable the Council to step in at an early stage of the conflict. Another function of the reporting requirement is, presumably, to have a restraining effect on the parties of a conflict. In this respect one should note, however, that the obligation to report does not apply to both parties in a conflict. This is because, in any conflict involving two parties, one of the parties will be committing aggression or armed attacks, whereas the other party will be

47 *See* Dinstein, *supra* note 45, at 214.

48 *See* Wedgwood, *supra* note 40, at 564, stating: "Indeed, the massacre of civilians and the destruction of facilities in Kenya and Tanzania must qualify as an armed attack *if the words are to retain any meaning* (emphasis added)".

49 *See* Randelzhofer, *supra* note 33, at 804-806.

50 *See* Franck, *supra* note 23, at 49.

51 *See* Gray, *supra* note 44, 104 *ff.*

conducting action in self-defence. The problem is, in most situations involving hostilities, that both parties, simultaneously, accuse the other party of aggression or armed attack. The problem is further accentuated in situations were one of the parties is a non-State actor. The obligation to report is only incumbent upon a member of the UN, and non-State actors cannot become a member of the UN.

The relationship between, on the one hand, the modality of self-defence and, on the other hand, the authority of the Council to intervene in this modality is far from clear in practice. Neither international law doctrine or the International Court of Justice have clarified this issue concerning the relationship of competence under Article 51 and the allocation of competence on either the Council or States opting to respond in self-defence against armed attacks.[52] Given the rather passive role of the Council during the Cold War, this particular issue has not been the highest priority of the international community. In a new age, an age where the Council seems to be more active and involved in international controversies, this issue becomes more important and indeed relevant to consider.

Some writers on international law take the view that the right of self-defence may be used only until the Security Council has taken necessary measures to restore international peace and security. According to this construction of Article 51, the remedy of self-defence is only meant to be of a subsidiary nature.[53] Thus, proponents of this view best classify the right of self-defence as a temporal right.[54]

Another topic is how to interpret the condition "measures necessary" in Article 51.[55] What measures are to be considered "necessary", and thus sufficient enough to deactivate the remedy of self-defence. Given the elasticity of this notion the possibility for multiply interpretations and, more importantly, the risks for abuse of this notion is obvious.

It is quite clear through an analysis of the Charter that the designers of this legal text intended that the Security Council should be the primary vehicle used when responding to treats to and breaches of, the peace. This opinion has major support in international law doctrine. However, this construction does not mean that the Council should be the only instrumentality in this respect. On the contrary, the Charter regulation on the use of force envisages other modalities for responding to threats to international peace and security. Particularly, when circumstances justifying

52 *Id.*

53 *See* Randelzhofer, *supra* note 33, at 804.

54 D.J. Harris, *Cases and Materials on International Law* 924 (6th ed., 2004).

55 *See* L. M. Goodrich, E. Hambro & A. P. Simons, *Charter of the United Nations* 352 (3rd ed., 1969).

self-defence are present, the Charter allows States to, although not in complete freedom, act outside of the United Nations system. Hence, measures which are taken in accordance to the stipulations of Article 51 are still an available remedy for individual States.

For the time being it must be considered unclear whether Article 51 really allocates competence to the Council which, in effect, enables the Council, to decide that a State suffering armed attacks must discontinue otherwise legitimate defensive measures. Such a construction is not in accordance with the proper balance between unilateral measures and collective measures, which is essential for the function of the State-based system which international law still is. Moreover, given the political character of decisions of the Council and, further, the limited seats in this particular organ, it can be argued that an unlimited or wide discretion in this respect for the Council is not in the interest of the majority of members of the UN. To cut back on the right of self-defence without providing institutional mechanisms for conflict solution is not, in the current state of international relations, a desired change of this essential State remedy. Still, it is uncontested that the UN Charter regulation in the field of international peace and security was meant to give a prominent role for the Security Council in issues involving hostilities. Accordingly, the broad powers of the Council in the scheme of Article 51 could be interpreted as a power to "divest Member States of the right to continue to resort to force in self-defence against an armed attack".[56]

C. Interpretation of Article 51 – Practice of the Security Council

According to the standard commentary on the UN Charter published by Oxford University Press "acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Article 51 of the UN Charter".[57] In the same text, the writer, Randelzhofer, concludes that large scale acts of terrorism, provided that these are attributable to a State, are to be considered armed attacks in the sense of Article 51. Let us examine these conclusions in light of the relevant Charter regulation.

According to the self-defence provision in Article 51, "*nothing* (emphasis added) in the present Charter shall impair" the right of self-defence "if an armed attack occurs" against a member of the UN until the Council has taken the "measures necessary" to maintain international peace and security. This rule abounds with legal notions necessitating interpretation and careful, repeated, reading. The wording "nothing … shall impair" clearly must signal

56 *See* Dinstein, *supra* note 45, at 189.
57 *See* Randelzhofer, *supra* note 33, at 802.

that the drafters of the Charter did not intend to restrict unnecessarily the inherent right of self-defence. Furthermore, this means that, pending the adoption of a new rule on self-defence, which explicitly attaches new limitations on the exercise of self-defence by, for example, restricting this right to large-scale armed attacks, the rule contained in Article 51 applies to *any* attack which is armed.[58]

Hence, provided that an armed attack has occurred against a State, this occurrence enables the State to legally respond in self-defence as a recognized remedy in international law. The central condition in Article 51 which triggers the right of self-defence, is thus an armed attack. Thus, the remedy of self-defence becomes available, *i.e.,* creates a legal option if an armed attack occurs. The stipulation "armed attack" in Article 51 does not contain any such restriction as proposed by the mentioned author. This lack of qualification concerning whether this condition implies, at least logically, that the armed attack requisite was not meant to be restricted any further by, for example, limiting its scope to large scale armed attacks.[59] If this was intended, or desired, then the text should stipulate so explicitly – this requirement is necessary in order to maintain the sanctity of legal rules, and pragmatic construction of these legal rules.

Hence, one must conclude, by an examination of the text in Article 51, that the opinion propagated by Randelzhofer (and others), *i.e.,* that acts of terrorism by private groups are not armed attacks according to Article 51, is at variance with the clear letter of the law.

The writer also concludes that the "large-scale" armed attacks, in order to qualify as armed attacks, must be attributable to a State. As is clear from the text of Article 51 the rule does not elaborate upon the character of the particular attacker. Logically, this must mean that any subject, in principle, can commit an armed attack in the sense of Article 51. Article 51 is thus "silent on who or what might commit an armed attack justifying self-defence".[60] The lack of emphasis in Article 51 on the character of the attacker must, reasonably, lead to the logical conclusion that the rule contained in Article 51 was meant to cover "all modes of attack as long as it is armed".[61]

58 *Cf.* Kunz, *supra* note 38, at 878, where he makes the following observation: "If 'armed attack' means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident".

59 *See* Dinstein, *supra* note 45, at 173 *ff*.

60 *See* Murphy, *supra* note 26, at 50.

61 *See* R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 200-204 (1963).

In conclusion, if the requisite "if an armed attack occurs" is read literally, then one cannot, logically, by this stipulation and the following text of Article 51, reach the conclusion that the rule only applies to armed attacks by a State. The stipulation does not, however, given the silence in this respect, rule out the application of the remedy of self-defence against armed attacks by non-State actors, as well as States, or other subjects or entities. The rule in Article 51 indicates that the factual, and objectively verifiable criteria of an "armed attack" is the focus of the Charter law on self-defence. Hence, if terrorists commit an armed attack against a member of the UN, this member is entitled to respond against the attack by way of self-defence. This is the law of the Charter, and this rule is also, considering the interaction between treaties and customary international law, probably also the law in customary international law. This construction of Article 51 also seems to have been adopted by the Security Council in its Resolutions 1368 and 1373. Hence, in Resolution 1368, the Council recognizes the inherent right of self-defence against "terrorist acts" (para. 3).[62]

D. The Question of Attribution of Armed Attacks to States

In its judgement in the *Corfu Channel case* the ICJ acknowledged the important principle that States are obligated, as a matter of law, "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[63] Thus international law does not legitimize the use of the territory of a State by another State, when the latter seeks to commit an armed attack or aggression against a third State from the territory of the State granting its territory be used for such a purpose. Hence the use of the territory of another State as a springboard for committing acts of aggression against other States is clearly a violation of international law.[64] If this is done, and a third State consequently suffers an armed attack, then the victim State is justified in responding – in self-defence – against the attacker irrespective of the particular location of said attacker.[65] Moreover, the response can also, in principle, be directed against the State which has placed parts of its territory at the disposal of the attacking State or entity, when the permitting State was aware of the risk that it could incur if a group operating from its territory would seek to endanger the security of another State.[66]

62 *See* Franck, *supra* note 39, at 840.
63 Corfu Channel Case (Merits), [1949] *I.C.J. Rep.* 4, 22.
64 *See* Dinstein, *supra* note 45, at 215.
65 *See* Murphy, *supra* note 26, at 50.
66 *See* Franck, *supra* note 25, at 67.

Thus the victim State, *i.e.,* the State being subjected to an armed attack, has the option of various modes of response as required by the specific circumstances surrounding its exposure to aggression by elements seeking to endanger and harm its citizens and security. If it is ascertained that the State from whence an armed attack was launched is either unwilling or unable to stop violations of another State's rights, violations which are attributed to elements operating from within that State's territory, then the victim State is justified in responding to those elements situated on the territory of the other State in order to disrupt the violations against its legitimate rights.

Issues of attribution of armed attacks to a State will, notwithstanding the frequency of armed attacks by non-State actors in cases where a foreign State is not involved, be relevant to consider. In many cases terrorists are sent directly by a foreign State into the territory of another State. In this scenario the terrorists can, according to the rules of State responsibility, be considered *de facto* organs of the sending State. If, in these circumstances, the terrorists conduct an armed attack against an innocent State it is not legally inappropriate to derive the main responsibility, for the armed attack, from the sending State. This line of reasoning is also spelt out in other sources.[67] Thus in Article 3(g) of the 1974 General Assembly Definition of Aggression the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" can, in principle, qualify as an "act of aggression".[68] It is not far-reaching to assume that the locution "armed bands, groups, irregulars" was meant as, *inter alia*, armed terrorist bands.

Hence, if a link between the sending State and the terrorists can be established, the victim State can respond with legitimate force – in self-defence – against the terrorists or against the sending State. Similarly, in a case where a foreign State is not an accomplice to the particular armed attack before and during the act, but, after the attack, provides shelter, or gives its endorsement to the illegal act and, moreover, does not comply with its obligations under international law – in such a *scenario* – the terrorists can be considered de facto agents of the foreign State.[69] In the same vein, the refusal of the Taliban' regime in Afghanistan to take action against Al Qaeda and Bin Laden, and the ambiguous signals of this regime towards the "9-11"

67 *See*, *e.g.*, 1 *Oppenheim's International Law* 418 (R.Y. Jennings & A. Watts eds., 9th ed., 1992).

68 *See* G.A. Res. 3314 (1974), repr. in 13 *I.L.M.* 710 (1974).

69 *Tehran Case*, *supra* note 43, at 31*ff*.

terrorist attacks, could together be said to have espoused the armed attack against the U.S.[70]

Issues of attribution of armed attacks are thus, still, relevant to ascertain *in casu* and this particular part of the derivation of armed attacks is, indeed, particularly relevant as concerns target selection in self-defence operations. If, for example, a State provides direct support to a particular terrorist group, or encourages such groups to commit terrorist acts in other countries, the acts, committed by the terrorists, can be said to be attributed to that particular State. Thus, an armed attack by those terrorists against the objects of another country can be – legally – viewed as an act on behalf of the State supporting, or encouraging, the terrorists. The State which, in some form or other, has instructed, funded, supported, acquiesced etc., to the activities of the terrorists, is thereby, in some sense, equated with the attacker, in the sense of the scheme of Article 51.[71]

Moreover, if a State gives shelter to terrorists *after* they have committed acts of terrorism within the territory of another State, the harboring State risks being susceptible to legitimate counter-measures – in self-defence – by the victim State.[72]

Hence, in a case where it can be ascertained, and thus established, that a particular State has in fact instructed and sent the terrorists, knowing that the terrorists would carry out acts of armed force against another State, the terrorists can be considered, in terms of law, as *de facto* organs of the sending State. This view of the law is also spelled out in the International Law Commission's Draft Articles on State Responsibility. According to Article 8 of this draft the conduct of private persons shall be considered an "act of the State" provided that it is established that such persons or groups were in fact acting on behalf of that State. This position is further confirmed by the ICJ in its *Nicaragua* judgement.[73] In this decision, the Court qualified as an "armed attack" acts of armed attacks committed in an indirect manner. In the words of the Court:

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be

[70] *See* S. Ratner, "*Jus ad Bellum* and *Jus in Bello* After September 11", 96 *A.J.I.L.* 905, 914 (2002).

[71] *Id.*

[72] *See* Wedgwood, *supra* note 40, at 565.

[73] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), [1986] *I.C.J. Rep.* 14.

> considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein.[74]

Hence a "substantial involvement" in the "sending" of private groups will also be considered an armed attack in the sense of Article 51. A State which places parts of its territory at the disposal of a terrorist group thus enabling it, *i.e.,* the terrorist organization, to train its members for terrorist attacks, is clearly, and undoubtedly, substantially involved in terrorist activity.[75] The same could be said of a State which offers a safe haven to terrorists, provides those groups with weapons and logistical support, and in other similar ways enables terrorists to continue their illegitimate activities.[76]

In fact, it must be clear that such State participation will increase the possibilities of terrorist acts being accomplished. Bearing in mind this fact, it must be concluded that from the perspective of international law, States which in some way or other are involved with terrorists will, accordingly, also be considered an accomplice to the particular terrorist crime committed.

In a situation where a link between the terrorists and a particular State can be established, it is not legally unsound to regard, as a matter of principle, that State as a legitimate target for the State suffering an armed attack by terrorists operating from the territory of the former.[77]

E. Schematic Structure of the Regulation Pertaining to the Resort to Force According to the Charter as Applied to International Terrorism

Measures of counter force in response to armed attacks by terrorists can take three forms according to the Charter regulation on use of counter force. The counter measures can take the form of individual self-defence, *i.e.,* unilateral action, by the victim State. This is the basic *scenario* envisaged in the stipulation in Article 51.

Another option is so-called "collective" self-defence, *i.e.,* multilateral defensive measures against international terrorism. This form of counter force is also regulated in Article 51. In these two instances, *i.e.,* unilateral or

74 *Ibid*., at 103 (para. 195).
75 *Cf.* S.C. Res. 1044 (1996), 1189 (1998) and 1214 (1998).
76 *See* S.C. Res. 1333 (2000).
77 *See* Franck, *supra* note 23, at 53.

multilateral self-defence, the State (s) conducting operations in self-defence, to a large extent, act (s) on its (their) own. Moreover, in these scenarios no prior approval from the Security Council is required. However, the subjects resorting to defensive measures in self-defence are required to report, *i.e.,* inform, the Council of the action taken. The Council can, in these cases, decide to take action itself, according to Article 51, and/or decide that the State (s) conducting defensive measures must cease and desist from any further action.

In the absence of any pronouncement of the Council barring the State, or States, from further action, e.g., through a binding cease-fire Resolution, the State (s) is (are), in principle, entitled, provided that the circumstances justifying self-defence are present, to the use of force in self-defence. Hence, pending a binding resolution by the Council in this direction, the subject entitled to self-defence retains this right, and, as a matter of principle, the remedy of self-defence continues to be an option for that State.[78]

In the absence of circumstances justifying action in self-defence under Article 51 of the Charter, inter-State use of force can only be authorized by the Security Council.[79]

F. Self-Defence Against Terrorists Situated in Foreign Territory

If the required espousal can be properly established, the remedy of self-defence would seem to apply as against the state supporting the terrorists.[80]

In the case of a genuine non-State terrorist attack, *i.e.,* an armed attack committed by private terrorist groups, where there is no link to a particular state, but the terrorists are located on the territory of a foreign State, these circumstances do not rule out the option of action in self-defence.[81] Thus, when the existence of terrorists in the territory of a foreign State where a formal link between that State and the terrorists cannot be proved, this lack of connection does *not* bar the victim State from invoking self-defence. This is the so-called "failed State" scenario. The modality of self-defence is, in such a *scenario*, indeed *sui generis*. In such a case, the response is not against the State on which territory the terrorists in question are situated – action directed against that State's premises would not be in accordance to the law – rather the mode of self-defence must be strictly, and exclusively,

78 *See* Alexandrov, *supra* note 37, at 146.

79 *See* Dinstein, *supra* note 45, at 250 *ff.*

80 *Cf.* para. 3 of UN S.C. Res. 1368 (2001) stressing that "those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".

81 *See* Randelzhofer, *supra* note 33, at 802.

directed against the terrorists. This modality has been lucidly articulated by Dinstein as "extra-territorial law enforcement".[82] The violation of the territorial integrity of the foreign State is here allowed provided that the counter-force operation is solely directed against the terrorists responsible for the attack.[83]

VII. THE APPLICATION OF THE RULES GOVERNING THE USE OF FORCE IN RELATION TO NON-STATE ACTORS

We live in an age of non-State actors. This is not to say that the primary subjects of international law, *i.e.,* States, are becoming irrelevant, or less important. Rather, other subjects are gaining in importance in international relations. The adaptation of international law, particularly that which is practiced at the UN, in providing the necessary legal, instrumental and institutional capacities to deal effectively with non-State actors, and particularly private terrorist groups which endanger the peace and security of the international legal order, will decide whether international law will be relevant or not in State decisions and conduct related to international law in the coming years.

In current international law, Article 51 has become, due to the frequency of international conflicts, one of the most central norms, or rules, in international relations involving hostilities. Consequently, States which are involved in armed conflicts, and thus conduct operations in self-defence, are eager to demonstrate that their particular action involving the use of military force is consistent with the legal requirements of Article 51.

In international law doctrine, there is a strong school of thought maintaining that an armed attack in the sense of article 51 can only be committed *by* a State.[84] Thus, according to this school and line of reasoning, armed attacks by non-State actors do not constitute "armed attacks" activating the provision in Article 51. This conclusion is – apart from being contrary to the text of Article 51 – probably due to an error in thinking (*i.e.,* erroneous inference), by otherwise intelligent international lawyers. This misconstruction has then, over the years, been reproduced and repeated, in international law discourse (and in other contexts), to the effect that it has been considered the correct interpretation, without anyone bothering to examine – *i.e.,* pore over – the wording of Article 51.

Surely the law of nations, and the UN Charter have as their primary subjects the individual States. Thus, most obligations derived from

82 *See* Dinstein, *supra* note 45, at 217.
83 *See* 1 *Oppenheim's International Law*, *supra* note 67, at 421.
84 *See* Alexandrov, *supra* note 37, at 99 with further references.

international law are primarily addressed towards States. The drafters of the Charter also modeled most of its rules in consideration of regulating State conduct and inter-State relations. Undoubtedly armed attacks by States were the primary concern when drafting the rule in Article 51. Moreover, in most cases, and to a large extent even today, armed attacks were (and are) committed chiefly by States. Thus, in our time States are still responsible for the majority of armed attacks in international relations. However, these days, non-State actors are increasingly involved in the commission of armed attacks in international relations. This new pattern in conflicts involving the use of force thus provides new challenges to the international legal order. How well does the international legal order deal with these rather new and asymmetrical occurrences? Does, for example, the text of Article 51 need to be changed in order to apply to this different form of armed attack?

It can be argued that international law is not well suited, nor well prepared for coping with non-State elements, such as, private terrorist groups and guerillas. Be that as it may, a close reading of Article 51 would attest to the view that this particular rule is perfectly drafted to apply to non-State actors or for that matter to indirect armed attacks.[85] As far as Article 51 is concerned, the plain meaning of its text unequivocally confirms its application to any armed attack.[86] The intense efforts by various elements of the world community, or for that matter, efforts by persons skilled in matters of international law, to restrict the ambit, and semantic range of Article 51 to armed attacks *by* States cannot be maintained – and does not stand up to scrutiny. The correct interpretation of the armed attack requisite in Article 51 has been lucidly expressed by Dinstein:

> Armed attacks by non-State actors are still armed attacks, even if commenced only from – and not by – another State.[87]

Hence, it seems that the rule in Article 51 is well-drafted in that it encompasses armed attacks by any entity or individual, be it a State, a non-State actor, a celestial being from another planet, individual military units, private or State groups etc., thus covering all modes of acts of aggression or armed attacks. Consequently, under the Charter, and particularly under its Article 51, an armed attack need not be launched by a foreign State: it can be launched *from* a foreign State.[88] The rule in Article 51 is thus meant to cover all modes of armed aggression and attacks. The Council in its Resolution

85 *Cf.* Randelzhofer, *supra* note 33, at 800.
86 *Cf.* Bowett, *supra* note 42, at 152.
87 *See* Dinstein, *supra* note 45, at 214.
88 *Ibid.*, at 192.

1368 also confirms this conception of Article 51 where it reaffirmed the right of self-defence in response to armed attacks by terrorists, *i.e.,* non-State actors. Moreover, NATO also explicitly endorses this interpretation of Article 51.[89]

The reluctance, on the part of segments of the international community, to accept the notion that armed attacks by non-State elements should also be classified as armed attacks triggering the right of self-defence has been going on for some time now. The true reason for this reluctance is most likely due to political and strategic factors, and not something which is based on strict legal reasoning. States, which adhere to this view, seem to desire to preserve the availability, under the law, of the option to use, against their adversaries, so-called "indirect aggression" through the instrument of non-State actors. Thus, if the rule in Article 51, or for that matter the international customary law proscribing the use of force, does not apply against non-State actors, then there are fewer restrictions on the use of non-State actors as a means for conducting "warfare" against a State's enemies.

The distinction between indirect and direct armed attacks, or aggression, does not hold up for scrutiny. Moreover, the exclusion of the former from the ambit of the armed attack requisite in Article 51 only serves to undermine the concept of an armed attack as such. The distinction appears fabricated and only contributes to the blurring of the contours of the rule in question and, particularly, the law on self-defence in the 21st century.

It seems clear that – provided that the interpretation is done *bona fide*[90] – when we examine the text of Article 51, it is not lexically possible to exempt armed attacks by non-State actors from the scope of the armed attack requisite in this rule. In fact, the rule does not contain any such limitation. Besides that, it must be stressed that an interpretation of a given rule, which fails to correspond with the "ordinary meaning" of the text, is surely contrary to established rules of interpretation.[91] Such interpretation would also, indeed, be considered illegitimate under any legal order. Moreover, interpretations of rules which, obviously, are at variance to the text of the specific rule, will only, in the longer perspective, undermine the rule of law and the role of law in international society. Thus, it is in the interest of those who desire a society, be that an international or national society, which is

89 *See* E.P.J. Myjer & N.D. White, "The Twin Towers Attack: An Unlimited Right To Self-Defence?", 7 *J. Conflict and Security L.* 1, 8-9 (2002).

90 *See* Art. 31 of the 1969 Vienna Convention on the Law of Treaties (1155 *U.N.T.S.* 331). According to the "general rule of interpretation" stipulated in this Article a treaty "shall be interpreted in good faith in accordance with the *ordinary meaning* (emphasis added) to be given to the terms of the treaty in their context and in the lights of its object and purpose".

91 *Id.*

based on foundations of law and order, that we all – including lawyers and jurists – interpret rules that are important to us, rules which are essential and worth preserving, in a manner which is consistent, coherent, compelling and – above all – faithful to the wording of the rule in question.

In conclusion, an examination of the self-defence rule contained in Article 51, clearly indicates that action by non-State actors involving the use of force may be classified as armed attacks in the sense of Article 51. Hence it is relevant to consider, as a matter of law, whether "private acts" as opposed to "State acts" involving the illegitimate use of force can be subsumed under the armed attack prerequisite in Article 51. In fact, as has been demonstrated, it is indeed questionable whether the distinction between acts by States and other actors is necessary in the first place in a discussion of Article 51.

Therefore it seems that Article 51 provides a suitable remedy for counter-terrorism measures, in self-defence. Questions of attribution of armed attacks will still be relevant to consider, especially as concerns the selection of targets and issues concerning State responsibility. Consequently, as is evident from this analysis, it is not possible (anymore), from a legal perspective, to assert that the legal position is unclear, regarding which measures are legally available to a State being the victim of international terrorism. On the contrary, States which are subjected to armed attacks by terrorists, be they, *i.e.,* the terrorists, individuals, private groups or *de facto* organs of a State, do – as a matter of law – have sufficient remedial protection as described in Article 51.

A reading of Article 51 which excludes armed attacks committed by non-State actors from the scope of the armed attack requisite in the rule in question, is, first of all, contrary to the wording of Article 51 ("if an armed attack occurs"). More importantly, such a restrictive reading of Article 51 is not synchronized with current patterns of international conflict. Such a construction of Article 51 is thus, clearly, not well adapted to modern conceptions of warfare. Moreover, when one uses a restrictive reading of Article 51, in current international society where non-State actors are increasingly involved in armed conflict, one runs the risk of making the rule contained in Article 51, in effect, inoperative. This cannot have been the intention of the drafters, who inserted the Article in the Charter, *inter alia*, in order to provide States with a remedy in case of being subjected to an armed attack.

The sole object and purpose of the rule of self-defence in Article 51 in current international law is to ensure that States are provided with an effective remedy for countering, and defending themselves from, armed attacks. To restrict the application of Article 51 only to armed attacks by States would, especially in our era, undermine the legal ability of States to

protect their citizens from great, external and internal, danger. This would also, presumably, lead the States to regard the Charter rules on the use of force as no longer useful and, indeed, irrelevant. The consequences of such a scenario is not something desired for the viability of international law in the conduct of States.

In a recent Advisory Opinion, the International Court of Justice arrived at the following conclusion:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by *one State against another State* (emphasis added).[92]

As has been clearly demonstrated above such a construction of Article 51 cannot – if one examines the wording of Article 51 – be maintained. Let us hope that the international court will, in future cases involving legal aspects of self-defence and the use of force in international law, put some more effort into examining the relevant Charter texts. If this were to be done then, presumably, the Court would be able to produce a valid precedent.

VIII. THE APPLICATION OF ARTICLE 51 TO INTERNATIONAL TERRORISM

As has been rightly pointed out by Reisman, the "dynamic of reciprocity and retaliation that underlines international law does not operate for non-State actors".[93] Thus these elements, which can be said to constitute the foundations of the State-based system of international law – and at the same time are the factors which enable the system to function effectively, do not, at least partially, operate as desired in respect of, for example, private terrorist groups. It is important to bear this in mind in a discussion of the modus of Article 51 in respect to international terrorism.

We now turn to the aspect of how this "war on terror" can, and should, be conducted in accordance with the letter and the spirit of the laws pertaining to the international legal order.

It can be argued that the forceful and coordinated response against international terrorism following the terrorist attacks which took place in the U.S. on the 11th of September 2001 in some sense, came too late. The terrorist attacks in the U.S. involving substantial human casualties and tremendous economic costs had already taken place. The tragedy of this

92 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), 43 *I.L.M.* 1009, 1050 (2004).

93 M. Reisman, "Self-Defense in an Age of Terrorism", 97 *A.J.I.L. Proc.* 142 (2003).

event was – and is – to the victims of this terror, irreversible. It cannot be changed. Hence, coordinated and forceful State responses to eliminate international terrorism should have begun earlier.

Prior to the events of "9-11" forcible State responses to international terrorism had only been carried out by a few States, and had, in most cases, been rejected as illegitimate by a majority of States.[94] Hence, substantial parts of the world community had given ambiguous signals as to the lawfulness of self-defence against international terrorism. It can be argued that the unclear, and in some way relativistic, position taken by those same States provided fertile ground for terrorists and their organizations to multiply and increase in size and diffusion, thus creating the necessary conditions for events such as "9-11" to come about. Thus, "9-11" can be seen as a consequence of this position, the passive stance of those same States towards the threat of international terrorism.

The international community now bears a responsibility towards its "citizens", to establish the necessary institutional framework for a successful eradication of terrorists wherever they may be located. Thus, the international community should unequivocally in word, and, more importantly, in *action* show that terrorists are indeed *hostes humani generis*, *i.e.,* enemies of mankind, and that, accordingly, the use of violence and intimidation for political, religious, ideological or other illegitimate purposes is never accepted in the realm of the civilized world. Only then will citizens in every part of the world be free from the threat of terror, and thus be saved from the extreme fear which is the consequence of being subjected to the threat of international terrorism.

CONCLUSION

Terrorism poses new challenges to international law. It particularly affects traditional interpretations of the law on self-defence. The UN Charter, adopted in 1945, is a product of that era's State-centered conception of international law.

In contemporary international relations, non-State actors such as, for example, private terrorist groups, have increased in frequency in different parts of the world. Modeling the remedy of self-defence and its application to this, and other, serious and relatively new phenomenon of threats to international peace and security, is an important task, and test, for the international community and, particularly, the UN and its central institutions. The successful performance of this crucial task will serve as an indicator of

94 *See* Gray, *supra* note 44, at 160 *ff.*

whether, and to what extent, international law and its institutional framework is capable of adapting to new challenges and threats, thus serving its constituents, *i.e.,* the human species, by assuring them viable security and freedom.

In conclusion, what should be the future strategy for the international community in respect to the threat of international terrorism? The international community should agree upon a comprehensive strategy of counter-terrorism in order to extirpate this phenomenon from the international and various national scene (s). This mission – *i.e.,* an agenda for the elimination of international terrorism – should have as its primary aim to disrupt and take (institute) legal proceedings against international terrorists and terrorist organizations all over the world, thus dismantling the infrastructure of terrorism from international (and national) society through the means of law and order. If this strategy were to be initiated and, eventually, carried out, this would assure, and secure, a safe international environment free from the disturbing threat of international terrorism.

Current international terrorism does not in any way resemble conventional warfare. The rudiments of the laws of war mandate that in combat the combatant must always make a distinction between military and civilian targets.[95] The latter should never be considered a legitimate target in warfare. Modern-day terrorists completely disregard this basic rule of international law. In fact, international terrorism has as its distinguishing-mark the striking at unarmed civilian targets in an attempt to destroy the structure and environment of international, and national, civil society. Hence the primary objective of contemporary terrorists is the *intentional* killing of innocent civilians: children, women and men, composing civil society at large.

In essence international terrorism has tremendous negative effects and implications on the international and national legal orders. For terrorists no targets are excluded, in other words: we are all exposed to the threat of international terrorism, we are all, in principle, a target for the terrorists. To some extent this means that we are all united in fear. This common fear of being subjected to terror, can be an instrument for creating new ways of responding. Thus, we can decide to embark on a venture, an undertaking, which in the end will result in the elimination of international terrorists and terrorist infrastructures.

Terrorism entails the power to control through fear and intimidation, but this power is illusory and doomed to failure. What should the objective be

[95] *See* K. Skubiszewski, "Use of Force by States. Collective Security. Law of War and Neutrality", *Manual of Public International Law* 801 *ff.* (M. Sorensen ed., 1968).

for the international community, considering the threat posed by international terrorism? Should the international community and States willing to destroy terrorist infrastructures "sit and wait" for terrorists to take action, action which would result in the loss of innocent lives? Or should they respond forcefully, re-evaluate the situation, and embark on the difficult path towards greater security and thereby reaffirm one of the tenets of pluralistic civil society? Some States, as well as the Security Council of the United Nations, have made their choice, and hopefully others will follow. This would secure some of the tenets of the Charter of the United Nations, namely the affirmation of human rights and the maintenance of international peace and security.

In contemporary international discourse, terrorism falls under the same category as similar international crimes of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, crimes against humanity.[96] This is natural, given the severe destabilizing effects caused by modern-day terrorism on the international (and national) legal order, and the immense suffering caused by such acts. Moreover, this classification is also consistent with the serious nature of acts of terror, and terrorist crimes.

In 1986 Friedlander lamented that "the horror of modern terrorism is that *anyone* (emphasis added) may fall prey to it".[97] This is unfortunately still a reality in our time. To this one might add that the horror of contemporary terrorism is that the terrorists are bent on killing innocent civilians. Another horror of modern terrorism is the risk that the terrorist organizations will acquire weapons of mass destruction, and use these heinous weapons against populous civilian targets. The modern conception of society as a free and pluralistic civil society with constitutional safeguards on recognized fundamental rights and freedoms is heavily exposed to the threat of terrorism. In countries that abide by these principles, the issue of international terrorism and counter-terrorism strategies will always entail a consideration concerning the core values of security and freedom – the balancing of these two concepts is an intricate and difficult dilemma in the

[96] *Cf., e.g.*, Rest. 3rd, § 404, *supra* note 24. On the issues whether terrorism should be regarded as crimes against humanity, the 1998 Rome Statute of the International Criminal Court (37 *I.L.M.* 999) provides some indicators. In Art. 7(1a) of the ICC Statute the crime against humanity of murder is elaborated. It reads, *inter alia*: 1. The perpetrator killed one or more person. 2. The conduct was committed as part of *a widespread or systematic* (emphasis added) attack directed against a *civilian* (emphasis added) population. *See*: http://www.un.org/law/icc/statute/romefra.htm. *Cf.* Cassese, *supra* note 18, at 995. The terrorist attacks of 11th September can easily be subsumed under this wording. Moreover "small-scale" terrorist attacks when conducted in a systematic manner can also be covered by this provision.

[97] *See* Friedlander, *supra* note 4, at 849.

"war on terrorism". In our time, this consideration is required by every State that takes its obligations towards its citizens seriously. This decision is inescapable for every governmental body and must be duly made.

In every forcible measure considered against international terrorists, the State conducting the operation should have one axiom in mind, namely: will the use of force save the lives of innocent victims and will it prevent future attacks? In so doing, we ensure that we distinguish ourselves from the terrorists.

In summary, international terrorism bring to the fore several important legal issues pertaining to international law. *Inter alia* it has implications on the law of self-defence in international law. As has been demonstrated in this analysis, current international law – notably the UN Charter and customary international law – provides sufficient remedial protection at the legislative and enforcement levels, for coping with this severe threat to international peace and security. The enforcement capacities vested in Article 51 thus provide States with the necessary legal basis for responding to terrorist attacks and, perhaps, for responding to threats of such attacks. The armed attack requisite in Article 51 is thus broad enough to encompass terrorist attacks.

Through an analysis of the relevant Charter stipulations, particularly Article 51, one detects support for the proposition that the State-based system of international law is, indeed, institutionally well equipped to meet the challenges presented by international terrorism. Article 51 is as we have seen, well drafted to cover – in its applicability – armed attacks by terrorists. Thus, the juridical remedy of self-defence contained in the Charter can redress the serious threat of international terrorism.

International terrorists, by planning and initiating actions that can cause substantial damage to almost any target in the world, try, by their illegal acts, to undermine the "Charter-based system of world order".[98] The international community should, by utilizing the UN system and its capacities, prove that the agenda of the terrorists cannot be successful when confronted with the institutional capacities vested in Chapter VII of the UN Charter, be they unilateral or collective.

In the area of international criminal law, the recent activism at the institutional level of the UN and the ensuing increase in the adoption of international instruments, particularly international conventions dealing with different manifestations of terrorism, e.g., terrorist financing, terrorist bombings, seems reassuring for those States which desire a legal order based

[98] *See* I. Charney, "The Use of Force Against Terrorism and International Law", 95 *A.J.I.L.* 835, at 838 (2001).

on the rule of law and an international legal order which includes the proscription of heinous international crimes, such as international terrorism. Let us hope that the international community can reach an agreement on a final and comprehensive convention on international terrorism. The adoption of such a convention would indicate the world community's willingness to eliminate international terrorism from contemporary society. Such a convention would also, presumably, enhance the possibilities for international adjudication of international terrorist crimes. Recent practice of the Security Council, particularly its responses to the tragedy of the 11th of September 2001, has the capacity to streamline the international legal order's response to international terrorism. This is the legacy of the terrorist attacks in the U.S. and in other parts of the world. By adhering to these Resolutions, we pay tribute to the victims of terrorism all over the world.

Considering the proliferation of occurrences of international terrorism, and the increase in terrorist armed bands, we see that military responses to international terrorism, particularly self-defence counter-terrorism measures, will presumably, and necessarily have to continue for the indefinite future, until this disturbing phenomenon has been eradicated from international relations.

The history of self-defence is a history of dynamic legal creativity. Throughout the years, international lawyers have designed and reshaped the juridical institute of self-defence. Different conditions have been attached to this central State remedy. The proportionality rule, the requirement of necessity and the immediacy condition have all been considered as natural conditions for the exercise of self-defence. Given this history of creative legal interpretation in this area, the field is somehow open to contemplate upon how to model the law of self-defence to current patterns of armed attacks and threats of such attacks. My proposal is – in order not to risk getting trapped in the realm of authoritarian statehood – to attach an ethical dimension to the law of self-defence, however elastic such a condition may be in its operation. Based on the models found in the humanitarian law corpus, this condition would render self-defence operations more stringent in terms of legitimacy. I am fully aware of the intricate dilemmas involved in such considerations. However, strong and compelling reasons indicate the necessity for attaching this element to the current – and future – law of self-defence. At least this should be done as a matter of principle. By doing this, we ensure our continued adherence to high moral standards, thus enabling us to regard ourselves as being part of that civilized world which is the essence of the *jus gentium*.

PROSECUTING INSURGENTS AND TERRORISTS IN IRAQ

By Andru E. Wall[*]

INTRODUCTION

Between April 2003 and December 2005, Coalition Forces[1] detained over 50,000 Iraqis. On 28 November 2005, 14,039 remained in detention. What was their crime and when could they hope to be released? Mass detentions without due process would certainly seem incongruous with a military action called "Operation Iraqi Freedom".

While technically fictional, the following three stories accurately reflect thousands of nearly identical incidents that took place in Iraq during its transitional period.[2] Only names, times and places are changed. These stories are all too familiar to Iraqis and Coalition Force patrols and even to those few journalists who ventured outside the protections of the International Zone (or Green Zone) in downtown Baghdad. The story less known is what happened to the individuals detained after they entered the apparent abyss of Abu Ghraib and the Coalition Force's detention system.

On 8 July 2004 Weapons Company of the 3rd Battalion, 2nd Marine Regiment, 1st Marine Expeditionary Force (1MEF) established a vehicle checkpoint on a major roadway outside of Ar-Ramadi in the Al-Anbar province of western Iraq. The Sunni-dominated Al-Anbar province was a hotbed of the insurgency and 1MEF was charged with finding insurgents and preempting their attacks on Coalition Forces. Vehicle checkpoints were useful tools to show presence and some semblance of control, while also regularly leading to the discovery of insurgents and weapons.

* The author is an international law attorney in the US Navy. He served in Iraq in 2004 and 2005. The views expressed here do not necessarily represent the views of the US Government.

1 While the USA led the invasion to topple Saddam Hussein and install democracy in Iraq, dozens of other countries contributed ground forces to the effort. As such, press releases, official pronouncements, and military orders all referred to the collective "Coalition Forces". After the transfer of sovereignty in June 2004, Coalition Forces included members of the Iraqi security apparatus – local and national police and the Iraqi National Guard. While the political benefit of the American decision to refer to all operations in Iraq under the collective Coalition Forces is apparent, the embrace of that term by this author is solely for reasons of simplicity and clarity.

2 The Transitional Period ran from the return of full sovereignty to Iraq on 28 June 2004 through the election of the Iraqi Parliament in Dec. 2005.

At 13:30 a Marine observer at the vehicle checkpoint spotted a white four-door pickup truck about a half-kilometer away traveling towards the checkpoint suddenly slow down and make a U-turn. This information was immediately passed to a squad manning an interdiction HUMVEE, which gave chase and stopped the truck. The driver and two passengers were ordered to exit the vehicle, place their hands on their heads, and then kneel on the side of the road. During the ensuing search of the truck, an AK-47 with a loaded thirty-round magazine was discovered under the front seat, and an RPG launcher and three RPGs were found wrapped in a sheet in a hidden compartment underneath the truck bed.[3] The three men were then searched and transported to a temporary holding facility where they would be interrogated by Marine intelligence officers and, no doubt, eventually transported to Abu Ghraib.

At 2130 that same evening, Dawood Jassim Salman Al-Zubai (Abu Ali) was eating dinner at home with his family, which included his wife, two sons, Ali Dawood Jassim Al-Zubai and Hussein Dawood Jassim Al-Zubai, and three daughters. The family lived in a small farming village south of Mosul in northern Iraq. Their home was just west of a main road leading into Mosul; an orchard lay between their home and the road. Insurgents attacked Coalition Forces traveling along the road with improvised explosive devices (IEDs) numerous times during the preceding week. In an attempt to locate the perpetrators of the IED attacks, a cordon and search was ordered of the village and homes nearby. This meant that Coalition Forces would establish a perimeter around the village by setting roadblocks on all roads leading into the village, while soldiers went house-to-house in search of insurgents, weapons or other evidence of insurgent activity.

During the search of Abu Ali's home, three AK-47s and several loaded magazines were discovered. As the grounds were searched, soldiers discovered a small path leading from Abu Ali's property to the bordering orchard. Buried underneath dead palm leaves, a small weapons cache was uncovered. It included several old 107 mm and 120 mm mortar rounds, a RPK belt-fed machine gun packed in grease and wrapped in plastic,

[3] Coalition Provisional Authority Order 3 was issued during the occupation of Iraq by Ambassador P. Bremer on 23 May 2003 (hereinafter: CPA Order 3). CPA Order 3, like many of the CPA Orders addressing security, amended existing Iraqi law and was later incorporated into the Transitional Administrative Law, which governed the period from the end of the occupation on 28 June 2004 through the election of an Iraqi Parliament in Dec. 2005. CPA Order 3 allowed Iraqis to possess small arms for their protection at their home and place of business, but not in vehicles. It banned possession of heavy weapons, which included weapons firing ammunition larger than 7.62 mm, belt-fed machine guns, rocket-propelled grenades (RPGs), indirect fire weapons such as mortars and rockets, and explosive materials such as mines, grenades and C4.

numerous pieces of wire of varying lengths, and the remote control for a toy car. Abu Ali and his two sons were questioned, but denied knowledge of the weapons cache. They stated the AK-47s were for the protection of their home and farm. Because Abu Ali was in his 50s and in good health (in other words, he was not incapacitated or dependent on his sons), he and his sons were taken into custody by Coalition Forces' soldiers for illegal weapons possession. Several pictures were taken of the house and property, including the weapons cache. Abu Ali and his sons were posed and photographed kneeling on the ground next to the weapons cache. The three men were then searched and transported to a temporary holding facility where they would be interrogated by US Army intelligence personnel and, no doubt, eventually transported to Abu Ghraib.

Two hours later an element of the US Army's 1st Cavalry Division was on patrol in the Sadr City neighborhood of Baghdad. The poverty, unemployment and slums of Sadr City fermented insurgent activity among its young men and Coalition Forces patrols were regularly attacked. As the patrol passed a four-way intersection bordered on all sides by decrepit buildings, it began taking sniper fire from a nearby abandoned building. The patrol's two .50 caliber machine guns immediately unleashed a torrent of fire in the direction of the sniper fire. A black Daewoo Prince sedan then darted across the intersection behind the patrol and a young man fired a RPG at the patrol from the backseat. A passenger in the front seat was also observed firing an AK-47 at the patrol.

While one gun truck (a HUMVEE with a .50 caliber gun mounted on a turret sticking out of the roof) turned around to pursue the sedan, the remaining patrol dismounted their vehicles and entered the abandoned building in search of the sniper(s). Fortuitously for the patrol, an unmanned aerial vehicle (UAV) was operating overhead and its lens was immediately focused on the scene unfolding on the ground below. As the patrol fired into the abandoned building, the operator of the UAV observed two individuals run out the back of the building and into another building some 100 meters away. This information was passed to the patrol and they were led towards the hiding snipers.

Two young men, sweating and breathless, were discovered in an apartment on the second floor. The soldiers took the pulse of the young men and confirmed their hearts were racing. After searching the apartment and finding no weapons, the patrol then took the men and walked back to the abandoned building were the sniper attack originated. There the patrol found an AK-47 with an empty magazine and one sniper rifle with empty shell casings on the floor nearby. The two young men insisted they had never seen the rifles before and knew nothing of the attack on the patrol. In fact, the men insisted they hated Saddam Hussein and welcomed the liberation

brought by Coalition Forces. They were sweating, they insisted, because they had just returned home from the market. Nevertheless, they and the weapons were seized and photographed by the patrol. When the arms of the young men were swabbed by the patrol, powder residue consistent with the recent firing of a gun was revealed.

At the same time, the gun truck chased the black sedan for several blocks around corners and down alleyways ways before finally shooting the Daewoo's tires out and forcing the sedan to stop. The driver and two passengers were flex-cuffed and searched. An AK-47 was found underneath the sedan's front seat, its barrel still hot to the touch, but nothing else of interest was in the car. The patrol searched to no avail for the RPG launcher; however, it wasn't unusual for those to be discarded after use – especially if the user was out of RPGs. The AK-47, on the other hand, was a necessary self-defense weapon in a place like Sadr city, so they were rarely discarded. All five men, a suspected insurgent cell, were taken into custody by the Coalition Forces patrol. They were questioned for two days by US Army intelligence officers and then transported to Abu Ghraib.

Using the illustrative facts in these three typical stories, this essay will review the legal basis for the detentions and the due process safeguards enacted by Coalition Forces. What was the legal basis for these detentions? Who reviewed the evidence and legality of the detentions? Would the men be detained indefinitely, or could they harbor some hope of eventual release? Would any of the men be prosecuted for the acts that led to their detention? Who would carry out such prosecutions? What, if any, legitimacy would the prosecutions have with the Iraqi people?

I. INSURGENTS, TERRORISTS, CRIMINAL SUSPECTS OR SECURITY INTERNEES?

In the three scenarios discussed here, the factual overviews provided make affixing the labels "insurgent" or "terrorist" deliberately difficult. The labels are, in many respects, inherently subjective. Terrorist would seem to have the least applicability as there is no evidence that civilians were the primary targets of attack by any of the three groups of individuals detained by Coalition Forces. Insurgent may fit, but even that would require some explanation of the objectives of the individual men. Abu Ali and his two sons were detained for illegal weapons possession, but all we know is that weapons were found buried in an orchard near Abu Ali's home. While constructive possession of the weapons by Abu Ali or one of his sons may be imputed, there's no evidence that they were part of an insurgent network or intended to use the weapons themselves to attack Coalition Forces. Likewise, the three men detained in the pickup truck may have been in

cahoots, or perhaps only the driver possessed or even knew of the weapons. Private taxis are commonplace in Iraq and passengers could not be expected to know what the driver may have hidden in the vehicle. How could one definitively call any of the three men in the truck insurgents?

The five young men who carried out the coordinated attack on Coalition Forces in Sadr City seem the most likely candidates for the insurgent label, but it is just as possible they were a criminal gang paid by true insurgents to carry out the attack. Insurgents by some agency theory, perhaps, but with no political agenda of their own. If you are a poor, uneducated, unemployed young man in Sadr City (or most cities in the world) and a wealthy man offers you what is by your standards a small fortune to attack someone, do you really care why? Do you really care if your paymaster's motive is revenge, greed, or political gain?[4]

So since we know what constituted illegal weapons possession in Iraq in July 2004[5] and since we can safely assume that armed assault was also prohibited under Iraqi law, the label most accurately applicable to the men here is "criminal suspect". Each of the men detained here was suspected of committing a crime under Iraqi law. However, because "criminal suspect" conjures up visions of peacetime law enforcement, probable cause, indictments, speedy trials, judges, and possible acquittal (in other words, all sorts of uncertainties), the Coalition Forces lawyers declared only individuals detained for Iraqi-on-Iraqi crimes would be considered criminal suspects; all other detainees would be "security internees". Of course the public affairs folks and the politicians kept referring to insurgents and terrorists. Until, at least, US Secretary of Defense Donald Rumsfeld opined that use of the term insurgents conveyed some undeserved sense of legitimacy: hereinafter, he declared they would be called terrorists or "enemies of the legitimate Iraq government".[6]

[4] It was not just the poor and uneducated that were lured into the insurgency or terrorist activity. One young college-educated man with computer skills was hired by Abu Musab al-Zarqawi's terrorist group to upload its propaganda and messages to various websites for distribution to news media and other members of the group. He stated that his initial motivation was the $500 a month he was paid for his work, but even when the pay became intermittent he continued in the job as he felt like he was "living a movie" – constant intrigue, surveillance, scheming and danger.

[5] *See* note 2 above.

[6] D. Miles, "Rumsfeld: Iraq's Terrorists Not Worth of 'Insurgent' Label", American Forces Press Service, Nov. 30, 2005, available at: http://www.defenselink.mil/news/Nov2005/20051130_3488.html (accessed Dec. 2005).

II. THE LEGAL BASIS FOR DETAINING SECURITY THREATS

The legality of civilian and other battlefield detentions during an international armed conflict is well established.[7] What is less well established, perhaps even developing customary international law, is the basis for detaining civilians during periods of transition. The occupation ended when the Iraqi Interim Government assumed full sovereignty over Iraq on 28 June 2004. While this was an important political milestone on Iraq's transition to democracy, it hardly marked an end to the armed conflict in Iraq. By magnanimously returning full sovereignty to the Iraqi people, did Coalition Forces lose the right to detain those who were deemed to pose a continuing threat? Some would say yes, yet Coalition Forces believed the international nature of the armed conflict in Iraq continued after the transfer of full sovereignty.[8] If an international armed conflict continued, then the full range of applicable customary and treaty law would continue to apply as well.

To remove all doubt regarding the legality of civilian detentions during the transition period, the United States of America and the Iraqi Interim Government sought and received a United Nations Security Council mandate authorizing such detentions. On 13 June 2004, the United Nations Security Council acting under Chapter VII unanimously adopted Resolution 1546 (UNSCR 1546), which welcomed "a new phase in Iraq's transition to a democratically elected government" and looked forward "to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq".[9]

The persistent necessity for civilian internments was expressly asserted in Secretary Powell's letter to the President of the Security Council, which stated the Multinational Force Iraq (MNF-I) would:

> [C]ontinue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, *internment where this is necessary for imperative reasons of security*, and the

7 *See, e.g.*, A.E. Wall, "Civilian Detentions in Iraq", in *International Law and Armed Conflict: Exploring the Faultlines* (J. Pejic & M. Schmitt, eds., 2006).

8 *Id*.

9 UN S.C. Res. 1546 (2004); hereinafter: UNSCR 1546. The Resolution annexed two letters from US Secretary of State C. Powell and the President of the Iraqi Interim Government, Dr. Ayad Allawi.

> continued search for and securing of weapons that threaten Iraq's security.[10]

President Allawi's letter requested a Security Council mandate for MNF-I that included "the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the Security Council".[11] In Resolution 1546, the Security Council granted the requested mandate and specifically decided "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution".[12] Thus, the detention or internment of civilians, grounded in the customary law of armed conflict, received the blessings of a Security Council Chapter VII mandate.[13] The only limitation or defining parameter for the detentions was that they be "necessary for imperative reasons of security".

While Coalition Forces did not necessarily believe that the 1949 Fourth Geneva Convention (GC IV)[14] applied as a matter of law to detentions that occurred after June 28, 2004,[15] they continued to apply the principles and Protocols of GC IV to security internees detained under the UNSCR 1546 mandate. In many senses, Coalition Forces were creating new customary international law – blending the customary law of armed conflict with the principles of the 1949 Geneva Conventions and a UN Security Council mandate during a transitional period.

In response to the basis for detention articulated in Secretary Powell's letter and incorporated into the UN Security Council mandate, guidance was promulgated to Coalition Forces permitting detention only "for imperative reasons of security". Nonexclusive examples of security imperatives included: attacks on Coalition Forces, interference with the mission

10 *Ibid*., at Annex (emphasis added).

11 *Id*.

12 *Id*. Notably, the resolution provided that the mandate would "expire upon the completion of the political process set out in paragraph four above" – *i.e*., the adoption of a permanent constitution "leading to a constitutionally elected government by 31 December 2005".

13 When acting under Ch. VII, the Security Council can essentially legislate, as resolutions adopted under Ch. IV are legally binding on all member States.

14 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 [hereinafter: GC IV], *Documents on the Laws of War* 301, 356 (A. Roberts & R. Guelff eds., 3rd ed., 2000).

15 Coalition Forces believed an international armed conflict continued in Iraq, but that the UNSCR 1546 mandate (*supra* note 9) supplanted GC IV. This was evidenced in part by the use of language from occupation law (GC IV Art. 78's term "imperative threat to security") and application of that outside of an occupation.

accomplishment or movement of Coalition Forces, entering or attempting to enter a restricted area, illegal weapons possession, or committing, attempting, conspiring, threatening or soliciting another to commit/aid/abet the commission of a serious crime against Coalition Forces. Additionally, members of named terrorist organizations or insurgent groups known to carry out attacks on Coalition Forces could also be detained.

Officially, individuals could be detained for their intelligence value for only a few days; however, anecdotal evidence suggested that longer intelligence detentions were common. The argument in favor of intelligence detentions was that, for example, if an individual knew who was responsible for carrying out attacks on Coalition Forces and did not provide this information, then his withholding of that information constituted an imperative threat to the security of Coalition Forces as they would remain vulnerable to imminent attack.

This was more than a mere hypothetical for many Coalition Forces' units operating in small Iraqi villages where all the locals knew each other. Take for example Abu Ali's small farming village. Assume there were only twenty men over the age of sixteen in the village. If numerous IED attacks were carried out within a couple hundred meters of the village, then it is a pretty safe assumption that at least one of the twenty men in the village knew or had a really good idea who was responsible for the IED attacks. To a military commander who just lost five of his soldiers in one of those IED attacks, holding all twenty men until they identified the attackers would seem not only rational, but possibly even a military necessity. From a human rights perspective, such corporate accountability and the deprivation of freedom of innocent men would violate accepted "universal" norms. From a legal standpoint, the argument against such detentions was that there was not sufficient evidence that each individual man posed an imperative security threat – it was simply too difficult to reasonably establish what an individual knows. Furthermore, detaining individuals on the basis of what they were believed to know could be a slippery slope leading to mass, unwarranted detentions, which would ultimately be counter-productive to the establishment of democracy and the rule of law.

III. RESTORING THE RULE OF LAW

The first recorded system of laws, Hammurabi's Code, originated in Mesopotamia over 3,800 years ago. With this important historical backdrop, the fall of Saddam Hussein in April 2003 provided the Iraqi people with the assistance of Coalition Forces the opportunity to reestablish the rule of law in the land where it began. As the occupation took hold and administrators were appointed to assess and help rebuild the various governmental

ministries, special emphasis was placed on replacing Hussein's tyrannical and corrupt use of law and courts, with a system that truly respected the rule of law.

Hussein's use of a parallel court system eased the burden of rebuilding the Iraqi judicial system. Hussein generally used the Revolutionary Court, the Ministry of Interior Court, and military courts to carry out his dirty work. As such, the established courts in the Ministry of Justice were *relatively* unblemished by Hussein's reign of terror. Granted, corruption was rife and the use of confessions obtained by torture was commonplace, but "the worst human rights abuses were taking place elsewhere".[16]

Additionally, the Ministry of Justice was relatively free of Ba'athist taint. Following the civil law tradition, Iraqi courts and prosecutors are part of the Ministry of Justice. While high-level officials were committed Ba'athists, middle and lower level employees and many judges that remained after the fall of Hussein were not. "[A]mbitious Ba'athists or 'party hacks'" found their power in the parallel courts or other government ministries, not in the Ministry of Justice.[17] Despite these positive factors, rebuilding the rule of law faced significant challenges due to the shortage of qualified prosecutors and judges and to the simple fact that nearly seventy-five percent of the courthouses in Iraq were damaged or destroyed.

By late May and early June 2003, the rebuilding of the Iraqi justice system was in a nascent stage. As the insurgency began to accelerate, the Coalition Provisional Authority and policymakers in Washington debated in earnest the best way to ensure accountability for attacks on Coalition Forces, while simultaneously reestablishing the rule of law in Iraq. Every decision was made with an understanding that the occupation would be limited and full sovereignty over Iraq would be restored to the Iraqi people as soon as feasible; it was also understood that rebuilding the local courts and judicial system would take several months and probably years. The establishment of military courts or commissions was also considered, yet it was clear that irrespective of the legality of such courts under the law of armed conflict, Iraqis would view them as a continuation of the injustice they endured under Hussein.

The agreed-upon compromise was to create an Iraqi criminal court within the Ministry of Justice with nationwide jurisdiction. So on 18 June 2003, the Coalition Administrator, Ambassador Paul Bremer, created the Central

[16] J.C. Williamson, "Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System", 33 *Georgia J. Int'l & Comp. L.* 229, 230 (2004).

[17] *Ibid*., 231.

Criminal Court of Iraq (CCCI).[18] Following the civil law system, the CCCI consisted of two chambers: an Investigative Court and a Felony Court. The Court, along with all courts in Iraq, applied the Iraqi Penal Code of 1969 and the Code of Criminal Procedure of 1971, subject to certain amendments by CPA Orders.[19] During the occupation, Ambassador Bremer appointed the judges in consultation with the Ministry of Justice and the Judicial Council. After 28 June 2004, the Judicial Council (now the Higher Judicial Council) operated as an independent organ of the Ministry of Justice with full authority to appoint judges and oversee the administration of the courts.

While the CCCI was initially viewed with apprehension and distrust by many judges and lawyers (*i.e.*, as a tool of the occupiers), the wisdom and independence displayed by its judges during its infancy earned it ever increasing legitimacy and respect.[20] The CCCI was anything but a "kangaroo court", as it convicted only about half the defendants referred to it by Coalition Forces during its first two years of operation.[21] Iraqi jurists began to see tremendous utility in the CCCI as it was the first criminal court in Iraq with nationwide discretionary jurisdiction. While the CCCI focused primarily on offenses committed against the embryonic Iraqi Government and Coalition Forces – attacks on Coalition Forces, illegal weapons possession, destabilization efforts, and governmental corruption – it could also hear cases where the local criminal court was unable or unwilling to provide a fair trial.

IV. DUE PROCESS FOR SECURITY INTERNEES

While detaining units continually refined their processes, the initial stages of review that immediately followed a civilian's detention remained essentially unchanged from what occurred during the occupation. Detainees were first

[18] Coalition Provisional Authority Order No. 13, The Central Criminal Court of Iraq, CPA/ORD/18 June 2003/13 (2003); hereinafter: CPA Order 13.

[19] Coalition Provisional Authority Order No. 7, Penal Code, CPA/ORD/10 June 2003/7 (2003); Coalition Provisional Authority Memorandum No. 3, Criminal Procedures, CPA/ORD/16 Jan. 2004/53 (2004); available at: http://www.iraqcoalition.org. Examples of these amendments included temporary suspension of the death penalty (until after the transitional period), a prohibition on use of coerced confessions, and other due process and human rights based amendments.

[20] The CCCI's independence was epitomized in its Chief Investigative Judge, Luqman Thabit Zargawi, who served as a judge for 22 years during Hussein's rule but was fired when he refused Hussein's order to sentence a prostitute to death. A man courageous enough to defy Saddam Hussein is unlikely to become a lackey of Coalition Forces.

[21] Of the 1,301 defendants referred to the CCC by Coalition Forces by 28 Nov. 2005, 658 were convicted. *See:* http://www.mnf-iraq.com/TF134/Trials.htm (accessed Jan. 2006).

transported to a brigade internment facility where they could be held for up to 72 hours. If the brigade's Detention Review Authority determined that probable cause to detain existed, the detainee was transferred to a division internment facility (DIF). The detainee could be kept for up to fourteen days for interrogation at the DIF. During the initial 72 hours at the DIF, the DIF Detention Review Authority conducted another review to determine whether there was probable cause to detain the individual. If the DIF Detention Review Authority determined that continued detention was appropriate, written documentation of such was included with the detainee file for forwarding to the theater internment facility at Abu Ghraib. Until the detainee was forwarded to Abu Ghraib, the cognizant commander (brigade or division) could authorize a detainee's release. Once the detainee arrived at Abu Ghraib, the Commander of Task Force 134 generally became the release authority.[22]

A. The Administrative Review Process

Between June 2004 and December 2005, Task Force 134 operated theater internment facilities at Abu Ghraib, Camp Bucca in the desert of southern Iraq, Camp Cropper near the Baghdad International Airport, and Fort Suse in north-central Iraq. All detainees were in-processed through Abu Ghraib and then transferred to whichever facility security needs and military necessity dictated. The plan, announced by President Bush in his State of the Union Address in January 2005, was to expand Camp Bucca and close the infamous detention camps at Abu Ghraib. However, with the detainee population on a continuous upward trend, the scheduled closure of Abu Ghraib was continually delayed.

The detainee's first stop at Abu Ghraib was the inprocessing facility. There he was photographed and fingerprinted, his personal property was cataloged and stored (including any evidence that accompanied him to Abu Ghraib), and he underwent a medical examination.[23] Within seventy-two hours of a detainee's arrival at Abu Ghraib, a military magistrate reviewed his case to determine whether there was a reasonable basis to believe the detainee posed an imperative threat to the security of Coalition Forces. The Magistrate's Cell then notified security internees of their status, the basis for

[22] There was an exception to this release authority: only the United States Central Command could authorize the release of foreign (non-Iraqi) fighters.

[23] The provisions of Art. 97 of GC IV (*supra* note 14) were complied with, including giving detainees a receipt for any retained property.

internment, and the right to appeal under Article 78 of GC IV.[24] This notification was provided as soon as practicable; however, during periods of mass detentions (such as during the second battle for Fallujah in November 2004 when hundreds of detainees were in-processed at Abu Ghraib on nearly a daily basis over a two-to-three week period), many days could pass before the notice was delivered to the detainee.

The file was next reviewed with an eye towards possible criminal prosecution and categorized as either 1) prosecute, 2) no prosecute, or 3) more investigation. If the basis for detention was an offense also punishable under Iraqi criminal law, such as assault on Coalition Forces or illegal weapons possession, and the file contained sufficient evidence to ensure the Iraqi equivalent of an indictment (two sworn statements from eyewitness to the crime was the absolute minimum and photos or physical evidence in the case of weapons possession), then the file was summarized in a prosecution memorandum and forwarded to the CCCI for prosecution.

If the basis for detention was not punishable under Iraqi criminal law (e.g., membership in a terrorist organization known to engage in attacks on Coalition Forces) or the basis for detention was classified intelligence that could not be turned over to the CCCI, the file would be classified as "no prosecute" and sent to the Combined Review and Release Board. If the file simply lacked sufficient evidence to prosecute, then it would generally fall into the "more investigate" category. The unit was then contacted and additional evidence requested. Because of the security situation and the near impossibility of traveling from Abu Ghraib to the units in the field or to the scene of the crime, investigations were in practice nearly exclusively by telephone and e-mail. By December 2004, about 25% of all detainee cases were referred for prosecution.

Task Force 134 created the Combined Review and Release Board (CRRB) in the summer of 2004.[25] Its membership consisted of nine board members: three MNF-I officers (military police, military intelligence, and a judge advocate) and six representatives from the Iraqi Government (two representatives each from the ministries of Human Rights, Interior and Justice). The CRRB was responsible for reviewing each detainee file at least

[24] Yes, even after the end of the occupation, the notice of right to appeal continued to reference Art. 78 rather than Art. 43 of GC IV (*supra* note 14).

[25] The CRRB replaced a review and release board utilized during the occupation. A second CRRB was created in May 2005 in order to keep pace with the increasing review workload.

every six months consistent with Article 43 of GC IV.[26] If a case was referred for prosecution but no action was taken to indict the detainee within six months, then the CRRB reviewed the file and made a determination on continued internment to ensure compliance with the principles of GC IV.

Once a detainee's case was docketed with the CRRB, the detaining unit was notified and provided an opportunity to provide supplementary evidence or argument justifying continued detention. The CRRB met regularly, initially two to three and then up to seven times a week, and reviewed well over 100 cases a day. A military attorney from the Task Force 134 legal office verbally summarized each file, an interpreter orally translated this summary into Arabic, and the board members were then provided a brief opportunity to ask questions and debate the merits of detention. The CRRB could recommend 1) continued detention, 2) release with a guarantor,[27] or 3) unconditional release. All recommendations were by majority vote. Between August 2004 and November 2005, the CRRB voted to release 12,052 detainees and continue internment for 9,903.[28]

It should be noted that CRRB recommendations to release did not necessarily mean there was no original basis for detention, but rather the individual was deemed to no longer pose a security threat to Coalition Forces. The seriousness of the underlying offense could also influence recommendations for release. For example, if the individual was detained on a minor weapons violation (one or two grenades, or perhaps an old machine gun), then the CRRB would typically recommend release. By the time the case reached the CRRB, three or four months could have passed from the initial detention. Since a minor weapons violation, without additional evidence of malfeasance, was likely to incur a sentence of no more than six months in the CCCI, the CRRB would recommend release with a guarantor on essentially a "time served" theory. By the time a guarantor was found and the detainee released, six months would likely have passed from the initial detention.

The results of the CRRB hearing were provided to the detaining units, which then had seven days to submit comment – *i.e.*, concur or non-concur.

[26] Regardless of whether GC IV (*supra* note 14) applied as a matter of law, Coalition Forces applied the spirit and review protocols as a matter of policy to detentions conducted under the authority of UNSCR 1546 (*supra* note 9).

[27] Release with a guarantor essentially involved a tribal leader or other community leader vouching for the detainee and "guaranteeing" the detainee would not engage in anti-Coalition Forces activity.

[28] Of those recommended for release, 4,426 were recommended for unconditional release and 7,626 were recommended for release with guarantor.
See: http://www.mnf-iraq.com/TF134/Release.htm (accessed Jan. 2006).

If the detaining unit (or a superior in its chain-of-command) did not concur with a CRRB recommendation for release, that fact and any supporting basis was documented in the detainee's file and it was returned to the CRRB for further consideration. Recommendations for unconditional release or release with guarantor were forwarded to the Commander of Task Force 134 for approval. While the Commander retained final release authority, CRRB recommendations to release were followed over 99% of the time.

B. Prosecution by the CCCI

The CCCI was located in a museum built by Saddam Hussein to house antiquities and other gifts to him from foreign dignitaries. Like most of Hussein's monuments to himself, it was an impressive building – round with a spiral rising over fifty feet into the sky. One reason it was chosen to house the CCCI was because it lay just outside the "Green Zone" in downtown Baghdad. In other words, it was close enough to the relative security of the Green Zone that military lawyers and witnesses could dart to court with minimal security threat, but being outside the Green Zone also signaled it was an Iraqi court and not the Coalition's court.

In accordance with the practice of civil law traditions, cases were referred to the Chief Investigative Judge who then, if he accepted the case for investigation, assigned it to one of the Investigative Judges. Coalition Forces' military lawyers arranged for the appearance of necessary witnesses and presentation of evidence during the hearing in front of an Investigative Judge. The judge sat behind his desk with a law clerk to his right who transcribed the proceedings. The defendant sat against a wall in the back of the room facing the judge, while the defense attorney, interpreter, military attorney, and witness sat in chairs in front of the judge's desk. As is typical of inquisitorial processes (vice the adversarial judicial process found in Great Britain and the United States), the Investigative Judge controlled the questioning of witnesses. The CCCI was equipped with video teleconferencing capability, so military witnesses who were deployed back to the United States were allowed to testify remotely. Confidential informants and other witnesses who feared revealing their identities to the defendant were also allowed to testify remotely or in disguise.

If the Investigative Judge determined there was sufficient evidence, the case was referred to the trial court, or Felony Court. While investigative hearings were held in the relative intimacy of a judge's chambers, trials were held in a cavernous courtroom with three trial judges sitting elevated while the defendant stood in the dock. Trials rarely included direct testimony from witnesses as the trial judges relied on the investigative file and witness summaries provided by the Investigative Judge. The Trial Judges regularly

engaged in lively questioning and exchange with the defendant before finally conferring and rendering their verdict. The typical trial lasted no more than fifteen minutes.

If acquitted, the detainee was released from detention. The standard for detaining someone under UNSCR 1546 and GC IV was simply a reasonable belief that the person posed a threat to the security of Coalition Forces. Since the standard for conviction in an Iraqi court was higher, the argument was made that acquittal in the CCCI did not mean there was no longer a legal basis for detaining the individual. Nevertheless, the Task Force 134 Legal Advisor believed the rule of law and the importance of signaling that judgments of the CCCI meant something outweighed this technical legal argument. After September 2004, all detainees acquitted by the CCCI were released from detention. If convicted, the individual was released from the custody of Coalition Forces and sent to an Iraqi prison to serve the imposed sentence. Imposed sentences ranged from a few months for a minor illegal weapons possession charge, to natural life for the murder of Coalition Forces or innocent Iraqi civilians.

V. WHAT WOULD HAPPEN TO ABU ALI AND HIS FELLOW DETAINEES?

After reviewing the applicable law and procedures implemented by Coalition Forces and the Iraqi Government to ensure due process, we return to the fact-based scenarios provided in the introduction to this essay and the questions for which answers were promised. What was the legal basis for these detentions? Who reviewed the evidence and legality of the detentions? Would the men be detained indefinitely, or could they harbor some hope of eventual release? Would any of the men be prosecuted for the acts that led to their detention? Who would carry out such prosecutions? What, if any, legitimacy would the prosecutions have with the Iraqi people?

Of these six questions, the first and last two were answered during the course of this essay. While Coalition Forces believed the law of armed conflict provided grounds for the detentions, they relied primarily upon the UN Security Council mandate of Resolution 1546. Coalition Forces only detained individuals believed to pose an imperative threat to the security of Coalition Forces, including the Iraqi Government, and a review and release process modeled on the requirements of GC IV was implemented to ensure compliance with international law. While some illegal weapons possession charges were prosecuted in local Iraqi criminal courts, detainees transferred to Abu Ghraib and the other Coalition Forces theater internment facilities had their cases referred to the CCCI for prosecution. After overcoming initial skepticism, the CCCI gained increasing legitimacy with Iraqi judges,

attorneys and the general populace. To answer the middle two questions, we will review the specific facts provided and assess typical outcomes.

A. Weapons Discovered in a Vehicle

Typically, the two passengers would insist they simply caught a ride in a taxi and had no knowledge of the hidden weapons. The driver would likewise insist he had never seen the weapons before, opining that the two unknown passengers he was giving a ride to undoubtedly hid the AK-47 under his seat. If the driver acknowledged the presence of the RPGs and launcher, he would insist he found them buried on his land (surely hidden by remnants of the former regime) and was only trying to turn them in to Coalition Forces. The Marines would take photographs of the three men kneeling on the side of the road next to the pickup truck with the weapons spread out on the ground in front of them. Two Marines would then handwrite sworn statements recounting their belief that the pickup truck was attempting to evade the checkpoint and that weapons were found hidden in the truck.

The detainees would then be transported to a temporary holding facility where Marine interrogators would again question them regarding the weapons and any knowledge of insurgent or terrorist activity. If Marine intelligence personnel believed the innocence of the two passengers, they would be released. If any of the three detainees offered helpful information regarding anti-Coalition Forces activity in the area, they would continue to be held at the local or tactical level. Just as happens with law enforcement officers throughout the world, if the detainees led the Marines to other weapons caches or higher-level insurgents or terrorists, it was possible they could be released. Otherwise, assuming the two passengers were evasive and exhibited signs they were lying regarding their knowledge of the weapons, all three detainees would be transported to Abu Ghraib.

At Abu Ghraib, the magistrate would undoubtedly find reasonable basis existed to detain the men. If the Marines sent photos showing the detainees with the weapons along with the two sworn statements and possibly the AK-47, the case would be referred to the CCCI for prosecution.[29] If the detainee's file only included one statement or no photos, the unit would be asked to provide the additional documentation. If the unit failed to provide the additional documentation (*i.e.*, there was only one sworn statement from

[29] Small arms and other evidence were regularly transported to Abu Ghraib along with the detainees, where they were cataloged and stored in an evidence room. Explosives and heavier weapons were either destroyed by the detaining unit or turned over to local Iraqi police.

an eyewitness) then the file would be sent to the CRRB for an inevitable decision to detain all three.

At the CCCI, military lawyers would present the Investigative Judge with the available evidence. While the CCCI did not initially require photographs or actual physical evidence (the minimal evidentiary standard was testimony, sworn statements or live, from two eyewitnesses), once military lawyers began providing photographs, their provision soon became a *de facto* requirement. In the absence of such evidence, it was simply too easy for a defendant to deny he was there or claim some mistake or attempt to frame him.

The Investigative Judge then forwarded the case to the Felony Court, where the detainees/defendants appeared in front of the three trial judges. The judges would question the defendants in an attempt to ascertain who possessed the weapons. While the defendants had the right to remain silent, few Iraqis ever invoked that right – the temptation to argue their case was simply too great. After conferring for a few moments, the judges would render their verdict. The driver would be found guilty – it was implausible that he had no knowledge of weapons in a hidden compartment in his truck – and sentenced to a prison term of between two to five years. Had the same weapons been found in his home, the sentence would be lower. Transporting the weapons in a vehicle was definitely an aggravating factor. The fate of the two passengers would hinge on their credibility with the judges. Iraqi judges are very perceptive: while they relied on evidence for findings of guilt, they seemed to be equally guided by their instincts.

B. Weapons Discovered in an Orchard

Abu Ali and his two sons would no doubt find themselves in front of an Iraqi judge at the CCCI. All three would be charged with illegal weapons possession and possibly acts against the security of Iraq. This last charge would require some evidence of involvement in the IED attacks. That evidence could be in the form of an admission (preferably in front of the Investigative Judge, but confessions during interrogation might suffice if handwritten and sworn to), testimony by one of the other two, or perhaps eyewitness testimony from another villager. The detaining unit typically swabbed the hands and arms of detainees suspected of involvement in IED attacks for traces of explosives residue, but such evidence was not sufficient in itself to lead to a conviction for carrying out attacks on Coalition Forces. Many anti-bacterial hand cleansers contain glycerin, which can cause false positives on explosives residue tests.

Several factors would influence the judges' findings. If one of the three admitted the weapons were his (or took the fall, so to speak), the other two

would likely be found not guilty. If Abu Ali testified that he believed his sons were involved in anti-Coalition Forces activity, then he would likely be found not guilty and they would be convicted – of illegal weapons possession and possibly acts against the security of Iraq. It took a lot for a father to testify against a son, but this occasionally happened when the father believed the family's name had been tainted by the son's actions. While always possible, the acquittal of all in this case would be unlikely because of the visible path leading from their home to the orchard, the temporary nature of the weapons burial (under palm leaves), and the fact that some of the weapons were wrapped in plastic and packed in grease (evidencing recent burial and intent to preserve the quick operability of the weapons). The former regime was known to have buried an untold number of weapons throughout Iraq, but the distinguishing factors present here were rare. Constructive possession was sufficient to uphold the charge of illegal weapons possession.

If convicted under the facts here, the sentence for illegal weapons possession could range from one to five years. Aggravating factors would be the presence of the wires and remote control along with the mortar shells. These were tools typically used to construct IEDs – especially the roadside bomb variety. Even if there was not sufficient evidence to convict one of the men on the charge of armed assault or acts against the security of Iraq, the judge could use the evidence of involvement in or at least knowledge of the construction of IEDs as an aggravating factor on the illegal weapons possession charge.

C. The Coordinated Attack on Coalition Forces

The three detainees who were pursued and captured in the Daewoo sedan after firing an RPG and small arms fire at the Coalition Forces patrol would be charged by the CCCI with illegal weapons possession, armed assault, and acts against the security of Iraq. Testimony from the Coalition Forces' soldiers would be key to obtaining a conviction; especially since the RPG launcher was not found.

Prosecution of the other two detainees, the snipers who fled to a nearby building, would be considerably more challenging. If this were an insurgent or terrorist cell, it would be unlikely that any of the detainees would provide substantive information or testimony to interrogators. Less likely still is that they would provide the sort of sworn statement that carried much probative value in court.

The challenge for the Coalition Forces' military lawyers would be to show that the two young men captured were the two snipers who instigated the attack. While it was public knowledge that Coalition Forces operated

UAVs in Iraq, the specifics of when and where they operated as well as any resulting video footage generally remained classified. In other words, the military lawyers working in the Coalition Forces' CCCI liaison office could view the UAV video footage and see the snipers run from the attack location into the building where they were found hiding, but this video footage would be classified and unavailable for release to the CCCI judges.

Coalition Forces obviously did not want insurgents and terrorists to know what the capabilities of the UAVs were, and releasing the footage to the CCCI meant that the defendant and his lawyer would be entitled to view the tape. A possible work-around was having the operator of the UAV provide a sworn statement attesting to the fact that he had "continuous eyes" on the snipers as they fled the scene of attack into the nearby building (leaving out any mention of the UAV). Of course, additional testimony or the judge's knowledge of the area where the attack occurred would inevitably cause questions to be raised about how that could be possible.

This would be one of those cases where the CCCI judges would likely apply what American military lawyers termed the "weight of the evidence" rule: the stronger the evidence, the longer the sentence imposed. Assuming the patrol properly detailed their observations (the weapons with hot barrels and spent shell casings nearby, the breathless suspected snipers with fast heartbeats, etc.), the judges may allow the circumstantial evidence to connect the two snipers to the scene of the attack. But the sentences imposed would not be as long as they would have been if direct evidence were presented to the court – *i.e.*, the UAV footage. Iraqi judges tended to be very skeptical of circumstantial evidence, or at least what they viewed as undue reliance upon it.

If there were no circumstantial evidence identifying the snipers (no evidence of breathlessness or racing heartbeats due to a time lapse between attack and capture), then the cases against the two snipers would likely be referred to the CRRB rather than the CCCI. Acquittal by the CCCI meant release, while the CRRB could vote to detain based on circumstantial or classified evidence.

VI. CONCLUDING THOUGHTS

It is a fool's errand to pass judgment on a process yet in its infancy. Any attempt to judge the success of the efforts to restore the rule of law in Iraq is quite premature. Thus, it is with considerable trepidation that this essay closes with two thoughts: one regarding whether the rule of law can be imposed or must it come from the people, and another on a new role thrust on soldiers in twenty-first century conflicts.

A. The CCCI's Top-Down Approach to Establishing the Rule of Law

From the outset of the conflict in Iraq, Coalition Forces' leaders understood that the detention of civilians would be for a limited time. They also believed that holding individuals accountable for attacks on Coalition Forces was an essential element in restoring the rule of law in Iraq. There would be no victor's justice: Iraqis would hold Iraqis accountable. The question, then, was whether Coalition Forces should work to ensure that crimes against Coalition Forces were prosecuted in established local criminal courts or in a centralized court like the CCCI. This question was one that leaders at the highest levels of the US Government struggled with. It is apparent that the reason for opting for the CCCI approach was because of the increased control Coalition Forces would have over the process. Even then, some opined that the problem with relying on Iraqis to prosecute these crimes was that the process seemed to be moving so slowly.

By December 2003, only five cases had been referred to the CCCI.[30] These cases involved illegal weapons possession, attempted emplacement of improvised explosive devices, and rocket-propelled grenade attacks. In other words, the CCCI was quickly becoming, in perception and developing practice, little more than an illegal weapons court. Investigative Judges were still investigating all five cases and none had yet been referred to the Felony Court. The US Army's Criminal Investigative Division and military lawyers at Coalition Forces' headquarters were investigating additional cases with a view towards referring them for prosecution, yet the perception of stagnancy and ineffectiveness was widespread.

In a memorandum to Deputy Secretary of Defense Wolfowitz dated 12 December 2003 (responding to an inquiry), Ambassador Bremer acknowledged the challenges inherent in referring cases involving attacks on Coalition Forces to the CCCI for prosecution. He wrote:

> Both procedural factors and resource limitations contribute to the time needed to bring these cases to trial. The primary procedural delay is caused by the requirement to fully exploit security internees for intelligence purposes before their status can be converted to criminal detainee. While conversion from security internee to criminal detainee would allow prosecution by the CCCI, it must be limited so as not to undermine intelligence gathering efforts by prematurely allowing access

[30] Under CPA Order 13 (*supra* note 18), the Administrator, Ambassador Bremer, retained the authority to refer cases to the CCCI. After 28 June 2004, the CCCI's Chief Investigative Judge decided which cases it would accept, although cases referred by Coalition Forces retained priority.

> to detainees by defense attorneys and triggering the requirement for rights warning by interrogators.[31]

After recounting some of the operational challenges to referring cases for prosecution, Ambassador Bremer requested thirty military criminal investigators, sixty military security personnel and additional military lawyers and federal prosecutors. Three months later, Secretary Wolfowitz sent a memorandum to the military departments endorsing Ambassador Bremer's request for assistance in prosecuting cases "involving crimes against coalition members".[32] The order, as refined by US Joint Forces Command "in coordination with the CPA", was for the US military services to provide twenty investigative personnel to conduct criminal investigations and ten military lawyers to coordinate investigations and prepare cases for the CCCI.

The first military lawyers, paralegals and investigators began flowing into Iraq in response to Secretary Wolfowitz's direction in March and April of 2004. The Staff Judge Advocate (the senior military lawyer in Iraq) for Combined Joint Task Force 7 (MNF-I's predecessor and the Coalition Forces headquarters) was responsible for integrating these personnel in such a way as to maximize their mission to support CCCI prosecutions of insurgents. Towards this end, Joint Service Law Enforcement Teams (JSLETs) were created.

It's not clear where the top-down concept for the JSLETs originated, but it seemed to be based on the presumption that the military lawyers already assigned to operational units in Iraq (there were well over 60 military lawyers in Iraq at this time) had insufficient time and resources to investigate cases involving attacks on Coalition Forces and refer those cases to the CCCI for prosecution. As the requested military personnel began arriving in Iraq from various places throughout the world, JSLETs consisting of one lawyer and one paralegal were assigned to each of the Major Support Commands (MSCs) throughout Iraq.[33] A few lawyers and paralegals were also assigned to a CCCI liaison office in downtown Baghdad.

As could be expected of a concept dictated from the top down, reception of the JSLETs at the operational and tactical level was varied. Facing numerous coordination and logistical challenges, and a deteriorating security environment, the JSLETs were hampered in carrying out their mission as apparently envisioned by the creators of the JSLETs concept – *i.e.*, teams of

[31] Memorandum on file with the author.

[32] The Memorandum, dated 10 March 2004, is on file with the author.

[33] CJTF-7 and later MNF-I divided Iraq into four zones: North, Central (Baghdad), South Central, and South East. A MSC was responsible for each zone.

lawyers, investigators and paralegals in the field who could respond to the scene of incidents and conduct investigations with the benefit of established working relationships with the operators. This resulted in inefficiencies and the co-opting of JSLETs by the senior military lawyers for the units the JSLETs were assigned to. For example, one JSLET produced just ten cases for prosecution over a five-month period of time, despite hundreds of attacks and even more detentions within their MSC's area of operations during that time period.

Thus, the grass-roots effort to prosecute insurgents and terrorists in Iraq faced two significant obstacles: local Iraqi judges wanted nothing to do with the cases (in some cases unwilling, in others unable), and military commanders at the lowest levels had little desire to contribute limited resources to a prosecutorial effort they saw as either futile or unnecessary (why bother with prosecutions when you can detain indefinitely under UNSCR 1546?). Everyone agreed the best-case scenario was for Iraqis to prosecute these crimes in their established local courts. However, local investigative judges were more than a little reticent to assume cases involving Coalition Forces. This was due primarily to security concerns, but also because Coalition Forces did not have strong relationships with most local courts. The end result is that Coalition Forces were forced to take greater control over the process than they seem to have wanted. Grass-roots justice was replaced with centralized justice.

One wonders whether this quick-fix solution will advance the long-term strategic goal: a peaceful, functioning democracy in Iraq that respects the rule of law. The key, it seems, is the degree to which Iraqis control the CCCI process – from acceptance of cases, through investigation, trial and sentencing. In 2004 the CCCI rarely initiated its own investigations (relying almost exclusively on referrals from Coalition Forces), military lawyers did all the case preparation and presentation of evidence, and the conviction rate was around 90%. By early 2006, the CCCI was taking more control over case selection and investigation and the conviction rate was down to around 50%. For the military commander who sent his troops into danger to capture an individual now freed by a CCCI acquittal, that may not be an encouraging trend; but for those who want to see the rule of law reestablished in the land it was first recorded, this could be a sign of progress.

B. Every Soldier an Evidence Technician

The United States Marine Corps has a mantra: every Marine a rifleman. This reflects the requirement that every Marine, whether cook, mechanic, artilleryman, or infantryman, evidence proficiency with his rifle. For Coalition Forces, the mantra soon became "every soldier or Marine an

evidence technician". By the summer of 2004, over 10,000 Iraqis were being detained by Coalition Forces, yet fewer than a few hundred of their cases had been referred to the CCCI for prosecution. One reason was that the detention packets provided by the detaining units, which were supposed to contain at a minimum an apprehension form and two sworn statements, simply didn't provide enough evidence to meet even the minimal standards required for CCCI prosecution.

After reviewing thousands of these old cases along with the hundreds of new ones that arrived at Abu Ghraib each week, military lawyers began to realize that the evidence was generally not lacking due to nonexistence, but rather because the detaining soldier or Marine simply didn't know how to properly document the evidence in a manner accessible to and admissible in a court of law. For example, even though nearly every soldier and Marine carried a digital camera with him at all times, photographs were rarely included in the detainee packets. Alternatively, photographs would be taken of weapons, a vehicle and a detainee, but not together in one picture. Or a photograph would be taken of a weapons cache, but not of the surrounding area to show where it was located in relation to the detainee's home. Or the sworn statement would include conclusory statements ("he's a terrorist") with no factual basis for the given conclusion.

As the CCCI prosecution pace accelerated in late 2004 and early 2005, considerable training was provided to Coalition Forces at the lowest levels on how to collect, document and preserve evidence for criminal prosecution. When informed that conviction in the CCCI guaranteed detainees would not return to the streets for the duration of the imposed sentence, any reticence to assisting the prosecution effort quickly dissipated. This training was also incorporated into the pre-deployment training programs for units enroute to Iraq.

Of course, saying soldiers and Marines were forced to become evidence technicians is a bit of a misnomer: the crime scene after a roadside IED attack near Mosul or a firefight in Sadr City is unlikely to be as thoroughly examined as it would be had the attack occurred in New York City. Yet the shifting mindset within the US military is remarkable. As the situation on the ground in Iraq slowly evolved from a wartime legal paradigm to a peacetime one, the US military began to recognize that enhanced evidence collection and documentation served both the military objective of removing terrorists and insurgents from the streets of Iraq, while simultaneously evidencing a commitment to accountability, due process, and the rule of law.

THE AMBIT OF THE LAW OF NEUTRALITY AND SPACE SECURITY

By Michel Bourbonnière[*]

INTRODUCTION

Superiority within both the air and space medium are presently considered within American military doctrine to be the crucial first step in the success of any military operation.[1] Space superiority is defined as "the degree of dominance in space of one force over another that permits the conduct of operations by the former and its related land, sea, air, space and special operations forces at a given time and place without prohibitive interference by the opposing forces".[2] United States Air Force (USAF) doctrine adds to this definition by including "the degree of control necessary to employ, maneuver, and engage space forces while denying the same capability to an adversary".[3] The result of space superiority is space control, which in turn is defined by the Department of Defense as "the combat, combat support, and combat service support operations to ensure freedom of action in space for the United States and its allies, and when directed, deny any adversary

* Legal Counsel, Department of Justice, PWGSC, Canada; Prof. of Law, at Royal Military College of Canada, Kingston, Ontario, and at the International Institute of Humanitarian Law, San Remo, Italy; Fellow of the Centre for Hemispheric Defense Studies, National Defense University, Washington, D.C.
The views, opinions and conclusions expressed in this article are those of the author alone and should not be construed as those of Canada, other individuals, or institutions.

1 *Counter-space Operations, Air Force Doctrine Doc.* 2-2.1, 2 Aug. 2004, at 1. The following citation highlights the importance of this USAF doctrinal document: "This publication codifies United States Air Force beliefs and practices on the use of counter-space operations in planning and executing military operations" (hereinafter: *AFDD* 2-2.1). USAF Gen. L.W. Lord recently illustrated the remarkable efficiency in military operations attributable to space assets by comparing a Nov. 18, 1944 raid by the Fifteenth Air Force against oil refineries in Austria and airfields in Italy. The mission required "680 bombers, with 186 P-51 Mustangs for escort … Although thousands of airmen were put in harm's way, on the ground, most of those bombs didn't find their intended targets. Today a B-2 stealth bomber powered by space assets can accomplish these sort of missions with pinpoint accuracy". *See* A.J. Herbert, "High Anxiety", 89(1) *Air Force Mag.* 1 (Jan. 2006). Available at: http://www.afa.org/magazine/jan2006/0106anxiety.html

2 *Ibid*., 55.

3 *Id.*

freedom of action in space".[4] This space control "mission" is achieved through the use of counter-space operations.[5] It is important to note that even though counter-space operations target space assets and capabilities, such operations are not limited to occurring within the space environment and may be conducted anywhere within a multidimensional battle-space.[6] In fact counter-space operations are defined as being "those offensive and defensive operations conducted by air, land, sea, space, special operations and information forces with the objective of gaining and maintaining control of activities conducted in or through the space environment".[7] Offensive counter-space measures aim to preclude an opposing belligerent force from exploiting space to its advantage. The means and methods through which offensive counter-space measures work[8] include both "hard kill" and "soft

4 U.S. Department of Defense, Joint Chiefs of Staff, Joint Doctrine for Space Operations, *Joint Publication* 3-14 Aug. 9, 2002, at GL-6, available at: www.dtic.mil/doctrine/jpoperationsseriespubs.html (hereinafter: *J.P.* 3-14).
As an illustration of the importance of space assets to combat support, "during the US Army's dash towards Baghdad in March 2003 lead elements of the 3rd Infantry Division ran into a sudden and serious problem. Soldiers lost contact with the overhead Milstar communications satellite network, which wiped out their secure link to trailing support elements. No longer able to send targeting data to their fire support units, the 3rd ID was momentarily stalled and isolated". After verification it was determined that the Milstar spot beam user antenna had simply been inadvertently snatched by another unit, and the spot was moved back. According to Col. J.C. Hutto Jr.: "the Victorious outcome of this engagement, along with numerous other battles in Operation Iraqi Freedom (OIF) would not have been certain without dominant US military space power". A.J. Herbert, "Towards Supremacy in Space", 88(1) *Air Force Mag.* 1 (Jan. 2005), available at: http://www.afa.org/magazine/jan2005/0105space.html

5 For an interesting analysis concerning Rules of Engagement applicable to space military operations *see* R.L. Simerall, "A Space Strategy Imperative: Linking Policy, Force, and Rules of Engagement", 39 *Naval L. Rev.*, 117 (1990). For a detailed analysis on the physics of counterspace operations *see* D. Wright, L. Grego & L. Gronlund, *The Physics of Space Security, A Reference Manual*, published by the American Academy of Arts and Sciences (AAAS), available at: http://www.amacad.org/publications/rulesSpace.aspx (hereinafter: *Physics of Space Security*).

6 According to Maj. Gen. (sel.) D.J. Darnell, commander of AFSPC's Space Warfare Center "a Hellfire missile, fired from a Predator UAV, which destroyed an Iraqi satellite antenna in Baghdad was the first offensive counter-space mission of OIF". *See* Herbert, *supra* note 4.

7 *AFDD* 2-2.1 *supra* note 1, at 51.

8 "U.S. Air Force counterspace operations are the ways and means by which the Air Force achieves and maintains space superiority. Space superiority provides freedom to attack as well as freedom from attack"; *id.*

kill" means and methods.[9] Hard kill weapons are those which are designed to physically destroy, either completely, or partially the targeted space assets, thus rendering them useless. Soft kill weapons can be equally effective in precluding the use of a space asset but may simply disable the space asset or alter its function without serious physical impact upon the space asset. Examples of hard kill technology that can operate within the space environment are Directed Energy Weapons (DEW[10]) or Kinetic Energy Weapons (KEW[11]). Examples of soft kill means and methods that can also operate within the space environment include KEW weapons that impair without physically destroying the satellite or that simply change the satellite's orbit, Electro Magnetic Pulse weapons (EMP) that degrade the electronic circuitry of a satellite, lasers which temporarily interfere with a satellite sensor (dazzling), high-powered microwave attacks (HPM) and Electronic Warfare Weapons. It is important to note that satellites are not the only targets of offensive counter-space operations, which may target all aspects of a space asset's architecture such as communication links,[12]

[9] *AFDD* 2-2.1 (*supra* note 1) lists five such means, namely: 1) Deception employs manipulation, distortion or falsification of information to induce adversaries to react in a manner contrary to their interest; 2) Disruption is the temporary impairment of some or all of a space system's capability to produce effects, usually without physical damage; 3) Denial is the temporary elimination of some or all of a space system's capability to produce effects, usually without physical damage; 4) Degradation is the permanent impairment of some or all of a space system's capability to produce results, usually with physical damage; 5) Destruction is the permanent elimination of all of a space system's capabilities to produce effects, usually with physical damage. *Ibid*., 31.

[10] *See* B. Preston *et. al., Space Weapons Earth Wars Project Air Force* (2002); *see also* Maj. Gen. (Ret.) D.L. Lamberson *et. al.,* "Whither High-Energy Lasers?", *Air & Space Power J.* (Spring 2004), available at:
www.airpower.maxwell.af.mil/airchronicles/apj04/;
M. Mowthorpe, "The Revolution in Military Affairs and Directed Energy Weapons", *Air & Space Power Chronicles* 8 (Mar. 2002), available at:
www.airpower.maxwell.af.mil/airchronicles/cc/mowthorpe02.html
For a review of the effects of such weapons *see* P.E. Nielsen, "Effects of Directed Energy Weapons", available at: http://www.ndu.edu/ctnsp/Nielsen-EDEW.pdf .

[11] For a description of the technology *see*:
http://www.rand.org/pubs/monograph_reports/MR1209/MR1209.appb.pdf;
see also: http://www.fas.org/man/dod-101/army/docs/astmp98/dd3a.htm

[12] In Sept. 2004 the USAF "fielded its first dedicated OCS capability, the Counter Communications System. Counter Com uses a ground-based antenna to temporarily jam enemy satellite communications. It is a mobile, 'no kidding' tool that will be deployed … if needed to assist theatre commanders". *See* Herbert *supra* note 4, at 5. The U.S. Air Force Space Command recently activated its first counterspace technology unit, dubbed the 76th Space Control Squadron. The control squadron will explore space control technologies for futuristic defensive and offensive counterspace weapon systems. Its purpose is to achieve rapid space superiority, as the freedom to operate in space is seen as

including up-links and down-links, ground stations, launch facilities, Command, Control, Communication, computer, Intelligence, Surveillance and Reconnaissance (C4ISR) Systems and even third party providers.[13] Defensive counter-space operations include Camouflage, Concealment and Deception (CC&D), system hardening or shielding, dispersal of space systems, maneuvering and redundancy.[14] From an operational perspective space control comprises four mission areas. These are: surveillance of space, negation, prevention and protection.[15]

I. THE LEGAL MATRIX GOVERNING THE RECOURSE TO THE USE OF FORCE

International law governs the use of force by States. The use of force in space is not an exception to this rule. In fact the primary international treaty governing the activities of States in outer space clearly refers to the international collective security structure. Article III of the 1967 Outer Space Treaty (OST) states:

> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.[16]

The normative deference within OST Article III to international law, the 1945 UN Charter[17] and to international peace and security textually launches the law governing both the recourse to force and the law governing the

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a "vital American interest", according to Brig. G.R. Dylewski, Air Force Space Command's Director of Operations (*United Press Int'l*, Jan. 25, 2006). For a description of the physics of hard kill and soft kill means and methods *see Physics of Space Security*, *supra* note 5, at 117-39.

13 *AFDD* 2-2.1 *supra* note 1, at 33-34.

14 *Ibid*., at 25-26. *See also* P.J. Baines, "Prospects for Non-Offensive Defense in Space", in *New Challenges in Missile Proliferation, Missile Defense and Space Security* 31 (J.C. Moltz ed., Center for Nonproliferation Studies, Occasional Paper No. 12, July 2003). Available at: www.cns.miis.edu.

15 M. Perdomo, "United States National Space Security Policy and the Strategic Issues for DOD Space Control", *US Army War College* 3 (18 Mar. 2005), available at: http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil8.pdf.

16 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967, 610 *U.N.T.S.* 205 (hereinafter: OST).

17 *Can. T.S.* 1945, No. 7.

means and methods of the use of force by States into outer space. National security law is thus conventionally present in space.

The applicability of national security law in space may at first appear as somewhat of a normative contradiction within the international legal matrix. The apparent normative contradiction results from the fact that Article II of the OST clearly states: "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means". Furthermore the UN Charter's collective security paradigm is based on a concept of protecting territorial sovereignty from armies marching through borders and physically occupying territory. This contradiction is, however, more one of appearance than substance. It has been cogently argued that the concept of "territorial integrity" within Article 2(4) of the UN Charter may refer not only to the land mass of a State, but also to its human and natural resources in space".[18]

Consequently the interference with a space asset may legitimately be construed by States as a threat to its national security and justify a proportional response in the use of force in self-defence. Thus, although States may not expand their territorial boundaries into space, States may nonetheless have national security concerns within the space *milieu*. Perhaps the two most important rights that States presently possess in relation to the space medium and which have a direct implication upon concerns of national security are the rights of States concerning access to space and the freedom of navigation in space.[19]

II. LAW GOVERNING THE USE OF FORCE

The use of force by States is judged twice. Firstly, the decision concerning the recourse to force is legally constrained by customary international law,

[18] *See* R.L. Bridge, "International Law and Military Activities in Outer Space", 13 *Akron L. Rev.* 649, 660 (1979).

[19] It is interesting to note that the International Telecommunication Union (ITU) Constitution makes reference to State sovereignty over radio frequency stating: "While fully recognizing the sovereign right of each State to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of all States, the States Parties to this Constitution, as the basic instrument of the International Telecommunication Union, and to the Convention of the International Telecommunication Union … which complements it, with the object of facilitating peaceful relations, international cooperation among peoples and economic and social development by means of efficient telecommunication services, have agreed as follows …". Furthermore, Art. 48 states that Member States retain their entire freedom with regard to military radio installations; available at: http://www.itu.int/aboutitu/basic-texts/constitution/annexes/preamble.html

the UN Charter and the collective security system of the United Nations. This body of law is referred to as *jus ad bellum.* It is comprised mainly of the right to individual and collective self-defence as established in Article 51 of the UN Charter and in customary international law. The United Nations Security Council also has a crucial role to play in determining the legality of the use of force, as its primary function concerns the maintenance of international peace and security.[20]

Secondly, the use of force requires legitimate use of the means and methods as established within a body of law commonly referred to as *jus in bello.* This body of law is composed of customary international law as well as various instruments and is also generally referred to as International Humanitarian Law (IHL), or Law of Armed Conflict (LOAC) and is principally, but not exclusively comprised of the 1907 Hague Conventions, the four 1949 Geneva Conventions and the two 1977 Additional Protocols.[21] Although the applicability of the main space treaties (OST, the 1968 Rescue Agreement,[22] the 1972 Liability Convention,[23] and the 1975 Registration Convention[24]) during an international armed conflict remains a debatable issue, conversely, the applicability of the IHL, or LOAC during an international armed conflict is indisputable. Nonetheless, at the time of the drafting of most of the IHL treaties, space travel, and even less space warfare, was the exclusive domain of writers of science fiction such as Jules Verne. It is thus undoubtedly safe to presume that the drafters of these treaties did not foresee the application of these instruments to belligerent acts in outer space. It is, nonetheless, a reality of our times that most of the normative instruments that regulate the enormous destructive power and

20 *See* UN Charter, *supra* note 17, Ch. VII, Arts. 39-51.

21 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 1949, 75 *U.N.T.S.* 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 *ibid.,* 85; Geneva Convention Relative to the Treatment of Prisoners of War, 1949, *ibid.*, 135; Geneva Convention Relative to the Protection of Civilian Persons in time of War, 1949, 75 *ibid.*, 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.* 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, 1125 *U.N.T.S.* 609.

22 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched Into Outer Space, 1968, 672 *U.N.T.S.* 119 (hereinafter: Rescue Agreement).

23 Convention on the International Liability for Damage Caused by Space Objects, 1972, 961 *U.N.T.S.* 187 (hereinafter: Liability Convention).

24 Convention on Registration of Objects Launched Into Outer Space, 1975, 1023 *U.N.T.S.* 15 (hereinafter: Registration Convention).

scope of contemporary warfare originated during a period when warfare was limited in scope and destructiveness. The fact that space military capabilities have been developed after most of the principles and rules of international humanitarian law had already come into existence cannot justify the exclusion of military activities in outer space from these rules. The International Court of Justice (ICJ) has explicitly refuted such an argument concerning the possible inapplicability of IHL to nuclear weapons, citing an eloquent excerpt from the New Zealand Written Statement:

> International Humanitarian Law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons.[25]

Furthermore, although IHL structures the legal relationship between warring belligerents and between belligerents and the civilian population, the law of neutrality complements this body of law by structuring the legal relationship between belligerent and non-belligerent States. The importance of the law of neutrality was elaborated by the ICJ in its advisory opinion on the legitimacy of nuclear weapons in the following terms:

> The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principles of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict whatever type of weapons might be used.[26]

Thus space control and the means and methods through which space control can be achieved remain constrained within the legal boundaries established by the international community through IHL or LOAC and the laws of neutrality, irrespective of the jus ad bellum issues.

III. EFFECT OF NEUTRALITY

The laws of neutrality have a limiting effect on armed conflicts. This effect is multi-dimensional for both belligerents and neutrals. First, neutrality limits

[25] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996, 35 *I.L.M.* 809, para. 86 (hereinafter: *Nuclear Weapons Case*).

[26] *Ibid*., para. 89.

the geographical scope of an armed conflict. Consequently, belligerents may not exercise belligerent rights within the territory of neutral States, which includes vessels, aircraft, and space assets listed on their registry.[27] Second, and as a corollary to the first premise, neutrality helps to reduce the number of States which participate in a conflict. The limitation of the number of participants in a conflict is a direct consequence of the duty of belligerents to respect the sovereign rights of States that decide not to participate in an armed conflict. The scope of the duty to respect the sovereign rights of a State applies to both respect for the territorial integrity of the neutral State and to the exercise of the sovereign rights of the neutral States within international space. The standard of the duty to respect the sovereign rights of neutral States is high. As Justice Fleischhauer stated in his separate opinion in the *Nuclear Weapons Case*: "…the respect for the neutrality of States not participating in an armed conflict is a key element of orderly relations between States".[28]

[27] "The territory of neutral Powers is inviolable": Art. 1, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (hereinafter: Hague Convention V), repr. in *Documents on the Laws of War* 87 (A. Roberts & R. Guelff eds., 3rd ed., 2000). In the *Nuclear Weapons Case* (*supra* note 25), Shahabuddeen J., within his Dissenting Opinion correctly points out that the term "inviolable" is not defined within the Hague Convention V and argues for a broad interpretation of the concept, not limiting the concept to belligerent acts occurring physically within the territory of a State but including a "trail Smelter type of situation" where a State "suffers substantial physical effects of acts of war carried out elsewhere". Shahabuddeen J. then completes his argumentation proffering: "The 1907 Hague principle that the territory of a neutral State is inviolable would lose much of its meaning if in such a case it was not considered to be breached"; *ibid.*, sec. 4, at 10. Neutral territory includes all national waters and airspace, *i.e.*, land, internal waters, territorial seas, and archipelagic waters as well as the airspace above them; *see* M.N. Schmitt & J. Ashley III, "The Law of the Sea and Naval Operations", 42 *Air Force L. Rev*. 119, at 139 (1997).

[28] *Nuclear Weapons Case*, *supra* note 25, Separate Opinion of Fleischhauer J., para. 2.

A. History of Neutrality

The concept of neutrality can easily be traced to antiquity.[29] International normative instruments on neutrality are, however, relatively more recent. The principal instruments dealing with neutrality and war were drafted at the onset of the 20th century. These are the 1907 Hague Convention No. V Respecting the Rights and Duties of Neutral Powers in Case of War on Land[30] and the 1907 Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War.[31] From these treaties one can deduce a legalistic concept of neutrality, namely "the legal position of states which do not actively participate in a given armed conflict".[32] Furthermore, as Oppenheim wrote: "Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial States and the belligerents".[33] Neutrality is thus a reciprocal concept

[29] *See* P. Constantineau, *La Doctrine classique de la Politique Etrangere* (1998); R.A. Bauslaugh, *The Concept of Neutrality in Classical Greece* (1991); D.J. Bederman, *International Law in Antiquity* (2001). The word "neutrality" originates from the Latin word *neutralis*; furthermore it is interesting to note that the etymology of the word "neutral" refers to the Latin concept "*medius*" whose definition included a concept of the community and the common good; *see*:
http://catholic.archives.nd.edu/cgi-bin/lookdown.pl?neutral.
Some publicists argue that the legal concept of neutrality emerged later in the Middle Ages. For an interesting discussion on this polemic *see* G. Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* 348 (1999).

[30] S*upra* note 27. According to Roberts & Guelff (*supra* note 27), at the time of its adoption Hague Convention V was considered to be declaratory of customary international law. The "general participation" Article is now obsolete.

[31] Repr. in *Documents on the Laws of War, supra* note 27, at 127 (hereinafter: Hague Convention XIII). According to Roberts & Guelff, *id.*, at the time of its adoption, Hague Convention XIII was considered to be declaratory of customary international law. The "general participation" Art. 28 is consequently obsolete. The Hague Conventions are considered to represent customary international law, even *jus cogens* (*Nuclear Weapons Case*, *supra* note 25).

[32] According to Roberts & Guelff, *supra* note 27, this legalistic form of neutrality is to be "distinguished from other uses of the term, for example to describe the permanent status of a State neutralised by special treaty. In this latter case, particular duties arise in peace as well as in war, and the state may have a treaty obligation to remain neutral"; *ibid*., 85. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (L. Doswald-Beck ed., 1995) defines "neutral" as "any State not party to the conflict" (at 13). For thorough discussion on the origins of neutrality *see Neutrality Changing Concepts and Practices* (A.T. Leonhard ed., 1988). For an interesting review of the contemporary history of the different forms of state neutrality *see* R. Ogley, *The Theory and Practice of Neutrality in the Twentieth Century* (1979).

[33] L. Oppenheim 2 *International Law* 653 (7th ed., by H. Lauterpacht, 1963).

engendering both duties and rights on the part of both belligerents and neutral States.

B. Juridical Status of Neutrality

It has been argued that the neutrality of States exists merely by virtue of not participating in a war. Once a state of war is declared, neutrality need not be declared:

> … all States which do not expressly declare the contrary by word or action are supposed to be neutral and the rights and duties arising from neutrality come into existence, through the mere fact of a State taking up an attitude of impartiality, and not being drawn into the war by the belligerents.[34]

The question of whether neutrality can still exist within an international system of collective security has been the subject of discussion by publicists since the days of the League of Nations.[35] They generally agree that collective security as structured within the UN Charter precludes States from establishing the juridical status of neutrality *vis-à-vis* an international armed conflict. The concept of neutrality is thus seen as antithetical to the premise of collective security. The argument is based on the application of Articles 2(5), 25 and 39 of the UN Charter. Publicists also generally agree that modern conflicts do not necessarily fit within the security paradigms established within Articles 2(5) 25 and 39 of the UN Charter. Indeed conflicts may arise where the UN does not take a position on determining the identity of the aggressor. An example of such a conflict is the Iran-Iraq War. Another example of silence of the Security Council on the legitimacy of the use of force by States was the NATO intervention in Kosovo. Contextually speaking, in conflicts where public actors decide to use force in a manner, which is outside the strict paradigms of the UN collective security system, the law of neutrality is revived and is once again pertinent to international legal order. Within this context, the argument advanced by Oppenheim[36] remains valid and in accordance with the customary international law of neutrality where any State that does not take part in the armed conflict

34 *Ibid.*, 653-54.

35 *See* F. Deak, "Neutrality Revisited", in T*ransnational Law in a Changing Society – Essays in Honor of Philip C. Jessup* 137-54 (W. Friedman, L. Henkin, & O. Lissitzyn eds., 1972); *see also* L. Henkin, "Force, Intervention, and Neutrality in Contemporary International Law", 57 *Am. Soc'y Int'l L. Proc*. 147 (1963).

36 Oppenheim, *supra* note 33.

automatically benefits from neutrality *vis-à-vis* the belligerent States and must respect the rights and exercise duties related to this status. Furthermore, and *a fortiori,* Articles 39 and 25 of the UN Charter have never been applied concurrently. Thus Security Council decisions to use force have been drafted in a manner, which leaves States the option to not participate in a conflict and to remain neutral.[37] In addition treaties subsequent to the UN Charter have recognized the existence of neutrality within armed conflicts. As commentators have pointed out, the Geneva Conventions of 1949 quickly signaled the survival of neutrality despite the UN Charter, by specifically restricting the rights of neutral States.[38] Historically, neutrality was contingent upon a declaration of war being issued by belligerent States in accordance with the third Hague Convention of 1907.[39] Article 2(4) of the UN Charter has rendered the legal requirement for a declaration of war inoperative. Within the UN Charter security system there are aggressor States and those that use force for individual or collective self-defence. International armed conflicts now occur in a wide variety of contexts that are often very difficult to categorize. Practically speaking, neutrality is more correctly described as being contingent on the occurrence of a state of generalized hostilities.[40]

C. Raison d'Etre of Neutrality

Although laws concerning neutrality have a humane effect by limiting armed conflict, their *raison d'être* is contingent upon historically variable paradigms. In antiquity, neutrality was primarily concerned with the security of city-States. The development of maritime neutrality as seen in the *Consolado Del Mare*, published in 1494, the French marine ordinances of 1543 and 1584*,* or the Rule of 1756,[41] represented the concerns of a different era primarily motivated by commercial interests and the desire of States to

37 On this point *see* P.M. Norton, "Between the Ideology and the Reality: The Shadow of the Law of Neutrality", 17 *Harv. Int'l L. J.* 249 (1976).

38 *Ibid*., at 254; Deak, *supra* note 35, at 144.

39 For an interesting comment on the topic of the effects and requirements of a formal declaration of war *see* "Effects of a Formal Declaration of War: U.S. Defense Department Statement", in 5 *I.L.M.* 791 (1966). For an interesting pre-Charter analysis *see* C. Eagleton, "Form and Function of the Declaration of War", 32 *A.J.I.L*. 19 (1938); F.R. Black, "The Declaration of War", 61 *Am. L.R*. 410 (1927).

40 This position is cogently argued by G.C. Petrochilos, "The Relevance of the Concept of War and Armed Conflict to the Law of Neutrality", 31 *Vand. J. Transnat'l L.* 575 (1998).

41 Politakis, *supra* note 29, at 352-57.

protect them.[42] In studying the history and *raison d'être* of the laws of neutrality, one commentator astutely pointed out the pragmatic origins of neutrality, stating that "laws of neutrality probably had their sources in the practical ability of non-participants in a war to insist on certain rights and on the corresponding practical ability of belligerents to impose some duties".[43] Other publicists have commented that:

> The rapid growth and increasing importance of international trade in the eighteenth and nineteenth centuries, which led maritime states to seek a means of resisting belligerent interference with neutral trade, became the foundation for the contemporary development of neutrality.[44]

The same logic should now be applied to space military activities for two reasons. First, in a manner similar to the high seas, space is widely used by public and private entities for civil, commercial and military operations. Simply put, within our information-based society and global economy, space assets are an important link in the information, commercial and security pipelines. This makes the application of the law of neutrality in space necessary for the maintenance of the global public order.

IV. SPACE CONTROL AND NEUTRALITY

It can cogently be argued that neutrality rights and duties in space are a corollary of the theory of space control promoted by US military doctrine. There are two reasons for this. First, the law of neutrality confers on neutral States protection from belligerent acts such as those either expressed or implied by the doctrine of space control.[45] Second, the international

[42] E. David argues: "Le fondement de la neutralite est cependant beaucoup moin humanitaire que commercial et ce n'est pas par hazard si, datan de l'antiquite, l'institition ne se developpe qu'au XIX siecle…"; *Principes de Droit des Conflits Armés* 17 (1999).

[43] H.J. Taubenfeld, "International Actions and Neutrality", 57 *A.J.I.L.* 377 (1953).

[44] *Documents on the Laws of War*, *supra* note 27, at 85.

[45] The applicability of the law of neutrality is practically omitted from *AFDD* 2-2.1 (*supra* note 1). Nonetheless *AFDD* 2-2.1 does tacitly acknowledge, albeit in a limited manner the effect of the doctrine upon neutral space assets. For example: one of the roles of understanding the battlespace with respect to Space Situational Awarness (SSA) is the "Monitoring and status of friendly, neutral, and adversary space assets, capabilities and operations" (at 21). "Deconfliction is just as important in counterspace operations as it is in other military operations. Electromagnetic spectrum and physical deconfliction must be accomplished to avoid blue on blue impacts and unintended interference with other parties" (at 22). "Space Intelligence Preparation of the Battlespace (SIPB) provides a framework for analyzing the full spectrum of adversary space capabilities and potential courses of action. This concept includes blue, red, and gray space orders of battle based

community is presently at a diplomatic stalemate on the question of the weaponization of space. The Conference on Disarmament (CD) is unable to break the diplomatic stalemate, handicapping the UN discussions on the Prevention of an Arms Race in Outer Space (PAROS). Furthermore, the international community has frequently expressed concern over the weaponization of space.[46] Given the improbability of the development of an

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on operational reporting and intelligence, surveillance and reconnaissance data. Each provides insight into the space system of friendly forces (blue), adversary forces (red) and third party (gray) space forces. The gray space order of battle, regarding US commercial and neutral foreign (commercial and government) space systems, can be difficult to develop and maintain … The importance of third party providers must not be understated as they provide space capabilities to numerous clients, including friendly and adversary military operations" (at 24). In analyzing possible targets "Ground based C2 data processing facilities …may be located in neutral countries" (at 40). Perhaps the strongest statement is found concerning the targeting of satellite communications: "…planned action against space communication assets must be carefully deconflicted to avoid unintended consequences" (at 40). The concept also appears as a simple caveat to the targeting of weather satellites: "When planning operations against an adversary's space-based weather capabilities, consider potential collateral impacts on friendly or neutral nation's assets or information" (at 41). It is important to note that the doctrinal document in discussing targeting space assets stresses that "there may be times when temporary, reversible counterspace operations prove more appropriate than operations that permanently degrade or destroy space capabilities" (at 40).

Furthermore, it is interesting to note that according to CJCSI 3121.01A, dated 15 Jan. 2000, Standing Rules of Engagement for US Forces: "Military or civilian space systems such as communication satellites or commercial earth-imaging systems may be used to support hostile action. Attacking third party or civilian space systems can have significant political and economic repercussions. Unless specifically authorized by the NCA, commanders may not conduct operations against space-based systems or ground and link segments of space systems. Detailed guidance is contained in Enclosure E"; at A-7. Also from a practical perspective, commenting on satellite jamming attempts by Iraqi forces, the chief of the U.S. Air Force's Space Command Forces, Gen. L.W. Lord, recently commented on how one of his command's missions is "offensive counterspace". He spoke of it in explaining how the United States was able to overcome the attempt by Iraqi forces last year to disrupt satellite signals. "We certainly knew it was occurring, and we also attacked GPS jammers with GPS-aided direct attack munitions and killed them", said Lord. He played down the effectiveness of such equipment, noting, "there are several tactics you can take to help defeat a low-wattage kind of jammer", and explaining that the United States "did some actions during the war that made sure that when the satellites were available in view of the theater they had the most accurate uploads, so we had the constellations screwed down as tight as we could with respect to the accuracy it provided". *See:* CDI Space Security Update #14.2004 ~ July 21, 2004 .

[46] For the most recent such expression of concern on the importance of preventing an arms race in space *see*: UN G.A. Res. 58/37, 17 Dec. 2003, adopted by a recorded vote of 113 in favour to 3 against (Federated States of Micronesia, Israel, United States), with 56 abstentions, online: United Nations.

effective legal regime to resolve conflicting national priorities concerning the weaponization of space, the law of neutrality remains, if only by default, a primary norm in the regulation of the practical effects of space control. The importance of neutrality in space is implicitly recognized in US military doctrine which advocates targeting neutral commercial space assets, should these be inadvertently used in an international armed conflict. It is argued that the use of neutral commercial space assets indirectly in support of an adversary's military activities renders these assets legitimate military objectives, subject to attack even preemptively.[47] This is a serious warning to neutral States to develop the legal and technical capacity to maintain the neutrality of their space assets during an international armed conflict.

Although not expressly stated within AFDD 2-2.1,[48] a belligerent must respect the neutrality of a non-belligerent in space. The international legal order obliges a State, which exercises space control as advocated within the said doctrine to respect the right of neutral States to access space and the ensuing freedom of navigation in space. This is an important factor in space control, restraining both the targeting process and possible collateral damage that could result from attacking military objectives in space. During the exercise of space control, the question that needs to be asked is, does the weapon or its effects respect the sovereign rights of neutrals in outer space?

The risk of damaging or destroying neutral space assets requires a definition of a neutral satellite. The law concerning maritime neutrality can perhaps help in establishing such a definition. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea[49] defines a neutral ship as any ship from a nation not party to a conflict. Nonetheless, the nationality of ships differs from the "nationality" of satellites. The determination of the neutral status of a satellite in international law is problematical. First, there is no text in international legal instruments that defines a neutral satellite. Secondly the normative structure within the major space law instruments compound the difficulty by dissociating the concepts of a State's "jurisdiction and control" of a satellite (Article VIII of OST)

47 "Potential adversaries have access to a range of space systems and services that could threaten our forces and national interests. Even an adversary without indigenous space assets may use space through U.S., allied, commercial or consortium space services. These services include precision navigation, high-resolution imagery, environmental monitoring, and satellite communications. Denying adversary access to space capability and protecting U.S. and friendly space capability may require taking the initiative to preempt or otherwise impede an adversary"; *AFDD* 2-2.1, *supra* note 1, at 31. *See also* Maj. D.L. Wilson, "An Army View of Neutrality in Space: Legal Options for Space Negation", 50 *Air Force L. Rev*. 175 (2001).

48 *Supra* note 1.

49 *Supra* note 32.

from the State's international liability for national activities in outer space (Article VI of OST).

Evidence of jurisdiction and control is established through the Registration Convention, which limits registration to Launching States.[50] Pursuant to Article III of the Registration Convention, the UN Secretary General maintains a register, which indicates, amongst various data the name of the launching State or States and the general function of the space object. Neither the OST nor the Registration Convention provides a mechanism, which allows for the transfer of the jurisdiction and control of a satellite to a non-launching State.[51] Considering that the ownership of a satellite can be transferred while in space, a satellite can conceivably be under the theoretical "jurisdiction and control" of a State while being owned and operated by nationals of a different State. State practice on this issue varies.[52] This discrepancy significantly increases the difficulty in determining the legal status of a targeted satellite as being an asset of either a belligerent or neutral State. This normative dilemma could result in the space treaties becoming irrelevant in the determination of the legal status of a satellite during an international armed conflict. The UN General Assembly recently expressed its concern over current diverging State practices regarding on orbit transfer of ownership of space objects, recommending the enactment and implementation of national laws providing continuing supervision of space activities.[53] A harmonization of State practice on this issue would increase space security. Furthermore, a protocol to the Registration Convention could address this issue and further strengthen the impact of the Registration Convention on space security.

A. Practical Applications

The 1907 Hague Convention No. V[54] establishes in Article 8 that a Neutral Power is not called upon to forbid or restrict the use on behalf of the

50 *Supra* note 24, there can be more than one Launching State.

51 In 1998, the United Kingdom transferred AsiaSat and Apstar satellite registrations to the People's Republic of China. UN Docs. ST/SG/SER.E/333 and 334, (Apr. 3, 1998). The registration change was possible, due to the fact that the United Kingdom and China were both Launching States.

52 B. Cheng, "Space Objects and Their Various Connecting Factors", in *Outlook on Space Law Over the Next 30 Years* 214 (G. Lafferranderie & D. Crowther eds., 1997).

53 G.A. Res. 59/115, ¶ 3, UN GAOR, 59th Sess., UN Doc. A/RES/59/115 (2005)

54 *Supra* note 27. The basic principles underlying the laws of neutrality are non-participation in war and impartiality although depending upon the context these duties can be either attenuated or strengthened through a concept of qualified neutrality which can include "preferential treatment of the belligerent that is the victim of aggression and

belligerents of Telegraph or Telephone cables or wireless telegraphy apparatus belonging to companies or private individuals. Although not originally intended to apply to space assets, the interpretation of the norm can evolve to become applicable to satellite telecommunications. Thus the use of a neutral telecommunication satellite by a belligerent would not necessarily be a violation of the duties of a neutral State. Article 40 of the 1923 Hague Rules also states "Belligerent military aircraft are forbidden to enter the Jurisdiction of a neutral state".[55] Although strictly speaking this paradigm cannot easily be transposed to apply to space assets and their applications, from a space law conceptual perspective the use of the word "jurisdiction" is nonetheless very interesting. Considering that sovereign territory in outer space does not exist but that States have "jurisdiction and control" over their space assets, by transposing the Hague Rules paradigm involving the use of the term "jurisdiction", interference with the national jurisdiction of States in outer space could be determined to be a violation of neutral rights.

The international trade of space related services during an armed conflict remain subject to the laws of neutrality. According to Article 7 of Hague Convention No. V[56] a neutral State is not obliged to prevent the export on behalf of belligerent of arms munitions or anything that can be of use to an army. The Hague Convention No. XIII[57] reaffirms this principle within its Article 7. Nonetheless Article 6 of Hague Convention No. XIII prohibits the supply of war material of any kind in any manner, directly or indirectly, by a neutral State to a belligerent. The supply by a neutral State of earth imaging data to a belligerent, either raw or processed, would then be a violation of neutrality. However the export of data to a belligerent by a private company operating an Earth imaging satellite, which has no government ownership, would fall under Article 7 of Hague Convention No. XIII and would not necessarily entail a State's violation of its neutral duties. The exception to this rule would be the presence of a UN Security Council resolution calling for an embargo of such commercial transactions. The sale by a purely private company of earth imaging data either raw or processed and/or the information contained therein to a belligerent does however raise other important IHL issues such as that of being a mercenary as defined in Additional Protocol II Article 47 or the direct participation in hostilities by

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discrimination against the aggressor"; *see* Y. Dinstein, "The Laws of Neutrality", 14 *Israel Y.B. Hum. Rts.* 80, at 82 (1984).

55 *Documents on the Laws of War*, *supra* note 27, at 139. Although these rules were never adopted in a legally binding form they were considered at the time authoritative.

56 *Supra* note 27, at 85.

57 *Supra* note 31.

civilians with their ensuing consequences. Nonetheless, the trade of Earth imaging data is also closely related to the draft 1923 Hague Rules (First Part) that establish in Article 6(1) that the transmission from a neutral vessel or aircraft, while on the high seas, of any military information intended for a belligerent's immediate use is to be considered a hostile act. In applying this rule to space based earth imaging it can be cogently argued that the transmission of earth imaging data and/or of the information resulting from the processed data, which has either tactical or strategic significance, in real time to a belligerent is a hostile act. In these circumstances the "neutral" or private space asset violating these norms would then be liable to capture or attack as a legitimate military objective. The acquisition and use of space imagery and space communications is an issue of concern to US military planners and current American policy is to deny enemy access to these.[58]

Neutrality laws also have an impact on the international trade in launch services. Using the Alabama Claims Arbitration[59] logic as codified in Article 8 of Hague Convention No. XIII, it can be argued that a State must use due diligence to prevent the launch of a satellite from its territory when it has reasonable grounds to believe that the satellite is intended for military use in a conflict within which it is neutral. Similarly a neutral State is bound to employ the means at its disposal to prevent the fitting or arming of a satellite within its territory which it has reason to believe is intended for hostile operation against a belligerent with which it is at peace.

The practical effect of the laws of neutrality upon belligerents is primarily that belligerents must not direct hostilities against a neutral State's space assets.[60] In transposing the paradigm of naval warfare into outer space, one can cogently argue and most would agree that unrestricted warfare against neutral space assets is unlawful.

B. Attacking a Neutral Satellite

The law of naval warfare allows, under certain conditions, belligerent acts against neutral vessels. On this point, the San Remo Manual comments that neutral vessels cannot be attacked unless:[61]

58 Perdomo, *supra* note 15, at 13.

59 Treaty Between Great Britain and the United States for the Amicable Settling of All Causes of Difference Between the Two Countries, 1871, 143 *C.T.S.* 145 (C. Parry ed., 1977).

60 Dinstein, *supra* note 54, at 99.

61 *San Remo Manual*, *supra* note 32, para. 67.

(A) They are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they clearly resist visit, search or capture;
(B) Engage in belligerent acts on behalf of the enemy;
(F) Otherwise make an effective contribution to the enemy's military action. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

Contextually speaking, the nature of space activity precludes the possibility of a prior visit search or capture of a satellite.[62] It is also difficult to conceive how a satellite could be carrying contraband. Nonetheless, in applying a similar rule to space assets, it can cogently be argued that a satellite of a neutral State cannot be attacked unless the satellite engages in a belligerent act or otherwise makes an effective contribution to the enemy's military action. Consequently, should a neutral space asset be used impermissibly by a belligerent, and should the neutral State be either unwilling or unable to stop the use of its asset, an attack upon the misused asset may be legally justified either under the doctrine of self-help or simply self-defence.[63] Although these two doctrines are very similar, an important difference exists in the conditions precedent to such attack. Under the doctrine of self-help, if time permits, a State should contact the neutral government allowing it time to react and correct the situation. Under the doctrine of self-defence, a State may react immediately to an imminent or ongoing attack originating from a neutral asset.[64]

V. OPERATIVE STANDARD OF SPACE NEUTRALITY

The international law standard applicable by belligerents towards neutral space assets and the latter's corresponding freedom of navigation in space is a primary factor that will determine the efficacy of neutral rights in space. In discussing the respect of neutral rights by belligerents, it is to be noted that in international humanitarian law the term "respect" has a very specific connotation amounting to a stringent duty of care upon belligerents. In fact, within the corpus of international humanitarian law, the term "respect" is used to create legal protection for a category of individuals or objects,

62 Container shipping presently severely restricts the ability to search ships on the high seas. *See* F.F. Megna, "Time for a Change: Maritime Neutrality in the War on Terror": http://atlas.usafa.af.mil/jscope/JSCOPE04/Megna04.html.
63 Schmitt & Ashley, *supra note* 27, at 140.
64 *Ibid*., at 141.

precluding a legitimate attack.[65] Consequently a duty of "respect" of neutral rights within a context of international humanitarian law terminology would presuppose a duty not to attack. It is perhaps more accurate to speak of a duty of "due regard" upon belligerents towards the neutral rights of space faring nations.[66] It has been cogently argued that the use of the standard of "due regard" in the law of naval military operations results from an "accommodation of interests or a balancing of rights and duties that can be summed up in the concept of reasonable use".[67] This argument can easily be transposed to space belligerent operations and to the rights of neutral States in space. Considering that a duty of due regard conventionally exists in outer space through Article IX of the OST, a development of the law of space neutrality would strengthen the OST. Again, a protocol could be added to the OST concerning this issue.

One of the primary difficulties in applying the law of neutrality to space military operations lies in the need to reconcile the law of neutrality and the right of self-defence as set out in Article 51 of the UN Charter. It is interesting to note that neither the UN Charter prohibiting the use of force primarily at Article 2(4) nor the Charter right of self-defence is weapon specific.[68] These normative dispositions thus cannot be used to either justify or ban space weapons *per se*. Nonetheless, the argumentation which Justice Fleischhauer adroitly presented concerning the interface between the law of neutrality and the right of self-defence in its application to nuclear weapons equally holds true when applied to space weapons. Justice Fleischhauer opined that these two principles were "in sharp contradiction to each other".[69] Although these two fundamental principles of the international legal system do not negate each other their coexistence remains problematic

65 M.S. McDougal & W.T. Burke, *The Public Order of the Oceans* 51-52 (1962): " …when considering obligations of behavior the term "respect" is used in the law of armed conflict to mean that armed force should not be directed against protected persons or objects".

66 In applying this principle to naval warfare the *San Remo Manual (supra* note 32) states: "In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights of those neutral States"; *ibid.,* para. 12.

67 J.A. Roach, "The Law of Naval Warfare at the Turn of Two Centuries", 94 *A.J.I.L.* 64, 68 (2000).

68 The ICJ stated in its Advisory Opinion in the *Nuclear Weapons Case* (*supra* note 25) in discussing Arts. 2(4), 42 and 51 of the UN Charter: "These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter"; *ibid.*, para. 39.

69 *Nuclear Weapons Case, supra* note 25, Separate Opinion of Fleischhauer J., para. 5.

as a conflict of norms of equal standing or value. Fleischhauer J. eloquently expressed the resulting dilemma stating:

> None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable. Yet international law has so far not developed (neither in conventional nor in customary law) a norm on how these principles can be reconciled.

The reasoning of the ICJ along with the Separate Opinion of Justice Fleischhauer posits that a violation of the law of neutrality could be breached should the survival of a State be contingent upon such actions.[70] An argument can be made that the threshold permitting the violation of neutral rights in outer space could be set at an equally high level as that established for the use of nuclear weapons on earth. It is to be noted that the ICJ did not limit the scope of its decision to the use of nuclear weapons on Earth. Consequently, the ICJ argument is easily applicable to nuclear space weapons. Nonetheless, considering the variety of the means and methods available to establish space control that may not involve the detonation of a nuclear weapon in space, a more nuanced and reasonable argumentation is perhaps one based on the principles of necessity and proportionality in the recourse to the use of force in space. Most publicists generally agree that an act of self-defence must be necessary and proportional.[71] The reasonableness

[70] *Id.* In discussing the polemic in relation to nuclear weapons, Fleischhauer J. argues: In view of their equal ranking this means that, if the need arises, the smallest common denominator between the conflicting principles and rules has to be found. This means in turn that, although recourse to nuclear weapons is scarcely reconcilable with humanitarian law in armed conflict as well as the principle of neutrality, recourse to such weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized state"; *ibid*., para. 5.

[71] C. Gray, *International Law and the Use of Force* 105 (2000), who points out that certain publicists reject these limits on self-defence as not being established in customary international law. Other publicists have defined the right of self-defence under the principle of proportionality as being "limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible purposes", in M.S. McDougal & F.P. Feliciano, *Law and Minimum Public World Order: The Legal Regulation of International Coercion* 217 (1961). In an excellent article, Maj. E.S. Waldrop points out that the American SROE defines proportionality in the use of force as "reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time", in "Integration of Military and Civilian Space Assets: Legal and National Security Implications", 55 *Air Force L. Rev.* 219 (2004). Maj.

and degree of violation of neutral rights in space would have to be proportional to the threat of the misuse of the neutral space asset faced by the State invoking the right. Such action should not be taken for a retaliatory or punitive purpose.[72] A space military operation that would affect the rights of neutral States within a geostationary orbit would require greater justification than the unintended consequences affecting a single satellite of a neutral country within a different seldom used orbit.[73] Arguably, the creation of space debris resulting from the use of force in space weather as an act of self-defence or self-help, and its corresponding effects upon the rights of neutral States would necessarily be an important variable in determining whether such an act in outer space is proportionate. It is interesting to note that in 2004 the International Space Station and two classified US DOD satellites were forced to maneuver in order to avoid space debris.[74]

Waldrop also points out that these SROEs establish an escalating requirement for the use of self-defence being:

1) De-escalation: warning and giving the hostile force an opportunity to withdraw or cease, when time and circumstances permit;
2) Using proportional force which may include non-lethal weapons; and
3) Only attacking to "disable or destroy" when that is the "only prudent means" to terminate the hostile act or intent.

Ibid., at 219-20.

72 Gray, *supra* note 71, at 106, points out the aim of such an act must be limited to "halt and repel". In reference to ideological subversion, T. Frank, *Recourse to Force* 75 (2002), points out that the practice of the right of self-defense "makes clear that there has been no support for interpreting Article 51 to permit a right to use force in self-defense against states exporting ideologies through militant but non-military means … for such countermeasures to be lawful, the provocation must be demonstrably grievous, military in nature and to have originated in the state against which such defensive military action is taken in self defense". Thus the use of a neutral state space asset for the broadcasting or transmission of contents which could be described as having the nature of ideological subversion could not justify the use of space countermeasures.

73 On this point it is important to note as T. Hitchins commented on *AFDD* 2-2.1 (*supr*a note 1) that: the Counter-space Operations doctrine itself makes no mention of the dangers of space debris or the need to ensure against unintentional damage caused by its creation (including that of fratricide of U.S. space assets), this is an example of an area where other doctrine and policy documents may take precedence … for example … DoD Space Policy … makes debris mitigation a priority (DoD Directive 3100.10, Space Policy, July 9, 1999, *J.P*. 3-14 (*supra* note 4): Joint Doctrine for Space Operations (Aug. 9, 2002), in July 8, 2005, Update on U.S. Military Space Policy Strategy. Available at: www.CDI.org.

74 *See* Herbert, *supra* note 4, at 4. "Destruction of a satellite by impact is likely to generate some persistent debris; just how much and how long the debris persists depends on the altitude of the satellite and the details of the collision. If the attacker has long-term

VI. THE AMBIT OF SPACE NEUTRALITY

The laws of neutrality were developed within specific contexts. As Louis Henkin pointed out in describing the evolution of neutrality:

> … as war became accepted as a legitimate means to resolve disputes or to pursue other ends of foreign policy, other nations strong enough to assert independence would not be compelled to choose and join sides. Nor were they willing to suffer the pangs of the wars of others, and forego trade and intercourse with both belligerents or with one of them. Belligerents could only assert and impose minimal limitations on the freedom of nations not involved in their wars.[75]

The laws of naval neutrality were created in an effort to maintain international trade during wars. The laws of neutrality specifically addressed the problems caused by naval technology of the time. The challenge at hand is to establish a normative structure relating to both the freedom of neutral navigation in space and the acceptable space commercial activities of neutral States *vis-à-vis* belligerents. In space, current technology does not permit interception, and inspection of space assets. Space security concerns are different than those of naval security and are based on the use of the asset rather than the nature of the cargo it is carrying. Furthermore, space navigation differs considerably from naval navigation. Space assets are less capable of choosing their routes in a manner similar to ships at sea. Space navigation is predicated upon predictable orbital parameters or orbital coordinates. Some satellites, such as those in the crowded geostationary orbit must maintain a fixed position in orbit. Other satellites have more eccentric orbits or even polar sun-synchronous orbits such as Earth imaging satellites. Space weaponry and their corresponding effects differ considerably from naval weapons. The targeting and attack of a space asset can cause considerable havoc to the navigation of other satellites through either space debris or through the radiological effect of the weapon. Seen in this light, an additional cause of concern for neutral States is the effect of the weapon, and not just the targeting of a satellite. Consequently, the rule of due regard for neutral rights in space, becomes a rule affecting weapons and their use more than anything else. Space military operations thus have a distinct variable to

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interests in space, debris production may be a deterrent to using these types of weapons if other weapons are available": *see Physics of Space Security*, *supra* note 5, at 136.

75 *Supra* note 35, at 160.

factor into the calculus of targeting, namely the duty of due regard towards the rights of neutral States to freedom of use and navigation in outer space.

VII. INCIDENTS OF CONCERN

It is important to remember that the technological capacity to affect space assets is available on the open market. For example GPS jammers may be purchased for $38,000 and satellite "noisemakers" can be purchased for 7,500.[76] Modern weapon systems generally have a back up inertial guidance system in case of GPS signal jamming but will nonetheless have decreased accuracy from the jamming.[77] The international proliferation of space capable military technology is evidenced by the following occurrences. In 2005, the State of Libya was accused of jamming the broadcast of two satellites, namely Eutelsat's Hotbird[78] and Loral Skynet's Telsat 12. The effect of this jamming was the interruption of the signals from several TV and radio stations. The jamming signals had been identified as originating from Tripoli. There are several issues of concern here.[79] However, from the

[76] According to Lt. Col. T. Freece, "GPS jamming is a verified adversary tactic"; *see* Herbert *supra* note 4, at 5. According to *Physics of Space Security*, *supra* note 5, at 119: "Simple jammers are inexpensive to make or buy. For example, GPS jammers on the commercial market can reportedly interfere with receivers 150-200 km away and instructions are available on the Internet for building a homemade GPS jammer inexpensively".
For a brief description on the functioning of a JDAM *see also*:
http://www.f-16.net/f-16_armament_article9.html

[77] C.B. Puckett, "In This Era of Smart Weapons is a State Under an International Obligation to Use Precision-Guided Technology in Armed Conflict", 18 *Emory Int'l L. Rev*. 645, at 715 (2004).

[78] "A high-powered signal of garbled noise on the satellite uplink frequency to render it inoperable … The effect of the jamming on the Eutelsat Hotbird satellite was not limited to the little dissident station. BBC World, Euro News, ESPN, CNN and UK commercial channel Five were also blown off the air … US military and diplomatic traffic that used the satellite were also affected. Officials at the highest levels of the US State Department and British Foreign Office expressed concern"; *see:*
http://www.washingtontimes.com/op-ed/20051215-092213-4859r.htm
According to Secretary of State for Foreign and Commonwealth Affairs, Dr. Howells: "Government communications may have been disrupted and we are investigating the matter further. Following discussions with the United States authorities…the British ambassador in Tripoli raised the issue with the Libyan authorities at senior level";
available at: http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmhansrd/cm051208/text/51208w32.htm

[79] According to the ITU Constitution, *supra* note 19, Art. 45, harmful interference with radio communications must be avoided and all States recognize the necessity of taking all practical steps to prevent harmful interference.

perspective of both the law of neutrality and the law of armed conflict, an issue of concern is the indirect effect of the Libyan actions, namely the disruption of US military communications in the Mediterranean. This incident demonstrated the possible unintended consequences of radio frequency jamming actions. Such unintended consequences can be quite destabilizing, as space is increasingly considered a battleground.[80] Space is no longer considered by the US as a militarily benign environment. The importance of space dominance dictates that US military satellite operators should no longer assume that satellite failures are necessarily the result of equipment malfunction but rather the result of malicious acts of enemies.[81]

It is also reported that Iran in 2003 had succeeded in jamming the uplink to Telstar 12 from its embassy in Cuba.[82] That such an act could emanate from an embassy is an issue of serious legal concern.

A Chinese satellite was also the target of jamming activities in 2005.[83] More specifically, on March 13, 2005, six transponders on AsiaSat 3S satellite were jammed. Although the point of origin of the jamming remains unknown, the jamming signals could have originated from outside China. This incident also demonstrates that such acts may be done not only by States but also by individuals or groups.

It must also be kept in mind that broadcasts of hate radio were an important part of the 1994 Genocide in Rwanda. A cogent argument can be made for a UN Chapter VII action in jamming such broadcasts.[84]

CONCLUSION

In observing the collective security system of the League of Nations, Professor Jessup had commented that a collective security system could benefit from the creation of an intermediate status between belligerents

[80] According to Gen. L.W. Lord, Commander of Air Force Space Command, "military leaders must think of space as a battleground. Indeed combat capabilities provided by advanced orbital systems increasingly are at risk"; *see* Herbert, *supra* note 1, at 1.

[81] According to Maj. Gen. (sel.) D.J. Darnell, commander of AFSPC's Space Warfare Center, "Space Command is trying to break the operators of that thinking. The first response when something goes wrong should be think possible attack"; *See* Herbert, *supra* note 4, at 4-5.

[82] http://www.washtimes.com/world/20030715-114937-2635r.htm.
and http://www.iranian.com/PhotoDay/2003/November/amb1.html

[83] *See*: http://english.people.com.cn/200507/05/eng20050705_194131.html

[84] A.C. Dale, "Countering Hate Messages that Led to Violence: The United Nations' Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts", 11 *Duke J. Comp. & Int'l L.* 109 (2001).

without retaining the classic status of neutrality.[85] Furthermore, Professor Lauterpacht's observation on the topic of neutrality during the era of the League of Nations still holds true today, namely that neutrality "has never been a doctrine with an immutably fixed content".[86] The observations of these two publicists might very well help to develop a contemporary concept of space neutrality embedded within a theory of space security. The concept of space security could encompass both space control and space neutrality creating a dynamic theoretical concept with a practical and justiciable regulatory effect upon international actors.

The law of neutrality remains an important normative corollary to the doctrine of space control. Neutrality creates an active balance between the conflicting interests of the belligerents and those that wish to remain outside the conflict. As George P. Politakis has commented, "[n]eutrality is certainly not a static point of equilibrium; it is a dynamic power relation".[87] From this perspective, the law of neutrality unmasks the fundamental paradox that permeates the doctrine of space control. In justifying the US doctrine of space control, US military manuals stress, "US space systems are national property afforded the rights of passage through and operations in space without interference".[88] These documents then review the possible consequences that can result from interference with American space assets that is viewed as an infringement of the sovereign rights of the US justifying self-defence measures.[89] Yet neutral satellites also benefit from this same right of passage and operation in space without interference.

The development and clarification of space neutrality norms is a necessary corollary to a doctrine of space control. However for space neutrality to properly evolve, in a similar manner in which naval neutrality evolved, there must be an international synergy combining space policy and capacity to promote, enforce and protect neutral rights in space. The moment appears to be propitious for nations concerned about the weaponization of space to expand their space policy and space power to influence the development of the law of space neutrality and its impact upon space security. Space security can only be enhanced by the determination of clear norms helping belligerents identify neutral space assets and determining the corresponding rights and duties of neutral States.

85 P.C. Jessup, "Should International Law Recognize an International Status Between Peace and War?", 58 *A.J.I.L.* 98 (1954).

86 Sir E. Lauterpacht, *International Law - Collected Papers of Hersch Lauterpacht* (Vol. 5, Disputes, War and Neutrality) 611 (2004).

87 Politakis, *supra* note 29, at 347.

88 Department of Defense Directive No. 3100.10 (July 9, 1999), Art. 4.1.

89 *Ibid*., Art. 4.2, 4.2.1.

ISRAEL AND THE INTERNATIONAL CRIMINAL COURT – AN OUTSIDER'S PERSPECTIVE

*By Andreas Zimmermann**

I. INTRODUCTION

> Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the Rome Statute, the Government of the State of Israel is proud to … express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity. … The Court's essentiality – as a vital means of ensuring that criminals who commit genuinely heinous crimes will be duly brought to justice, while other potential offenders of the fundamental principles of humanity and the dictates of public conscience will be properly deterred – has never seized to guide us. Israel's signature of the Rome Statute will, therefore, enable it to morally identify with this basic idea, underlying the establishment of the Court.

These are excerpts from the declaration accompanying Israel's signature of the Rome Statute (hereinafter: the Rome Statute or the Statute) of the International Criminal Court (ICC) on 31 December 2000, the very last day the Statute was open for signature.[1] Only one and a half years later, on 28 August 2002, the United Nations received from the Government of Israel a communication indicating that Israel does not intend to become a party to the treaty.[2] Besides it is also well known that Israel was one of the very few,

* Prof. Dr. jur., LL.M. (Harvard), Director, Walther-Schücking-Institut for International Law, University of Kiel (Germany). Revised version of a lecture given at the Herzliya Interdisciplinary Center, Herzliya on 27 Nov. 2005 as part of the Conference on "The Universality of Human Rights".

1 Text of the Rome Statute to be found, *inter alia*, at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.

2 Text to be also found at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.; the relevant part of that communication reads: "... Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty".
The legal effect of this declaration was that the pre-contractual obligations Israel had been exposed to as a signatory State of the Rome Statute, as envisaged by Art. 18(a) of the

namely seven, States voting against the text of the Statute, when it was adopted at the end of the Rome conference.[3] It is against the background of these conflicting Israeli statements and approaches that one has to address and analyse first the role the International Criminal Court and the underlying Statute[4] play with regard to the continued development of international law;[5] and second the reasons for the support by the member States of the European Union (including Germany) on the one hand and Israel's reluctance to become a contracting party on the other,[6] which is *inter alia* shared namely by the United States.[7]

Before doing so, one has to first however take stock where we currently stand with regard to the Court and its activities: so far 100 States have ratified the Rome Statute,[8] which has entered into force on 1 July 2002, including all but one member State of the European Union[9] and also including one neighbouring State of Israel, namely Jordan.[10] Besides, Egypt and Syria also signed respectively on 26 December 2000 and on 29 November 2000, but have not (yet) ratified the Statute.

1969 Vienna Convention on the Law of Treaties (1155 *U.N.T.S.* 331), have since then ceased. For an analysis of the parallel action taken by the United States, *see* G. Hafner, "An Attempt to Explain the Position of the USA Towards the ICC", 3 *J. Int'l Crim. Just.* 323 *et seq.* (2005).

3 Although the vote was not recorded, at least China, the United States, India and Israel, according to their own declarations, had voted against the adoption of the Statute.

4 *See* http://www.un.org/law/icc/statute/romefra.htm.

5 *See infra* II.

6 *See infra* III.

7 *See generally* as to the position of the United States *vis-à-vis* the Court, A. Zimmermann & H. Scheel, "USA und Internationaler Strafgerichtshof: Konfrontation Statt Friedlicher Koexistenz?", 50 *Vereinte Nationen* 137 *et seq*. (2002).

8 For a list of current contracting parties *see*: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.

9 This exception concerns the Czech Republic which has to modify its constitutional provision on the non-extradition of Czech citizens in order to be able to ratify the Statute; so far such amendment has not gathered sufficient political support; for further details *see* 'The implementations for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court – The Progress Report by the Czech Republic", Consult/ICC (2001) 10; text to be found at: http://legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)10E.pdf

10 Jordan, which had signed the Rome Statute on 7 Oct. 1998, ratified it on 11 Apr. 2000. Besides, it is also noteworthy that another Arab State, namely Djibouti, has also ratified the Rome Treaty.

As to specific situations being investigated by the Court so far, Uganda,[11] the Democratic Republic of Congo,[12] as well as the Central African Republic[13] have referred the situation in their respective countries (or part of them) to the Court, while the Ivory Coast, while not being a contracting party of the Statute, has *ad hoc* accepted its jurisdiction under Article 12(3) of the Rome Statute with respect to crimes committed on its territory.[14] Finally, it should be also mentioned that, while giving up attempts to shield United Nations personnel from the Court's jurisdiction as previously done in Security Council Resolution 1422 (2002) and 1487 (2003),[15] the Security Council has, in a groundbreaking step, acting under Chapter VII of the Charter by adopting Security Council Resolution 1593 (2005) on 31 March 2005 referred the situation in Darfour, Sudan, to the ICC and has thereby, for the first time ever, established the Court's jurisdiction for crimes committed on the territory of a non-contracting State, namely Sudan.[16] The Court has thus by now, certain shortcomings notwithstanding, become a reality and a working institution.[17]

It is against this background that one has to analyse the role the Rome Statute and the International Criminal Court play with regard to the ongoing

11 *See* ICC Press Communiqué of 29 Jan. 2004 – "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC"; text to be found at: http://www.icc-cpi.int/pressreleases.html.

12 *See* ICC Press Communiqué of 19 Apr. 2004 – "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo"; text to be found at: http://www.icc-cpi.int/pressreleases.html.

13 *See* ICC Press Communiqué of 7 Jan. 2005 – "Prosecutor Receives Referral Concerning Central African Republic"; text to be found at: http://www.icc-cpi.int/pressreleases.html.

14 *See* ICC Press Communiqué of 7 Jan. 2005 – "Registrar Confirms that the Republic of Côte d'Ivoire has Accepted the Jurisdiction of the Court"; text to be found at: http://www.icc-cpi.int/press/pressreleases/93.html.
As to the legal effects of such acceptance, *see e.g.* S. Williams, Art. 12, marginal note 17, in *Commentary on the Rome Statute of the International Criminal Court* (O. Triffterer ed., 1999).

15 As to the legal problems involved in UN S.C. Res. 1422 (2002) and 1487 (2003) *see, inter alia,* A. Zimmermann, "'Acting under Chapter VII (…)' - Resolution 1422 and Possible Limits of the Powers of the Security Council", in *Verhandeln für den Frieden/ Negotiating for Peace – Liber Amicorum Tono Eitel* 253 *et seq*. (J.A. Frowein *et al*. eds., 2003).

16 For the (significant) legal problems and questions involved in UN S.C. Res. 1593 *see* A. Zimmermann, "Two Steps Forward, One Step Backwards? – Security Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court", in *Festschrift für Christian Tomuschat* (P.-M. Dupuy *et al*. eds., forthcoming 2006).

17 Recently, for the second time the Assembly of States Parties has elected judges to fill those places, which by virtue of Art. 36(9)(b) had become vacant after three years so as to guarantee over time a continued renewal of the bench.

development of international law generally and international criminal law in particular.[18]

II. THE ROME STATUTE AND INTERNATIONAL LAW

The success of the Rome Conference and the fact that in a relatively short period of seven years 100 States have ratified the Rome Statute has to be considered to constitute a historic milestone in the development of international criminal law and international law generally. Indeed, it is hard to believe that anybody in 1985, or even 1995, would have considered that in twenty, respectively in ten years, we would see an international criminal court which has jurisdiction for acts of genocide, crimes against humanity or war crimes committed in one-hundred countries of the world. Besides it is also worth noting that those one-hundred contracting parties have effectively waived, subject to the principle of complementarity, the immunity of their heads of States, members of governments and parliaments with regard to crimes which come within the jurisdiction of the Court.[19] The Rome Statute and subsequent State practice has thus confirmed the tendency towards reducing the scope of personal immunity with regard to crimes against international law[20] – a trend already foreshadowed in Article 7 of the Nuremberg Statute.[21]

Finally the Rome Statute has also been able to not only come up with a balanced merger of Anglo-Saxon and continental theories in the field of general principles of criminal law dealing with issues like *actus reus, mens*

[18] *See generally* as to the interdependence of (general) international law and international criminal law the various contributions in *International Criminal Law and the Current Development of Public International Law* (A. Zimmermann ed. 2003).

[19] *See* Art. 27 of the Rome Statute; *see also* the fact that the International Court of Justice in the *Arrest Warrant* case, specifically referred to this provision when stating that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include … the future International Criminal Court created by the 1998 Rome Convention", ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2000] *I.C.J. Rep*. 182, 198, para. 61.

[20] *See* most recently in that regard T. Stein, "Limits of International Law Immunities for Senior State Officials in Criminal Procedure", in C. Tomuschat & J.-M. Thouvenin, *The Fundamental Rules of the International Legal Order – Jus cogens and Obligations Erga Omnes* 249 *et seq*. (2006).

[21] Art. 7 of the Nuremberg Statute reads: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

rea or various forms of participation,[22] but to also codify and further develop the corpus of international humanitarian law in particular with regard to non-international armed conflicts. This is even more important given that the vast majority of armed conflicts which have occurred over the last twenty years, and namely those in Africa, have been of a non-international character. Similar considerations apply to the concept of crimes against humanity, where Article 7 of the Rome Statute contains the first-ever modern codification of those heinous crimes.

This positive perception of the Rome Statute is confirmed by the subsequent practice of States parties and non-State parties: on the one hand, a large number of States which are contracting parties to the Rome Statute have by now incorporated into their own domestic legal system criminal norms which are, *mutatis mutandis*, identical to the Rome Statute, the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*)[23] just being one example. On the other hand, the United Nations, in their function as transitional administrative authority for East Timor, created special panels for the punishment of serious crimes, the substance-matter jurisdiction of which with regard to acts of genocide, crimes against humanity and war crimes is identical to the provisions of the Rome Statute.[24]

The same is true, and that is even more telling, for the Iraqi Special Tribunal created by the Coalition Provisional Authority, *i.e.*, created under

22 *See* in that regard K. Ambos, "General Principles of Criminal Law in the Rome Statute", 9 *Crim. L. Forum* (1999); C. Van den Wyngaert, "The Structure of the Draft Code and the General Part", in *Commentaries on the ILC's Draft Code* 55 (M. Bassiouni ed. 1993).

23 I *Bundesgesetzblatt* 2254 (2002); English translation to be found at: http://www.iuscrim.mpg.de/; for an analysis of the German Völkerstrafgesetzbuch *see* A. Zimmermann, "Implementing the Statute of the International Criminal Court: The German Example", in *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese* 977 *et seq.* (L. Vohrah, F. Pocar, Y. Featherstone, O. Fourmy, C. Graham, J. Hocking & N. Robson eds., 2003).

24 For a detailed analysis *see Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (C. Romano, A. Nollkaemper & J. Kleffner eds., 2004). It is particularly interesting that the United Nations regulation creating the special panels has solved some of the compromises reached in Rome in favor of the jurisdiction of the specials panels. Thus, for example the panels have been granted universal jurisdiction, as had been proposed, albeit unsuccessfully, for the ICC itself. *See* Sec. 2 of UNTAET Reg. No. 2000/15 of 6 June 2000. Besides, Sec. 6(b)(xx) of UNTAET Reg. No. 2000/15 includes the war crime of "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict" without requiring, unlike Art. 8(2)(b)(xx) of the Rome Statute, "that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute" by way of a formal an amendment in accordance with the relevant statutory provisions.

the auspices of the United States and the United Kingdom as Occupying Powers,[25] and later endorsed by the Iraqi Governing Counsel, where in particular the war crimes provisions are identical, *mutatis mutandi*s, to the ones of the Rome Statute.[26]

Finally the Security Council adopting and those member States voting in favour, or at least not vetoing in March 2005 Security Council Resolution 1593 (2005),[27] referring the situation in Darfour to the ICC, have by the same token, also endorsed the codification of the substantive norms contained in Articles 6–8 of the Rome Statute, *i.e.*, the ones defining genocide, crimes against humanity and war crimes.

It is against this background that one has to analyze the conflicting positions of Israel on the one hand, and that of the member States of the European Union on the other (as exemplified by Germany's position) *vis-à-vis* the International Criminal Court.

III. THE GERMAN AND ISRAELI POSITIONS *VIS-À-VIS* THE ROME STATUTE – A COMPARISON

As is well known, Germany, like many member States of the European Union, was and continues to be one of the strong proponents of the International Criminal Court.[28] In contrast thereto, and as demonstrated by the sequence of events outlined above, Israel has, at least so far, been quite skeptical *vis-à-vis* the Court. Indeed, as mentioned, Israel was one of the few countries alongside the United States, Libya, the Marshall Islands, China, Iraq, Qatar and Yemen, which at the very end of the Rome conference voted against the Statute of the ICC. During the negotiations and its aftermath, Israel was mainly concerned with certain features of the Rome Statute, namely first certain definitions of war crimes and in particular the clause on

[25] As to the legal status of the United States and the British forces in Iraq *see in particular* UN S.C. Res. 1483 (2003) of 22 May 2003.

[26] *See more specifically* for the crime of transferring one's own population into occupied territories on the one hand Art. 13 (b)(9) of the Statue of the Iraqi Special Tribunal (*see:* http://www.iraq-ist.org/en/about/sec3.htm) and on the other Art. 8(2)(b) (viii) of the Rome Statute.

[27] UN S.C. Res. 1593 (2005) was adopted with 11 States voting in favor (including France, Russia and the UK) and four States (Algeria, Brazil, China and the US) abstaining.

[28] *See specifically* as to the position of Germany *vis-à-vis* the ICC, *inter alia,* C. Kress, "Gedanken aus Anlass der Ratifikation des Internationalen Strafgerichtshofs", [2000] *Neue Zeitschrift für Strafrecht* 617 *et seq*., at 618; The official position of the European Union *vis-à-vis* the Court has been determined by various common positions such as e.g., the common position on the ICC adopted by the Council on 11 June 2001 (2001/443/CFSP).

the transfer of population into occupied territories;[29] second the problem of the crime of aggression,[30] and finally third the extent of the Court's jurisdiction with regard to non-State parties.

A. The Subject-Matter Jurisdiction of the ICC

Before addressing the various war crimes provisions, one has to reiterate that both, the inclusion of the crime of genocide (and its definition), as well as the list of crimes against humanity proved, as compared to the definition of war crimes, by and large, relatively uncontroversial.

1) Genocide

With regard to the crime of genocide, the definition of genocide as contained in Article 6 of the Rome Statute, is identical to the one of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[31] the customary law nature and content of which by now has also been confirmed and further refined by the judicial practice of both the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY)[32] and the International Tribunal for Rwanda (ICTR).[33] This reconfirmation of the "crime of crimes" by the international community, to which for obvious historical reasons, both Israel and Germany attach particular importance, has to be considered a very positive sign.

2) Crimes Against Humanity

But also with regard to the notion of crimes against humanity, it has to be noted that the Rome Statute confirmed, if ever there was need, certain basic underpinnings, namely that no nexus to an armed conflict is needed;[34] that such crimes may be committed either as part of a wide-spread commission

29 *See infra* in this Chapter.

30 *Id.*

31 78 *U.N.T.S.* 277.

32 *See e.g.* ICTY, Blaskic, IT-95-14-AR, 29 Oct. 1997.

33 *See* as to ICTR judgments dealing with the crime of genocide most recently *e.g.*, Gacumbitsi, ICTR-2001-64-T, 17 June 2004; Kibuye, No. ICTR-96-10-T, 19 Feb. 2003; as well as Niyitigeka, ICTR-96-14-T, 15 May 2003.

34 *See* in that regard the *chapeau* of Art. 7 of the Rome Statute. It was already the ICTY which had stated that the Security Council, by requiring such a nexus in Art. 5 of the Statute of the ICTY, had inserted a requirement not in line with customary international law. *See* ICTY, Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 141 (2 Oct. 1995).

of such acts or as part of a systematic commission of such acts;[35] that no discriminatory intent is required;[36] and that finally also gender-specific crimes such as rape were specifically included in the Statute.[37]

3) War Crimes

a) Non-international armed conflicts

As mentioned, the definitions of war crimes are to some extent more problematic. Yet, it cannot be overstressed that the major achievement to be perceived in that regard lies in the fact that, first the scope of application of the war-crimes provisions applicable in non-international armed conflicts by now also extends to armed conflicts between various armed groups,[38] thus extending far beyond the rather restrictive threshold clause contained in Article 1 of the Second Additional Protocol of 1977.[39] Second, the list of war crimes to be possibly committed in such types of armed conflicts is much longer and detailed than the list of prohibited acts as contained in the Second Additional Protocol of 1977, let alone common Article 3 of the four Geneva Conventions of 1949.[40]

35 Already Art. 3 of the ICTR Statute did not contain such a requirement. *See also* The Prosecutor v. Akayesu, Case No. ICTR-96-4, 2 Sept. 1998, at para. 579; and The Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, 21 May 1999, at para. 123.

36 The only exception contained in Art. 7(1)(h), as further defined in Art. 7(2)(g) of the Rome Statute concerns the crime of persecution; *cf.*, *e.g.*, Art. 6(c) of the Nuremberg Statute.

37 *See* Art. 7(1)(g) of the Rome Statute.

38 *See* in that regard the threshold clause contained in Art. 8(2)(f) of the Rome Statute, whereby war crimes in non-international armed conflict may be committed in "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" [emphasis added]. Once again this definition is based on the previous jurisprudence of the ICTY, *see* A. Zimmermann, Art. 8, marginal note 333, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

39 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 *U.N.T.S.* 609.

The relevant part of Art. 1, para. 1 of Protocol II reads: "1. This Protocol … shall apply to all armed conflicts … 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".

40 The sole exceptions where the list of war crimes to be committed in international and those to be committed in non-international armed conflicts do not match or relate to Art. 8(2)(b), (ii), (iv), (v), (vi), (vii), (xiv), (xv-xxi), (xxiii), (xxv) of the Rome Statute.

b) International armed conflicts

(1) Grave breaches of the four Geneva Conventions

With regard to the list of war crimes relating to international armed conflicts, it is first important to note that certain parts, namely those relating to the grave breaches provisions of the four Geneva Conventions of 1949[41] have proved to be unproblematic. This is due, not the least, to the fact that their customary law character has by now been confirmed, if ever there was need, by both the rich and detailed jurisprudence of the ICTY[42] and the Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons.*[43]

(2) Other serious violations of the laws and customs of war

(α) General remarks

With regard to other forms of war crimes, it has to be first noted that the drafters of the Rome Statute deliberately decided, given the fact that at the time of the negotiations a significant number of States, then including France and the United Kingdom (both of which have however since then become parties of the First Additional Protocol[44]) were not yet party to the First Additional Protocol of 1977, not to include at least *tel quel*, the further violations of international humanitarian law which had been made grave breaches under said Protocol.[45] Instead, on many occasions, provisions from the 1907 Hague Regulations were used, even where the First Additional Protocol of 1977 contained almost identical norms, thereby once again

41 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 (Geneva I), 75 *U.N.T.S.* 31, Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 (Geneva II), 75 *U.N.T.S.* 85, Art. 51; Geneva Convention relative to the Treatment of Prisoners of War, 1949 (Geneva III), 75 *U.N.T.S.* 135, Art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (Geneva IV), 75 *U.N.T.S.* 287, Art. 147.

42 For an overview of the jurisprudence of the ICTY *see* the annual surveys in the German Yearbook of International Law, as well as *e.g.*, R.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 3 *et seq*. (2nd ed., 2000).

43 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, [1996] *I.C.J. Rep*. 66 *et seq*. (82).

44 *See* the list of States parties available at: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

45 This compromise was reached, in particular, at an informal meeting of NATO member States held in Bonn under the auspices of the German Government in between two sessions of the Preparatory Commission.

demonstrating a firm intention of the drafters to stay within the realm of customary international law.

On the other hand, it has to be also noted that certain norms do reflect language from the First Additional Protocol, albeit sometimes with certain nuances and modifications.[46] In that regard it has to be also noted, however, that at least to a large extent the development and current status of customary international law is at least by now, certain exceptions notwithstanding, reflected in the First Additional Protocol, given not the least the very high number of ratifications thereof[47] – a development also reflected in the fact that the content of the customary international law study undertaken by the International Committee of the Red Cross to a large extent parallels the content of the prohibitions contained in the First Additional Protocol.[48]

Besides, again taking into account the post-Rome State practice, one wonders whether certain States, including Israel and the United States which, at least until the Rome conference might have been considered persistent objectors *vis-à-vi*s the whole content of the First Additional Protocol,[49] have not lost that status with regard to those parts of the First Additional Protocol which have been included in the Rome Statute due to the fact that both States had either signed the Rome Statute, or by having at least implicitly accepted Security Council resolutions embracing the Rome Statute, or, in the case of the United States, by having themselves made use

[46] *See e.g.*, the provision on the prohibition to undertake an attack in the knowledge that it would cause disproportionate collateral damage to civilians or civilian objects where the word "clearly" and "overall" were added, as compared to the parallel provision in Art. 57 (2)(a)(iii) of the First Additional Protocol (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.* 3).

[47] By now 163 States have ratified the First, and 159 States the Second Additional Protocol.

[48] For a critical analysis of the ICRC study *see* Republican Policy Committee (United States Senate), "Are American Interests being Disserved by the International Committee of the Red Cross?", to be found at: http://rpc.senate.gov/_files/Jun1305ICRCDF.pdf.

[49] It should be noted, however, that the US has signed the First Additional Protocol in 1977 and has, unlike in the case of the Rome Statute (*see* the text of the US note of 6 May 2002 indicating its intent not to become a party of the Rome Statute, U.S. Department of State at: http://www.state.gov/r/pa/prs/ps/2002/9968.htm; for a list of current contracting parties *see supra* note 7) so far, at least not formally, informed the depositary that they do not intent to ratify the treaty. *See also generally* the position of the United States *vis-à-vis* the First Additional Protocol: M. Matheson, "Remarks on The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 *Am. U.J. Int'l L. & Pol'y* 419 *et seq.* (1987).

of the war crimes provisions of the ICC Statute for other purposes such as the adoption of the Statute of the Iraqi Special Tribunal.

It is also worth mentioning that the *chapeau* of Article 8(2)(b) of the Rome Statute dealing with war crimes specifically provides that those rules are to be applied "within the established framework of international law", thereby linking the norms as defined in the Rome Statute to current customary international law.[50]

The most problematic issue of concern for Israel was and continues to be, however, the provision that makes it a war crime coming within the jurisdiction of the ICC to transfer, directly or indirectly, the population or part of the population of an occupying power into occupied territories.[51]

(b) Transfer of population into occupied territory

During the negotiation process the question whether a provision, which would make it a war crime coming within the jurisdiction of the ICC to transfer parts of the population into occupied territories, has proved to be one of the most difficult ones, even more so since the Rome Statute adds the "directly or indirectly"-formula to the text otherwise taken over from the Fourth Geneva Convention. In that regard it has to be first noted, however, that under Article 85(4)(a) of the First Additional Protocol, the establishment of settlers in an occupied territory and changes to the demographic composition of such occupied territories does constitute a grave breach of the Protocol.[52] Besides, it is also worth noting that already under Article 49(6) of the Fourth Geneva Convention to which Israel is a contracting party, such transfer of population is prohibited, albeit not constituting a grave breach of the Convention. Thus at least the customary international law nature of the prohibition as such can no longer be seriously doubted.[53]

The United States, the alignment of which with the Israeli position in Rome was critical with regard to the inclusion of the provision, seem to have by now accepted that this prohibition does indeed constitute a war crime

[50] For a more detailed analysis of that provision *see* M. Cottier, W. Fenrick & A. Zimmermann, Art. 8, marginal notes 20-178, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

[51] *See* Art. 8(2)(b)(viii) of the Rome Statute.

[52] For further analysis *see Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Y. Sandoz, C. Swinarski & B. Zimmermann eds., 1987), marginal notes 3502-3504; as well as *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 517 *et seq.* (M. Bothe, K.-J. Partsch & W. Solf eds., 1982).

[53] *See, inter alia,* H.-P. Gasser, in *Handbook of Humanitarian Law in Armed Conflicts* (D. Fleck ed., 1995), at 241: "... Arts. ... 47 ff. G.C. IV are now seen to be a codification of the rights and duties of the occupying power".

under customary international law. *Inter alia* one may refer to the Statute of the Iraqi Special Tribunal. Under this Statute the following act is a war crime, namely:

> … the transfer, directly or indirectly, by the Government of Iraq or any of its instrumentalities (including by an instrumentality of the Arab Socialist Ba'ath Party), of parts of its own civilian population into any territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; … .[54]

Similarly, the instrument regulating the subject-matter jurisdiction of the East-Timorese special courts to deal with war crimes committed by Indonesian troops adopted by the then United Nations Transitory Authority for East Timor (UNTAET)[55] also uses the very same formula.[56] It is also worth noting that the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*), making the provisions of the Rome Statute crimes under German domestic criminal law, contains a similar provision.[57] Finally the Security Council, when referring the situation in Darfour to the ICC, by the same token, similarly endorsed the list of war crimes contained in the Rome Statute.

With regard to the direct or indirect-formula, added due to an Egyptian initiative during the Rome conference on behalf of the group of Arab States,[58] one has to take note of the fact that the elements of crimes adopted under Article 9 of the Rome Statute,[59] state that "the term 'transfer' needs to be interpreted in accordance with the relevant provisions of international

54 Art. 13(b), No. 9 of the Statute of the Iraqi Special Tribunal, available at: http://www.cpa-iraq.org/human_rights/Statute.htm; for a more detailed analysis of this Statute *see* Y. Shany, "Does One Size Fit All? Reading the Jurisdictional Provisions of the New Iraqi Special Tribunal Statute in the Light of the Statutes of International Criminal Tribunals", 2 *J. Int'l Crim. Just.* 338 *et seq*. (2004).

55 UNTAET Reg. 2000/15; *see also supra* note 24.

56 *See* Sec. 6(1)(b)(viii) of the UNTAET Reg., *id.*

57 Sec. 8, para. 3, No. 2: "Whoever in connection with an international conflict (...) transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory (...) shall be punished with imprisonment for not less than two years".

58 For further details *see* M. Cottier, Art. 8, marginal note 97, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

59 For a comprehensive analysis of the elements of crimes *see The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (R.S. Lee ed. 2001) (at 158 *et seq*. dealing with the transfer of population); and more specifically with regard to the elements of crimes of the various war crimes provisions K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* 208 *et seq*. (2003).

humanitarian law". Besides, a proposal to add, as part of the elements of crimes, an interpretation under which that formula would cover "inducing, facilitating, participating or helping in any manner in the transfer of civilian population" was clearly rejected.[60] Besides, the authoritative ICRC Commentary on the Fourth Geneva Convention underlines that the very term of transfer as used in Article 49(6) of the Fourth Geneva Convention, which served, as mentioned, as the bedrock of the parallel provision in the Rome Statute, *per se* involves the compulsory movement of persons.[61]

Given this limited interpretation, it is submitted that, notwithstanding the direct and indirect-formula, the provision is indeed in line with current international humanitarian law. Besides, given the very fact that the Court's jurisdiction extends *ratione temporis* solely to offences committed after the treaty has entered into force for the State concerned[62] and further given that any such transfer is not to be considered a continuous violation of the Statute,[63] the Court's jurisdiction would in any case not extend to any settlement activities undertaken before Israel, or any other State the ratification of the Rome Statute of which could bring about the Court's jurisdiction, becomes a contracting party of the Rome Statute.

4) The Rome Statute and the Crime of Aggression

During the Rome conference, maybe the most difficult issues, both politically and legally, had arisen in relation to the definition of the crime of aggression since every discussion relating to the definition of the individual criminal liability for the crime of aggression is necessarily overshadowed by the general debate on the definition of aggression.[65] Besides, the crime of aggression entailed most difficult problems concerning the relationship between the ICC and the Security Council[66] and it is due to the ingenuity of

60 C. Garraway, in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, supra* note 59, at 160.

61 *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 283 (ICRC, J.S. Pictet ed., 1958).

62 *See* Art. 11 of the Rome Statute.

63 *See generally* as to this concept, as developed by various human rights treaty bodies, and, in particular, the European Court of Human Rights, R.C. Pangalangan, Art. 24, marginal note 13, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

64 *See generally* Dörmann, *supra* note 59, at 211 *et seq*.

65 *See* Zimmermann, Art. 5, marginal notes 22-25, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

66 Thus, it is no surprise that Art. 5(2) of the Rome Statute provides that "[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations. For

the then chairman of the whole of the Diplomatic Conference and current President of the ICC, Philippe Kirsch, who came up with the combined *de jure* inclusion and the *de facto* exclusion of the crime of aggression, since while Article 5(1) of the Rome Statute provides that the ICC has jurisdiction over the crime of aggression, it shall only be able to exercise it "once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime".

If one takes a closer look at the discussions both during the Rome Conference and since then, it seems to be clear that the whole issue has become, not the least Germany's attempts during the conference and beforehand notwithstanding,[67] a more or less purely academic question with no real chances that the contracting parties will ever adopt with the necessary 7/8-majority[68] a provision of the crime of aggression. Besides, assuming Israel were a contracting party and further assuming that the Statute had been amended so as to include the crime of aggression, the Court could still not, under Article 121(5) of the Rome Statute, exercise its jurisdiction with regard to alleged acts of aggression unless Israel itself had ratified any such amendment.

IV. ISRAEL'S STATUS AS A NON-CONTRACTING PARTY *VIS-À-VIS* THE INTERNATIONAL CRIMINAL COURT

It seems that, at least for the time being and as long as the conflict in the region has not come to an end, there are few chances, if any, that Israel will soon become a contracting party of the Rome Statute. It is against this background that some remarks as to Israel's status *vis-à-vis* the Statute are warranted.

As a third State not bound by the treaty, Israel has, by virtue of principle of *pacta tertiis nec nocent* as codified in Article 34 of the 1969 Vienna Convention on the Law of Treaties, first of all obviously no obligation whatsoever to cooperate with the Court,[69] unless it were to accept the

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further details *see* A. Zimmermann, Art. 5, marginal notes 27-28, in *Commentary on the Rome Statute of the International Criminal Court*, *supra* note 14.

67 *See* H.-P. Kaul, "Auf dem Weg zum Weltstrafgerichtshof – Verhandlungsstand und Perspektiven" , 45 *Vereinte Nationen* 177 *et seq*., at 178 (1997); H.-P. Kaul, "Durchbruch in Rom – Der Vertrag über den Internationalen Strafgerichtshof", 46 *ibid*., 125 *et seq*., at 128 (1998).

68 *See* Art. 121 containing the formal requirements for an amendment to the Rome Statute entering into force.

69 *See* Art. 86 of the Rome Statute which limits the duty to cooperate with the Court to States Parties and to those States (like the Côte d'Ivoire) which have accepted the Court's

Court's jurisdiction *ad hoc* under Article 12(3) of the Rome Statute, or unless the Security Council were to refer a situation involving Israel to the Court, both scenarios being however of a solely more or less academic nature.

Accordingly, and at least after both the United States and Israel had more or less at the same time indicated their intent not to ratify the Rome Statute[70] thus excluding any obligations arising for a signatory State of the Statute under Article 18(a) of the Vienna Convention on the Law of Treaties, Israel was free to conclude an agreement with the United States under which both States agreed that they would not surrender their respective nationals to the ICC.[71]

Yet, in the unlikely, hypothetical and once again academic event that Israeli citizens were to commit crimes within the jurisdiction of the Court on the territory of a contracting party of the Rome Statute the ICC may, given the unequivocal wording of Article 12(2)(a) of the Statute, undoubtedly exercise its jurisdiction. Such exercise of jurisdiction extending to nationals of a third State, not party to the Statute, namely Israel, may, however, not be construed as a violation of the principle of *pacta tertis nec nocent*, since such exercise of jurisdiction would constitute nothing, but the exercise of the bundled national jurisdiction of the contracting parties, each of which could similarly individually prosecute acts of genocide, crimes against humanity and war crimes even when committed beyond their own national borders.[72]

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jurisdiction *ad hoc*. UN S.C. Res. 1593 (2005) extends this obligation to cooperate with the Court to Sudan and the other non-State actors involved in the conflict, but at the very same time determines that other third States, not party to the Rome Statute, shall not be obliged to cooperate with the Court (*see* operative para. 2 of S.C. Res. 1593 (2005)).

70 The US Declaration dates from 20 May 2002, and the Israeli Declaration from 28 Aug. 2002, *see*:
http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11. n. 3 (Israel) respectively n. 6 (United States).

71 The standard proposed text of Art. 98 agreements concluded by the US can be found at:
http://www.iccnow.org/documents/otherissues/impunityart98/USArticle98Agreement1Aug02.pdf. *See further* as to the non-compatibility of such so-called "Art.98-agreements" with the Rome Statute when concluded by one or more of the parties of the Rome Statute (respectively the obligation of signatory States not to frustrate the object and purpose of the Statute), *e.g.*, J. Crawford, P. Sands & R. Wilde, "Joint Legal Opinion on Bilateral Agreements sought by the US under Article 98 (2)", text to be at:
http://www.iccnow.org/documents/USandICC/BIAs.html.

72 Thus the situation is structurally similar to the European Community (also founded by an international treaty) exercising jurisdiction regarding competition issues *vis-à-vis* third party natural or legal persons such as e.g., US-based companies, even where the behavior took place outside the territory of the member States of the European Community.

Indeed, it was already the International Military Tribunal at Nuremberg which foreshadowed this idea when dealing with the exercise of jurisdiction *vis-à-vis* national of a third State, *i.e.*, Germany, when stating that the Allied powers had done together what each of them could have done individually.

V. CONCLUDING REMARKS

Given the current political situation in the Middle East, the chances that Israel will in the near future become a contracting party of the Rome Statute are rather slim. Besides, given the close political cooperation between the State of Israel and the United States any positive move by Israel *vis-à-vis* the ICC will obviously also be linked to the overall US position concerning the Court. Given recent developments, such as the non-prolongation of UN Security Council Resolutions 1422 (2002) and 1487 (2003), as well as the referral of the Darfour situation to the Court with the implicit agreement of the United States, it seems that the so-far strained relationship between the US and the ICC might over time at least somewhat improve. Besides, time will prove that the Court will solely tackle those situations it was made for, namely to use the word of the preamble "the most serious crimes of concern to the international community as a whole". Indeed the first situations the Court is concerned with demonstrate that the Court is so far on the right track. By the same token, given the principle of complementarity, democratic States which uphold the rule of law, such as *e.g.* Israel and Germany, which would, should the case arise, themselves prosecute perpetrators having committed crimes within the jurisdiction of the Court, should have nothing to fear from an institution such as the International Criminal Court.

SELF-DETERMINATION IN THE 21ST CENTURY – MODERN PERSPECTIVES FOR AN OLD CONCEPT

*By Peter Hilpold**

I. INTRODUCTION

Looking back it can be stated that the 20th century was the era of self-determination. The whole century was characterized by attempts to create new States, dismember old ones and to draw continuously new lines on the world map in the hope to finally carve out the definite boundaries of distinct societies which, taken singularly, should form ideal aggregations of human beings on a certain territory. The unifying bond could be of diverse nature: race, language, culture, a common history or the pursuit of a common national idea. At the same time, however, also the search for the individual identity gets more complex and answers found are of partial nature and restricted durability. The definition of identity is determined by a continuously growing number of elements.[1] Collective identities are overlapping and ever-faster evolving. When taken as the legal and moral foundation for a right to self-determination this concept itself is subject to continuously changing definitions creating unfulfillable hope and unnecessary delusions. In the following it will be shown that the concept of self-determination is an important instrument for change. It is an argumentative tool with an extraordinary capacity to provide legitimacy to calls for modifications of the existing international order. These modifications are in part essential for the survival of the international order; in part, however, they jeopardize the system itself. In the course of the 20th century a complicated system of rules has been carved out that seems to fulfil in a satisfactory way both the aspiration for stability as that for change. Exactly because of the dichotomy of the goals pursued looking out for an inherent fairness[2] of this system will lead to a disappointing result. Towards

* Professor of Public International Law, European Law and Comparative Public Law at the University of Innsbruck (Austria).

1 *See* T. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice", 90 *A.J.I.L.* 359 (1996). There is extensive literature on the difficulties of identifying the identity of a nation. *See, e.g.*, E. Gellner, *Nations and Nationalism* (1983); E.J. Hobsbawm, *Nations and Nationalism Since 1780* (1990); *Nation and Identity in Contemporary Europe* (B. Jenkins *et al.* eds., 1996).

2 With regard to the principle of fairness in international law *see* T. Franck, *The Power of Legitimacy Among Nations* (1990).

the end of this contribution it will be shown, however, that there are ways to overcome this problem. The most important approach consists in fully integrating the right to self-determination in the human rights order created in the second half of the 20th century and making thereby self-determination both point of departure and point of arrival of all endeavours to foster human rights.

II. THE DEVELOPMENT OF THE LAW OF SELF-DETERMINATION

A. The Wilsonian Concept

In the political manifesto, to which the name Woodrow Wilson will always remain associated with, the so-called "Fourteen Points" presented to the US Congress on 8 January 1918, the term "self-determination" is not mentioned. Only more than a month later, on 11 February 1918, again in a speech before the Congress, Wilson made an explicit reference to the principle of self-determination:

> National aspiration must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril. [...] [P]eoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game [...] [A]ll well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.[3]

On the whole, this is a lesson in political expediency where it is hard to state in advance when a claim to self-determination is legitimate or not. In examining this issue the State Community maintains a far-reaching discretion and in any case the adequacy of a behaviour taken in this field will become evident only ex post. If further imprecisions of this statement, e.g., with regard to a possible conflict between the personal and the territorial component of the right to self-determination, are taken into consideration then this lofty new element of change in international law seems to lose altogether its consistency and therefore its relevance. Such a conclusion

[3] 56 *Cong. Rec.* 8671 (11 Feb. 1918), cited according to H. Hannum, "Self-Determination in the Post-Colonial Era", in *Self-Determination – International Perspectives* 12, 13 (D. Clark & R. Williamson eds., 1996).

would, however, surely be too far-reaching. Wilson statement is not a mere tautology but it contains two elements that cannot be simply neglected in accordance with the interpretation of a certain factual situation: the requirement that government be based on the consent of the governed and the interpretation of the principle of self-determination as a peace-creating instrument requiring the ponderation of all interests involved. In this sense, the meaning given by Woodrow Wilson to the concept of self-determination is surprisingly modern and seen from hindsight many struggles carried out under the banner of this concept appear to be based on a misconceived idea of self-determination and an aberration from the original Wilsonian thought.

B. The Aaland Case

That the concept of self-determination is open to wildly diverging interpretations has been demonstrated very impressively by the Aaland Islands case which is often cited as the first step towards the development of the modern law of self-determination. Briefly stated, the question to be solved was the following: Did the Aaland Islands which were inhabited mainly by a people culturally very close to Sweden have the right to secession from the newly constituted State of Finland and to aggregate themselves to Sweden? The Committee of Jurists which had first to deal with this controversy denied the existence of an independent right to self-determination in the form of a right to secession but recourse to the principle of self-determination as a problem-solving device should be possible when national sovereignty has not yet fully been constituted as was purportedly the case with Finland. Taking up this lead, the Commission of Rapporteurs which was subsequently asked to devise a program of action proposed the Salomonic solution to uphold on the one hand Finland's sovereignty and required on the other hand this country to grant a meaningful autonomy to the Aaland Islands.[4] By this carefully built approach an ingenious balancing of interests could be achieved to which the concept of self-determination provides the aura of international legitimacy. In this sense, it could even be argued that the principle of self-determination also benefited from the fact that reliance has been made on it in this case as it gained the status of a successful problem-solving device where such hotly disputed matters as territorial conflicts with a nationalist background were at issue.

[4] *See* T. Modeen, "Aaland Islands", 1 *Encyclopedia of Public International Law (E.P.I.L.)* 1 (R. Bernhardt ed., 1992); L. Hannikainen & F. Horn, *Autonomy and Demilitarization in International Law: The Aaland Islands in a Changing Europe* (1997); A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal* (1995); J. Crawford, *The Creation of States in International Law* (2nd ed., 2006).

If we ask what the Aaland case can tell us today, two aspects come to mind even though the surrounding legal framework after more than eighty years has, of course, largely changed:

– The concept of self-determination necessarily enters into conflict with traditional international law which derives its essential basis from the existence of sovereign States. Therefore, even those who should deny the concept of self-determination the quality of a right will probably find it easier to accept the concept of self-determination as a guiding principle when sovereignty is in abeyance.[5]

– A further lesson that can be learnt from a careful consideration of this case regards the paramount importance which has to be given to the context of the individual problem if an adequate solution shall be achieved. Again, this tenet can be split into two sub-elements. The first one encompasses a warning against over-generalization from past experience as a specific context rarely repeats itself in history even in its most important elements. The second element refers back to the considerations made above with regard to human rights. If the context is taken seriously and not only in its factual but also in its legal sense, then today central attention has to be given to the human rights issue. Therefore, reliance on self-determination for the primary goal of attaining independent statehood can find no place in international law if this should be detrimental to the specific human rights situation.[6]

Interestingly enough, there is a third element to the Aaland case to which great attention has been given, especially in later times: Reference is made here to the statement according to which minorities, though normally not bearers of the right to self-determination, in altogether exceptional situations can even claim a right to secession as a last resort if they are victims of severe discrimination and oppression.[7]

5 *See* N. Berman, "Sovereignty in Abeyance: Self-Determination and International Law", 7 *Wis. Int'l L. J.* 51, 104 (1988).

6 *See*, with regard to the central importance of human rights considerations in all struggles for self-determination, H. Hannum, "The Right to Self-Determination in the Twenty-First Century", 55 *Wash. & Lee L. Rev.* 773 (1998).

7 With this clarity, this statement can be found only in the report presented by the Commission of Rapporteurs (League of Nations, Report Presented to the Council of the League by the Commission of Rapporteurs, Council Doc. B7/21/68/106, 16 Apr. 1921, at 28). For the Committee of Jurists the consequence of events of this kind was merely to transform a minority issue from a purely internal matter to a matter of international concern. *See* Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion on the Legal Aspects of the Aaland Islands Questions, *L.N. Off. J.*, Special Supp. No. 3, at 5 (Oct. 1920).

C. The Interwar Period

While the concept of self-determination had, at least as an argumentative tool, enormous importance for the conceptualization of the immediate after-war order, once the new order was established, the desirability of change diminished visibly. On the contrary, it can be said that the newly established entities were strongly interested in stability and denying the concept of self-determination the force to change border lines no matter how persuasive the arguments for change should be. This was particularly true for those States which had profited from the changes the First World War had brought about while the losers, especially Germany and Austria, constituted an exception to this rule.

On a political level, the perception for the people in Germany that the concept of self-determination has been a motor for territorial change to their detriment led, in the later years of the interwar period when Germany had become authoritarian while becoming stronger to the conviction that this instrument can also be used in the opposite direction, *i.e.*, to re-acquire territories once lost or even to enlarge this country with territories never possessed before.[8] In this way Germany had grown considerably in size by the year 1939 but alongside this process the concept of self-determination had been tarnished, especially if it were minorities which wanted to take reliance on it to alter the course of national boundaries. This episode nearly caused the death of minority protection for a time after World War II and it allowed the rebirth of self-determination only in a very altered form.

[8] On the tactical way Germany has made reference to the principle of self-determination *see* the contribution by P. Kluke in *Inhalt, Wesen und Gegenwärtige Praktische Bedeutung des Selbstbestimmungsrechts der Völker* 79 *et seq*. (K. Rabl ed., 1964).

D. The UN Experience[9]

At the time the Charter of the United Nations entered into force and for a long time after it was by no means clear what specific role should be attributed to this principle. By the equation of this principle mentioned in Article 1(2) as well as in Article 55 of the Charter with that of sovereign equality of Article 2(1)[10] this concept lost most of its autonomy and justification for existence in its own right. For a long time it was contended that the Charter of the United Nations does not speak of a *right* to self-determination anywhere;[11] in fact the term "principle" is seeming used to refer to a far more generic legal construct[12] which for some did not constitute a legal rule but only a political or moral guideline.[13] In any case, it is widely held that the concept of self-determination has undergone a dramatic development since 1945 and that this development was originally not foreseeable.[14] To say that the views on this concept have changed and that a far-reaching development has occurred may, however, be of no great help as long as the exact contours of this new concept are not defined. In fact, as has been shown in literature, if we do not want this concept to become absolutely futile self-determination – as long as it remains a group related concept – it cannot mean "self-determination for all" in its most radical sense but the implementation of this principle requires a careful ponderation

9 On the contribution of the United Nations to the development of the law of self-determination, there can be found countless studies. Among them, *see especially* for the developments in the first decades: J.L. Kunz, "The Principle of Self-Determination of Peoples", in *Inhalt, Wesen und Gegenwärtige, supra* note 8, at 128; D. Thürer, *Das Selbstbestimmungsrecht der Völker; mit einem Exkurs zur Jurafrage* (1976); M. Pomerance, *Self-Determination in Law and Practice – The New Doctrine in the United Nations* (1982); E. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (1977); A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal* (1995); H. Quane, "The United Nations and the Evolving Right to Self-determination", 47 *I.C.L.Q.* 537 (1998). For a detailed account of the historical background of this contribution *see* E.A. Laing, "The Norm of Self-Determination, 1941-1991", 22 *Cal. W. Int'l L. J.* 209 (1992).

10 This was the interpretation given by H. Kelsen in his first commentary on the law of the United Nations, *The Law of the United Nations* 52 *et seq*. (1951).

11 *See* Kunz, *supra* note 9, at 129.

12 *See*, for a source of more recent times, K.J. Partsch, "Self-Determination", in *United Nations: Law, Policies and Practice* 1171, n. 11 (R. Wolfrum ed., 1995).

13 *Id*. As H. Hannum writes Britain, France and Belgium, the great colonial powers at the end of World War II, would not have adhered to the Charter had this document at that time included a right to self-determination. *See* Hannum, *supra* note 6, at 775.

14 *See, in particular*, R. Higgins, *Problem and Process, International Law and How We Use It* 111 *et seq*. (1994); R. Higgins, "Postmodern Tribalism and the Right to Secession", in *Peoples and Minorities in International Law* 29 (C. Brölmann *et al*. eds., 30).

of all interests involved and, in the end, a political decision to determine which interest should be sacrificed and which should prevail.[15]

As this principle is spelled out in the Charter only in rudimentary form the task to transpose it into a workable concept without falling into arbitrariness seemed almost impossible. Famous, and often cited, is the statement by Sir Ivor Jennings that letting the people decide is ridiculous because someone must first decide who is the people.[16] Practically all the problems associated with this concept are hinted at by these few words: on the one hand further concretization is needed, on the other this implies a risk of abuses and, eventually, of a total relativity of the interpretation.[17]

The identification of the self which should be the bearer of this right *in statu nascendi* stands at the core of the whole issue. If we assume that this "self" is not to be equated with the existing nation-States as Hans Kelsen has suggested then the dimensions of the ensuing disruptive effects have to be determined. Should the term "people" be interpreted in a sociological sense so as to comprise ethnic groups, indigenous peoples or even minorities? How should conflicting claims between these groups be dealt with? Which weight should be given to territorial aspects in the sense that existing territorial delimitations (external and internal boundaries) are a preferential reference point for the identification of a people entitled to self-determination? Is this entitlement of a people to be measured only against its actual consistency or are historic developments also to be taken into consideration? What role should be attributed in this field to past violations of human rights?

15 In this context M. Pomerance ["The United States and Self-Determination: Perspectives on the Wilsonian Conception", 70 *A.J.I.L.* 1, at 26 (1976)] stated eloquently the following: "Unless the 'self' of 'self-determination' is reduced to the individual 'self' of the formula's metaphysical origin, it is necessary to determine which people *are* embraced within the self and which are *not*".

On the problems associated with the implementation of the right to self-determination, *see also* J. Packer, "Considerations on Procedures to Implement the Right to Self-Determination", in *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, Report of the International Conference of Experts held in Barcelona from 21 to 27 Nov. 1998* 149 (UNESCO Division of Human Rights, M.C. van Walt van Praag & O. Seroo eds., 1999).

16 I. Jennings, *The Approach to Self-Government* 56 (1956).

17 *See also* the following statement of Fitzmaurice:

> The initial difficulty is that it is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to become one, for in whom or what would the claim reside?

G. Fitzmaurice, "The Future of Public International Law and the International Legal System in the Circumstances of Today", in *Evolution et Perspectives du Droit International* 233 (*Institut de Droit International*, 1973).

Even if it were possible to find answers to all these questions (and to the many more issues associated with the definition of the "people") it would still be necessary to state what this right entails for its bearers. Here, too, the possible answers cover an extremely wide spectrum, ranging from provisions designed to assure effective participation to a right to secession guaranteeing independent nationhood. The uncharted waters do not end at this point. Once both the bearer of this right and its content are identified it still has to be implemented. As it is known, implementation is often characterized as one of the weakest points of international law, the very Achilles heel in its competition to be recognized as true law.[18]

While this quality can no longer be reasonably denied in this set of norms,[19] it remains uncontested that international law still relies on very particular instruments to become effective. In this context, concepts such as reciprocity, good faith, international reputation and the fear of retorsions or reprisals plays a dominant role.[20] With regard to the right to self-determination the discussion about possible instruments for implementation have concentrated primarily on the most radical tools with particular attention to issues such as the right to self-determination and the use of force while the ordinary, much more subtle ways in which the right to self-determination is or could be implemented on a day-to-day basis have received far less attention. Even if a general theory of implementation could be devised in this field, further questions would immediately arise. In particular, it is not clear whether the act of self-determination is a once-and-for-all-decision or whether it can be repeated in time. Two extreme positions can be discerned in this field: According to representatives of the first, the right to self-determination expires once it has been exercised and it never comes to life again barring new developments that constitute autonomous justifications for such a right. According to the adherents of the other group, the right to self-determination is exercised on a day-to-day basis. Speaking with Ernest Renan[21] we could say in this case that the act of self-determination is repeated continuously by the way of a permanent plebiscite

[18] Brief discussions of these problems can be found in numerous manuals on public international law. *See, e.g.,* O. Kimminich & S. Hobe, *Einführung in das Völkerrecht, A. Francke* 17 *et seq*. (1997). For an extensive elaboration on the compliance problem *see, e.g.,* A.A. Handler Chayes, *The New Sovereignty* (1995).

[19] *See* P. Malanczuk, *Akehurst's Modern Introduction to International Law* 6 (1997), who describes this question as a "moot point".

[20] *See* H. Neuhold, "Die Einhaltung des Völkerrechts in Einer außenpolitischen 'Kosten-Nutzen-Analyse'", 19 *German Y.B. Int'l L.* 317 (1976); H. Neuhold, "The Foreign-Policy 'Cost-Benefit-Analysis' Revisited", 42 *ibid*., 84 (2000).

[21] *See* E. Renan, "Qu'est-ce qu'un Nation?", in *Conference faite en Sorbonne* (11 Mar. 1882).

in which options can be expressed continuously anew for an ever-varying political status. Still further questions pertain to the relationship between the right to self-determination and the principle of democracy.

Over decades, decolonisation has been a core issue for the main UN organs even though the UN Charter is by no means explicit on a relative obligation of the Member States.[22] Of crucial importance was the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly on 14 December 1960,[23] which mentions three forms in which the right to self-determination can be exercised: the establishment of a sovereign and independent State; the free association with an independent State or the integration into an independent State. The option for the association with or the integration into an independent State required special precautions to assure that this decision corresponds to the true will of the population.[24] By the so-called "Friendly-Relations-Declaration"[25] which was passed at a time when the decolonisation process had already reached a good point and its end was more or less foreseeable, the UN Member States reiterated consensually their determination to fight colonialism. In this context, self-determination was presented again mainly as a decolonisation issue.

It shall not be denied that all this criticism against a narrowly defined concept of self-determination (*i.e.*, as an instrument which finds its justification merely in the fight of colonialism) could also be countered to a certain extent. If we view, for example, the international order from the perspective of the year 1960, to limit a right to self-determination to the field of anti-colonialism is not necessarily to be condemned as there can hardly be discerned a higher ranking principle inherent to the structure of international law imposing the development of a generally applicable right to self-

22 *See* Partsch, *supra* note 12, at 1173. According to Pomerance, the creation of the "New UN Law of Self-Determination" was the expression of "an attempt to revise the Charter in a binding manner"; *supra* note 11, at 11.

23 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), 15 *UN GAOR*, Supp. (No. 16) at 66, UN Doc. A/4684 (1960).

24 *See* Principle IX(b) of Res. 1514 (XV), *ibid.*:

> The integration should be the result of the freely expressed wishes of the territory´s people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

25 Declaration on Principles of International Law Governing Friendly Relations and Co-Operation between States, UN G..A. Res. 2625 (XXV) (1970), repr. in 9 *I.L.M.* 1292 (1970).

determination. The most important cases in this regard were those of Western Sahara and of East Timor.

a) With regard to Western Sahara, a Spanish colony up to the year 1975, the UN General Assembly, the Security Council and the International Court of Justice have clearly and consistently qualified this problem as one of decolonisation and pointed out that the population of this territory has the right to self-determination to be exercised through a free and fair referendum.[26] Nonetheless, Morocco and in the first years also Mauritania have blatantly ignored the will of the International Community by occupying this territory with force. When Mauritania in 1979 could no longer afford the war against the liberalisation army POLISARIO, it withdrew from the occupied territories renouncing all territorial claims. The abandoned territories were immediately occupied by Morocco. A strong UN involvement with the agreement of a cease-fire, the deployment of peacekeeping troops and various plans for a referendum that would implement the right to self-determination followed. While the cease-fire and the peacekeeping troops helped, in the end, to stabilize the factual Moroccan control on the Western Sahara, it was not possible to agree on a concrete plan for a referendum as there was no consensus on the identification of eligible voters.[27] It could be sustained that the Western Sahara conflict evidences only the fact that the concept of self-determination is still contradictory and that in contentious cases it is still not possible to identify the "self" in an objective way. It could, however, also be argued that those criteria adopted in other cases of decolonisation to overcome comparable impasses were strangely enough not applied to the Western Sahara case. It is true that a strict orientation on the Spanish census of 1974 would have been a rather approximate approach and unjust in many cases. Of all the possible

[26] *See, in this regard, in particular* Advisory Opinion on Western Sahara, [1975] *I.C.J. Rep*. 68, which insisted on the applicability both of the Declaration on the Granting of Independence to Colonial Countries and Peoples (*supra* note 23), and the principle of self-determination on the Western Sahara question.
With regard to the Western Sahara issue *see, for example*, T. Franck, "The Stealing of the Sahara", 70 *A.J.I.L*. 694 (1976); B.G. Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara", [1998] *African Y.B. Int'l L*. 205; T. Marauhn, "Sahara", 4 *E.P.I.L.* 283 (2000); K. Oellers-Frahm, "Western Sahara (Advisory Opinion)", *ibid*., 1463.

[27] For the POLISARIO the Spanish census of 1974 should have been the basis for the identification of the eligible voters. Morocco, on the other side, insisted on a far larger voting base including numerous individuals who in the meantime have moved from Morocco or Mauritania to the Western Sahara territory. Accepting this request would have made more or less sure that in the referendum to be held a majority would have opted for an integration of Western Sahara into Morocco.

approaches it would have been, however, probably the fairest one and, in any case, it would have been very well in line with the strategy of generalization so typical to the decolonisation process.

b) The second important case where the principles developed during the decolonization process were overtly set aside regards East Timor.[28] The Eastern part of the Timor Island had been under Portuguese control since the later part of the 16th century. After World War II Portugal tried in vain to impede East Timor being set on the list of non-self-governing territories; this happened officially in 1960.[29] From then on, the pressure on Portugal to decolonise East Timor (together with its other colonies) was continuously augmented. Finally, Portugal was confronted with bloody insurgencies in its colonies, a fact which contributed to turmoil in the metropolitan country, too. The revolution in Portugal of 1974 marked the beginning of the definite breakdown of the Portuguese colonial empire. Portugal was, however, not able to complete the decolonisation process of East Timor, as this territory was occupied by Indonesian troops in December 1975. An assembly in Dili, the capital of East Timor, requested its integration into Indonesia. As this request was, however, orchestrated by Indonesia, it was not a valid act of self-determination as required by international law. A bloody war of secession ensued, and the brutality displayed by the Indonesian troops compared to that witnessed only in the worst colonial wars. About a third of the East Timor population died as a direct or an indirect consequence of these acts of oppression.

The position the United Nations has taken in the East Timor case viewed from the perspective of a potential bearer of the right to self-determination, is both daunting and encouraging. It is daunting if we consider that the Security Council required a withdrawal of the Indonesian troops only twice in the immediate aftermath of the Indonesian invasion and has remained

[28] With regard to the East Timor case *see, for example*, R.S. Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression", 7 *Yale J. World Pub. Order* 1 (1980); Ch. Chinkin, "East Timor Moves into the World Court", 4 *E.J.I.L.* 206 (1993); P. Lawrence, "East Timor", II *E.P.I.L.* 3 (1995); P. Hilpold, *Der Osttimor-Fall* (1996); P. Hilpold, "Das Selbstbestimmungsrecht der Völker vor dem IGH – der Osttimor-Fall", 53 *Z.A.O.R.V.* 263 (1998); C. Chinkin, "East Timor: A Failure of Decolonisation", 20 *Australian Y.B. Int'l L.* 35 (1999); D.C. Turack, "Towards Freedom: Human Rights and Self-Determination in East Timor", in *Asia-Pacific J. Hum. Rts. and the Law* 55 (2000/2); C. Drew, "The East Timor Story: International Law on Trial", 12 *E.J.I.L.* 651 (2001).

[29] Transmission of Information Under Article 73e of the Charter, UN G.A Res. 1542 (XV), 15 *UN GAOR*, U.N. Doc. A/RES/1542 (1960).

silent afterwards for a quarter of century.[30] It was daunting also to see that the support in the General Assembly for the right to self-determination of the people of East Timor diminished continuously: From 1975 to 1982 eight Resolutions were adopted which continuously mustered less support. Afterwards, all related efforts were abandoned as it was no longer sure that initiatives of this kind would obtain a majority. This development reflected pure *realpolitik*: For the West Indonesia was economically and militarily an important ally; in the Third World it has long been one of the most important advocates of self-consciousness and self-reliance of the developing countries. In this sense, the East Timor case can be considered a very good example of the fact that in a self-regulating society as the international one issues such as self-determination or human rights are often not considered on their own merits alone – like comparable issues would be treated in national law – but under parallel consideration of various other factors among which national interests rank very high. At the same time, the handling of the East Timor case through the United Nations is, notwithstanding all its shortcomings, also very encouraging. In fact, East Timor has remained on the list of the non-self-governing territories, notwithstanding the dwindling support for this cause in the General Assembly and in the Security Council. Already this fact exercised continuous pressure on Indonesia and guaranteed in a subtle way that this case would not go away. The next important step on the way to a solution of the East Timor question was set by the International Court of Justice in 1995. In this controversy between Portugal and Australia the immediate object was a treaty between Australia and Indonesia on the exploitation of the East Timor continental shelf which, according to Portugal, violated the right to self-determination of the people of East Timor. As it is known, the Portuguese claims were dismissed on procedural grounds but nonetheless the ICJ took the opportunity to confirm *obiter* the right to self-determination of the people of East Timor.[31] This judgement was much criticized because it was considered as not going far enough and in any case left open how the asserted right to self-determination should be implemented. In hindsight, however, the confirmation of this right alone through one of the most authoritative institutions constituted to interpret international law proved to be of great value. In fact, by its finding the ICJ conferred final and undisputable legitimacy to the struggle for self-determination of East Timor, a legitimacy which previously threatened to dwindle as States no longer found it to be politically expedient to sustain the cause of the oppressed. Retrospectively, one may be left to wonder how it

[30] *See East Timor*, UN S.C. Res. 384, *UN SCOR*, 30th Sess., 22 Dec. 1975, at 10 and S.C. Res. 389, *UN SCOR*, 31st Sess., 22 Apr. 1976, at 18.

[31] Case Concerning East Timor, [1995] *I.C.J. Rep*., paras. 31, 37.

was possible that the interest in the cause of East Timor did not totally die out in the two decades from 1975 to 1995. Apart from the activities of Portugal, there was a continuously growing number of NGOs that kept the interest in the East Timor cause alive and which managed to influence public opinion especially in Western democracies thereby indirectly exerting pressure also on the relative governments.[32]

The information the public obtained about the situation in East Timor regarded primarily the mass violation of human rights such as the massacre committed on the participants of a Christian burial ceremony in Dili in 1991. Associated with the fact that the people of East Timor were one of the few people to whom the right to self-determination in a colonial setting had been denied this situation called for action. Shortly after the judgement of the ICJ, in 1996, the attention of public opinion was drawn again to East Timor by the assignment of the Nobel Prize to two representatives of the East Timor cause, Bishop Belo and Mr. José Ramos-Horta. One year later, an unlikely ally for this cause, the South-East-Asian financial crisis, hit and it proved to be, in the end, the final blow for the Indonesian dominance on East Timor. The International Community called to the rescue also of Indonesia could now exert pressure on this country and make aid dependent on the respect of basic human rights – an ideal case to study the efficacy of conditionality.[33]

As it became more and more clear that the disastrous economic and financial crisis of Indonesia was not only due to exogenous factors but also – and perhaps in the first place – to endemic corruption and mismanagement President Suharto, one of the staunchest opponents of more autonomy or outright independence for East Timor had to resign. The ensuing period of transition constituted the most fertile ground for the right to self-determination to be implemented effectively. After terror and coercion, proposals for greater autonomy and the insistence of local leaders on independence an arrangement was finally found – a referendum on the future of this territory would be held on 30 August 1999 under UN control. The

[32] On the important role NGOs are playing in the creation and the implementation of international law, *see, e.g.,* Malanczuk, *supra* note 19, at 96 *et seq*.

[33] On the issue of conditionality *see* various contributions in: *The EU and Human Rights* (P. Alston ed., 1999); P. Hilpold, "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance", 7 *Eur. Foreign Aff. Rev.* 53 (2002); P. Hilpold, "Konditionalität in den Beziehungen zwischen der EU und den AKP-Staaten: Menschenrechte, Demokratie, Rechtsstaatlichkeit und verantwortungsvolle Regierungsführung", 5 *Z.E.S.* 239 (2002). Recent econometric studies have, however, shown that human rights conditionality plays still a rather small role in the allocation of aid, especially because aid is usually made dependent from a variety of factors. *See* E. Neumayer, "Is Respect for Human Rights Rewarded? An Analysis of Total Bilateral and Multilateral Aid Flows", 25 *Hum. Rts. Q*. 510 (2003).

ballot which was considered to be fair by international observers resulted in an overwhelming majority for the independence option. This result led to violent action by pro-Indonesian groups and to a chaotic situation the Indonesian forces could no longer control so that the Security Council had to authorize the intervention of multilateral forces to restore order. This task was achieved and though the final struggle was again enormously costly in terms of lives and material damage, the option for independence could no longer be reversed. East Timor became independent on 20 May 2002 and is therefore the 192nd State.

For many years it seemed that the International Community would become more and more willing to accept the annexation of East Timor by Indonesia. Though such an annexation was already contrary to international law as it existed before World War II (Stimson Doctrine), the Indonesian government had been prudent enough to arrange for a fake act of self-determination in 1976 which resulted in a request for integration. Most striking was the fact that, looking at the behaviour of the UN Members in the General Assembly or in the Security Council, the passage of time seemed to heal the original sin of an unlawful territorial acquisition, a fundamental challenge to basic values of modern International Law. It was the International Court of Justice which, in albeit timid language and form, deferential to State sovereignty, inadvertently set a deadly blow to Indonesia hope in this field. The affirmation of a right does not yet equal, however, its implementation. The danger was real that again the passing of time would operate against the East Timor people and that their claim for self-determination would weaken as over the years, a new factual situation becomes reality.[34]

III. SELF-DETERMINATION AND HUMAN RIGHTS

In the 60s of the 20th century, it was not yet clear whether the decolonisation struggle could be won fully and whether this would be possible in an acceptable period of time. Only a short time after the UN Charter entered into force, in an era loaded with moral rhetoric, a fierce struggle between three systems (the Western capitalist, the Eastern socialist and the "third way" of the developing countries for economic and politic leadership) commenced and it soon became clear that the Western bloc was most vulnerable with regard to their colonial empires. A second field where Western democracies were purportedly inferior regarded the treatment of

[34] This could be seen as the result of the "normative power of facts" or as an extinctive prescription. *See, in this context*, C.A. Fleischhauer, "Prescription", 3 *E.P.I.L.* 1105 (1997).

their minorities: While the so-called class free systems in the East were able to define this problem away, the Western democracies were accused of exacerbating the disadvantaged position of minorities through their systematic exclusion from all decision processes made possible through the strict application of the majority rule. A formally liberal decision rule could therefore lead, so it was said, to the permanent exclusion of sizeable groups of society from political participation. In the Cold War between East and West where the Third World more often than not sided with the East, the insistence on a rapid decolonisation and on the introduction of wide-ranging minority rights became political demands towards which the West was ill-at-ease. In this all-out-struggle between the blocs, the call for self-determination to be recognized as an autonomous right was not only a tool to further the interests of the people in non-self-governing territories but it became also a powerful mechanism to weaken the West and this instrument was employed on all possible levels. The endeavours to build up a solid set of instruments for the international protection of human rights opened an additional forum in which this struggle could again take place. While the existence of large common ground between the blocs on the human rights issue can, of course, not be denied, the creation of new rules whose essence was the restriction of governmental behaviour could, at the same time, exercise unforeseeable influence on the final shape of the obliged governments' societal orders. The human rights issue was therefore a natural field of competition between East and West and North and South, a competition which regarded, in a positive perspective, the moral leadership in the creation of a new international order and, in a more sober sight, the attempt to secure the eventual prevalence of a certain societal system. In view of such colliding and functionally similar interests, a common regulatory system could be nothing other than a package deal, a compromise from which each antagonist party had both to hope and to fear. The insertion of a right to self-determination through the equally-worded Article 1 of the two International Human Rights Covenants of 1966 [International Covenant on Economic and Social Rights (ICESCR)[35] and International Covenant on Civil and Political Rights (ICCPR)[36]] was a concession by the Western States, a concession largely rewarded, for example, in the field of civil rights.

If we have recourse to the historic circumstances under which the two human rights Covenants have been created, some insight into the meaning of the two Articles 1 can be gained. The *travaux preparatoires* evidence that

35 999 *U.N.T.S.* 171.
36 993 *U.N.T.S.* 3.

the term "peoples" should primarily apply to peoples in colonial countries taken as a whole. This wholistic approach meant furthermore that in principle self-government should be granted to a people territorially delimitated by the colonial boundaries (*uti possidetis* principle) and that a right to secession was to be excluded. It is, however, known that the historic roots of an international treaty are only of subsidiary importance for its interpretation[37] though in practice this rule is not always obeyed. Primarily the interpreter should adopt a textual, objective approach.[38] Does this mean that the concept of self-determination has in any case to keep its importance after the decolonisation process has come more or less to an end as there is no textual restriction of self-determination to the colonial area? This would surely be a mistaken view. A concept that has fulfilled its role has not to be kept artificially alive only because it is written neutrally into a treaty and because it is suited for different interpretations which may still be of importance in present days. A rule can become obsolete if the parties to a treaty into which it is written consensually no longer want to stick to it. With regard to the common Article 1 of the two UN Covenants this has, however, not been the case. It may have been the flexibility and the adaptability of the concept of self-determination that prompted interpreters continuously anew to give a new meaning to self-determination in postcolonial times. In recent times, the concept of self-determination seems to have become acceptable in its new "free-standing meaning" also for the State Community though it regularly remains couched in a tortuous wording which acts as a strongly restricting factor.

How is the relationship between self-determination and human rights exactly to be defined in present day? In its General Comment No. 12 of 1984, the Human Rights Committee interpreted the right to self-determination primarily as an "essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This is an absolutely traditional perspective and can well be brought into line with the original function the right to self-determination was intended to have: For countries under colonial domination or foreign rule it was of pivotal importance to exercise first their right to self-determination in order to later improve the human rights situation. Though not even here the relationship between the concept of self-determination and human rights was strictly linear in the sense that the human rights issue should be tackled even while foreign rule prevails, logically, a certain priority for self-determination can be assumed in order to

[37] *See* Art. 32 of the Vienna Convention on the Law of Treaties, 1969, 1155 *U.N.T.S.* 331.
[38] *See* I. Brownlie, *Principles of Public International Law* 604 (2003).

be able to address the human rights issue effectively afterwards. Once colonial or foreign dominance is no more an issue, the question arises as to what sort of relationship shall exist between the newly defined concept of self-determination and human rights. In this situation it is much more difficult to treat the right to self-determination as a precondition for the full respect of human rights as long as the essence of this right remains unclear under so many aspects. As the concept of self-determination is not fully self-explanatory but seems to need further integration from related institutes other approaches have been suggested to devise a meaningfully structured relationship between this concept and the field of human rights. One author, Antonio Cassese[39] tried to describe this relationship in the context of the ICCPR in an inverted perspective. According to him, self-determination "presupposes freedom of opinion and expression (Article 21), the freedom of association (Article 22), the right to vote (Article 25 (b)), and more generally the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25(a)). Whenever these rights are recognized for individuals, the people as a whole enjoy the right of internal (political) self-determination; whenever these rights are trampled upon, the right of the people to self-determination is infringed".

In this way, the concept of self-determination becomes the mirror image of the human rights situation in that area of the public sector that in a large sense is commonly associated with the political life of a society. Self-determination understood in this sense would largely be coterminous with what has been called internal self-determination. While the concept of external self-determination refers primarily to the rights of a people as a whole with respect to other peoples – thereby including the discussion about the much disputed "right to secession" – the right to internal self-determination refers to the interior structure of a people's society and concentrates on the question of whether all elements of a society can effectively participate in a meaningful political process. Here, advanced participatory forms of democratic government come into play. Even if the concept of self-determination, understood in this way, is defined in its content only by reference to other rights also mentioned in the Covenants it does not become superfluous. In fact, the whole is more than the sum of its parts and by reciprocally integrating the various rights mentioned to a new right of a prestigious though not fully transparent pedigree the single elements of this new concept could gain in terms of enforceability. There are various other attempts to give a new meaning to the relationship between the

[39] A. Cassese, "The Self-Determination of Peoples", in *The International Bill of Rights* 92, 97 (L. Henkin ed., 1981).

right to self-determination and human rights. It has been said that starting from the assumption that the right to self-determination nowadays, *i.e.*, in a post-colonial setting, applies to all peoples in all situations where they are subject to oppression in the form of subjugation, domination and exploitation by others the human rights approach opens a formidable avenue to find a balanced solution sensitive to all interests involved.[40] In fact, it is known that a great part of human rights can be restricted and limited and thereby adapted to competing needs. The particular value of this approach consists of the fact that it can help to overcome some of the main defects of the right to self-determination as it has been understood in the past. This is in particular true of situations where there are competing, prima facie irreconcilable claims to self-determination or where there is the risk that an unrestricted exercise of a right to self-determination could lead to an escalation of violence and therefore, to a worsening of the situation. This approach is, therefore, helpful to answer potentially disruptive claims with an instrument that furthers compromise and the search for sustainable solutions.

In fact, the definitorial problem seems to be solved here. True, there is still no universally recognized minority definition in international law[41] but the efforts so far undertaken in this field have yielded results that come very close to such a definition and the main open points pertain to questions that are of no immediate importance for the discussion on the issue of self-determination.[42]

Ulterior evidence suggesting that the concept of self-determination and the protection of minorities are two intimately related subjects can be drawn from a "description" for a people elaborated by an UNESCO Group of

[40] *See* R. McCorquodale, "Self-Determination: A Human Rights Approach", 43 *I.C.L.Q.* 857 (1994).

[41] *See* M.N. Shaw, "The Definition of Minorities in International Law", in *The Protection of Minorities and Human Rights* 1 (Y. Dinstein & M. Tabory eds., 1992); N. Lerner, "The Evolution of Minority Rights in International Law", in *Peoples and Minorities in International Law* (C. Brölmann *et al.* eds., 1993); P. Hilpold, "Minderheitenschutz – Die Definition des Schutzgegenstandes", in *Juristische Ausbildung und Praxis* 203-206 (1992/1993); O. Andrysek, "Report on the Definition of Minorities in International Law: A Problem Still Looking for a Solution", 52 *R.H.D.I.* 321 (1999); Pentassuglia, *Defining "Minority" in International Law: A Critical Appraisal* (2000); P. Hilpold, "Der Schutz der Minderheit in der Minderheit im Völkerrecht", in 1 *Migralex* 3 (2003).

[42] The most important point which is still open regards the question whether the so-called "new minorities" are entitled to protection under traditional minority rights instruments. It seems that a differentiating approach which distinguishes between single rights is the most appropriate one to take regarding the needs of new minorities. *See* P. Hilpold, "Das Problem der neuen Minderheiten im Völkerrecht und im Europarecht", 42 *Archiv des Völkerrechts* 80 (2004).

Experts.[43] The elements which, according to this description, are evidence that a group constitutes a people are the following:
(a) a common historical tradition;
(b) racial or ethnic identity;
(c) cultural homogenity;
(d) linguistic unity;
(e) religious or ideological affinity;
(f) territorial connection;
(g) common economic life.[44]

The conclusions drawn from this apparent resemblance should, however, not be carried too far.[45] Intentionally Articles 1 and 27 of the ICCPR were kept clearly distinct in the structure of the treaty and also from the subsequent treaty practice; a tacit change of this understanding cannot be deduced. On the contrary, States were very careful not to intermingle these concepts.

Among the plethora of documents on the protection of minorities issued by international bodies in particular after the end of the conflict between East and West, there is no one that would grant a right to self-determination to minorities. The norms on the protection of indigenous peoples apparently only form an exception to this rule. It is true that these groups starting with ILO Convention 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries were characterized as "peoples" and that the UN draft Declaration on the Rights of Indigenous Peoples which will probably be adopted in 2004 recognizes an outright "right to self-determination".[46] On the other hand, it has to be kept in mind that this set of norms has been created with the precise understanding that they will not find application outside the limited field they were created for. The norms on the protection of indigenous peoples are typical exceptional norms not suited for analogous application. Therefore, in this special field of human rights the terms "peoples" and "self-determination" have a totally particular meaning which is not of any help for the elucidation of the general meaning of these terms.

[43] *See* International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, convened by UNESCO, Paris, 27-30 Nov. 1989, SH-89/CONF. 602/7. Deliberately this group stopped short of calling the elements of this description in their entirety a definition, thereby making clear that it was neither intended to give a definite answer to this old question nor to block further discussion of it.

[44] *Ibid*., para. 23.

[45] *See*, in this sense, *also* P. Thornberry, "The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism", in *Modern Law of Self-Determination* 101 (C. Tomuschat ed., 1993).

[46] *Id*. *See, furthermore*, P. Hilpold, "Zum Jahr der indigenen Völker - eine Bestandsaufnahme zur Rechtslage", 97 *Z.V.R.* 30, 52 *et seq*. (1998).

This choice of terms could be criticized as equivocal but on the other hand there are also good arguments for a defense. In fact it is known that these peoples are in a very precarious position and that they are facing the imminent risk of losing their cultural identity and disappearing altogether. In this situation only the most powerful instruments and concepts can – perhaps – help to make a difference. On the other hand, exactly because of their weakness and lack of influence indigenous peoples pose no real danger to State sovereignty even if offered a set of qualified instruments of protection otherwise forbidden to "ordinary" minorities. This is especially true if the particular, subjectively and objectively restricted meaning of these concepts can be deduced directly from the instruments containing these provisions.

This exactly this seems to be the case for the right to self-determination which has taken a very particular meaning within the field of indigenous rights.[47] Much emphasis has been given in this article to the need of a contextual reading of the right to self-determination;[48] for the area of indigenous rights context is paramount. In principle it can be said that wherever a right to self-determination is granted to indigenous peoples the meaning of this right has to be found within this specific area of law and the result of this interpretation process cannot lead to an analogous application of this concept outside the field for which it has been formulated.[49] In a more general perspective, however, some elements for the general concept of self-determination can be obtained also from the usage of this term within the field of indigenous rights.

In fact, in a world which is characterized both by the coming up of new groups at an ever-accelerating pace as well as by the willingness to grant due recognition to these new identities, the right to self-determination can hardly be an absolute, exclusive right whereby in the case of conflicting claims

47 *Id*.

48 *See, further*, M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", 43 *I.C.L.Q*. 241, 249 (1994).

49 *See, in particular*, Art. 31 of the Draft United Nations Declaration on the Rights of Indigenous Peoples of 23 Aug. 1993:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

See also Hilpold, "Zum Jahr der indigenen Völker", *supra* note 46, at 52 *et seq.*

winners and losers would result. What is rather needed is an instrument that provides for group accommodation.[50]

IV. IS THERE A RIGHT TO SECESSION?

Outside the specialists' field, the right to self-determination is often equated with the right to secession which is a field of rather marginal importance and of dubious legal credentials. Secession shall here be understood in its narrower, more typical sense excluding the decolonisation process as well as the phenomenon of a consensual dissolution of a country into two or more parts.[51] There can be no doubt that international law, not being the order of a suicide club, in general does not foresee such a right but finds its pre-eminent function in the preservation of the existing States. The decisive question is whether there is an exception to this rule, maybe of more recent date because the international order has undergone a transformation from a State centered law of co-existence to an order which puts the well-being of the ultimate component of the international society, the human being, in the middle of its attention.[52] The existence of such a transformation and – of such an exception – is maintained by a sizeable though not prevailing part of the literature.[53] As a legal basis for this claim[54] the so-called "saving clause"

[50] *See*, for a seminar contribution to this issue, A. Eide, "Protection of Minorities. Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities", UN Doc. E/CN.4/Sub2/1993/34 of 10 Aug. 1993.

[51] The dissolution of Czechoslovakia into the Czech Republic and the Republic of Slovakia in 1993 is a typical example of a consensual dissolution of a country into two parts where it does make little sense to speak of secession as this institute has been created to describe the factual consequences of a struggle in a country drifting apart.

[52] The slogan of the "changing structure of international law" for many has come to design the open, ever-modernizing nature of this legal order. Of pivotal importance in this regard has been W. Friedmann, *The Changing Structure of International Law* (1964).

[53] Of seminal importance has been, in this regard, the contribution by L.C. Buchheit, *Secession – The Legitimacy of Self-Determination* (1978). The procedural model developed by this author to determine in which case access should be given to so-called "remedial self-determination" has heavily influenced great part of later contributions to this issue.

Further authors sustaining the existence of a right to remedial self-determination are, for instance, U.O. Umozurike, *Self-Determination in International Law* (1972); A. Heraclides, *The Self-Determination of Minorities in International Politics* (1978); V. Nanda, "Self-Determination Under International Law. Validity of Claims to Secede", *Case W. Res. J. Int'l L.* 251 (1981); L. Brilmayer, "Secession and Self-Determination. A Territorial Interpretation", *Yale J. Int'l L.* 177 (1991); M.H. Halperin, *Self-Determination in the New World Order* (Washington, D.C., Carnegie Endowment for International Peace, 1992); M. Eisner, "A Procedural Model for the Resolution of Secessionist Disputes", *Harv. Int'l L. J.* 407 (1992/2); L.M. Frankel, "International Law of Secession:

with regard to the provisions on self-determination in the Friendly Relations Declaration of 1970[55] is usually cited. This clause states as follows:

> Nothing in the foregoing paragraph shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

At first glance it seems that from this clause it can be deduced *e contrario* that the territorial integrity or the political unity of a State are not guaranteed if the representation of the whole people without distinction as to race, creed or colour is not given. Interpreted in this way, the right to internal self-determination would have found its definite basis in international law and for those States which do not respect minimum requirements of legitimacy, the menace of secession or dismemberment would be looming. It has, however, been shown in literature that such a reading of this provision is not only in total contrast to actual international practice, but does not stand up to closer scrutiny as an abstract principle neither. First of all, the negative formulation of the clause gives rise to the question of whether an *e contrario* interpretation is admissible when there is no other provision in the whole Declaration warranting it and such an interpretation would actually

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New Rules for a New Era", *Hous. J. Int'l L.* 521 (1992); D. Turp, "Le Droit de Sécession en Droit International Public", 20 *Canadian Y.B. Int'l L.* 24 (1982); F.L. Kirgis, "The Degrees of Self-Determination in the United Nations Era", 88 *A.J.I.L.* 304 (1994); A. Tancredi, *La Secessione nel Diritto Internazionale* (2001).

54 It has to be added that there is also growing philosophical and political scientist literature that maintains the existence of such a right. For various approaches to justify secession from a pre-eminently philosophical and political point of view *see, e.g.*, A.E. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991; D. Philpott, "In Defense of Self-Determination", 105(2) *Etics* 352 (1995); M. Walzer, "The New Tribalism", 39 *Dissent* 164 (1992); W. Kymlicka, "Is Federalism a Viable Alternative to Secession?", in: *Theories of Secession* 111 (P.B. Lehning ed., 1998); U. Schneckener, *Das Recht auf Selbstbestimmung – Ethno-nationale Konflikte und Internationale Politik* (1996); D.L. Horowitz, "Self-Determination: Politics, Philosophy and Law", 36 *Nomos* 421 (1996).

55 *Supra* note 25.

structurally change the declaration with regard to its position towards self-determination.[56]

What is more, even in the case that such a far-reaching scope should be attributed to this clause, it would not demand secession in the cases mentioned above or sustain it through further instruments, but only permit it.[57] On the other, hand there is no international norm prohibiting secession and therefore it is difficult to see an actual need for such a norm. Of course, it would provide legitimacy to such claims and render it easier for other States to intervene in favour of the secessionists but still it would not make much sense to speak about a "right to secession". In a historic interpretation it has been shown that the contorted language of the clause here under examination is due to the conflicting interests between North and South as well as East and West and to a poor drafting process of the Friendly Relations Declaration.[58] The ingenious criterion developed by Buchheit according to which the permissibility of a claim for secession is judged on the basis of an evaluation according to which the internal merits of the claimants' case have to be balanced against the justified concerns of the international community on the basis of a calculation of the disruptive consequences of the situation[59] has heavily influenced a consistent part of the subsequent attempts to come to grips juridically with this factual event and appears still to be unmatched by all attempts of refinement. *De lege lata* this criterion does, however, not seem to be applicable as this would mean widely overrating the means of the international order and also for the foreseeable future a change in this direction appears to be improbable.[60] With very few exceptions, international law is still interpreted and applied decentrally and international controversies are bilateral and dominated by the principle of reciprocity while the objective application of the criterion mentioned would require the establishment of central institutions and create (or presuppose) an *erga omnes* interest in a fair solution of any single secession issue. Beside these technical and structural objections that regard the feasibility of such an evaluation procedure even *de lege ferenda*, there is the more substantial question of whether criteria of this kind are desirable at

56 *See* O. Corten, "A propos d´un désormais 'classique': Le droit à l´autodétermination en dehors des situations de décolonisation, de Théodore Christakis", 32 *Rev. Belge D. Int'l* 329 (1999).

57 *Id.*

58 *See* Cassese, *supra* note 9, at 108 *et seq.*

59 *See* L.C. Buchheit, *Secession – The Legitimacy of Self-Determination* 238 *et seq*. (1978).

60 For a detailed criticism of this approach *see* P. Hilpold, "Sezession und Humanitäre Intervention – Völkerrechtliche Instrumente zur Bewältigung Innerstaatlicher Konflikte?", 54 *Z.A.O.R. V.* 529 (1999).

all. As has been shown in a diverse though related context,[61] the development of criteria to evaluate the legitimacy of a claim is not as such a neutral approach as it implies that the basic question of whether a juridical examination of this issue is possible in principle has already been answered in the affirmative. In fact, usually each criterion is vague enough to open new space for uncertainty and in the end it is far from improbable that an abusive intent is effectively hidden behind a seemingly objective procedure. From a practical viewpoint, even if general consensus could be found for the enactment of such a procedure, its application in specific cases of attempted secessions may be hard to achieve.[62] Of course, as a moral-political criterion for the evaluation of a secession, crisis remedial secession is a valuable argument in what has to be in any case a broad discussion on the search of constructive solutions.[63] But here we are already outside a legal framework, however large it may be defined and it cannot be stated whether the normative framework will ever develop in this direction.[64]

V. THE SO-CALLED "RIGHT TO DEMOCRATIC GOVERNANCE"

As has been shown, the development of human rights has considerably influenced the emancipation of the concept of self-determination from its post-World-War decolonisation roots even though decolonisation has been the foremost motivation for including the right to self-determination into the

61 *See* P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *E.J.I.L.* 437 (2001).

62 *See* O. Schachter, "Micronationalism and Secession", in *Festschrift Bernhardt* 179, 186 (1995), who has written the following on the procedural approach to secession:

> The [...] question is whether an international quasi-judicial process for hearing and mediating separatist demands has a serious chance of acceptance. It may seem naive to think so in the light of the intransigence and the brutalities that we have witnessed in conflicts over secession

63 *See* in this regard the Report of Eide, *supra* note 50. In para. 84, Eide states as follows:

> Only if the representative of the group [living compactly in an administrative unit of the State or dispersed within the territory of a sovereign State] can prove, beyond reasonable doubt, that there is no prospect within the forseeable future that the Government will become representative of the whole people, can it be entitled to demand and to receive support for a quest for independence. If it can be shown that the majority is pursuing a policy of genocide against the group, this must be seen as very strong support for the claim of independence.

The entitlement mentioned by Eide seems to be primarily a political one.

64 *See, in this regard*, Thornberry (*supra* note 45, at 118), who is citing a detailed catalogue of criteria for the recourse to remedial self-determination, stated the following: "Even this cautious and careful account of criteria appears as possibility rather than probability in terms of normative development of general international law".

relevant instruments. But there is a second element common to all these instruments which has contributed to further the idea of self-determination, at least in its internal dimension: As has been noted,[65] it has been a common feature of human rights instruments beginning with the 1948 Universal Declaration of Human Rights and continuing afterwards in various regional and global documents to grant a right to political participation and to periodic and genuine elections.[66] The full potential of these provisions could long not be grasped as their pronounced political connotation made them an ideal subject for ideological controversies inspired by the East-West conflict. The end of this conflict meant that it was necessary to undertake a catch up in this field by which decades lost in the development of these rights had to be made up in a very short period of time. Therefore, in the years 1989/1990 the impression of a pivotal change was created. All these developments could be interpreted as the final confirmation that the long disputed right to internal self-determination was finally established. For some commentators, a "right to democratic governance" was on the horizon[67] but in the meantime some disillusionment has come up as this fundamental change which purportedly at the beginning of the 1990s was on the verge of taking place, a decade later still was far away from having fully materialized. At a closer look, however, it seems that the expectations at the outset may have been exaggerated and the upheaval too abrupt to allow any prediction of the exact direction of further developments in this field while the tendency as such, in the sense of a fundamental change in international relations, was rightly forecasted.

65 *See* G.H. Fox, "Election Monitoring: The International Legal Setting", 19 *Wis. Int'l L. J.* 295 (2002); Hannum, *supra* note 6, at 776; T. Christakis, *Le Droit à l'Autodetermination en Dehors des Situations de Décolonisation* (1999). In German literature the idea of remedial secession has found many followers mainly referring to D. Murswiek, "Offensives und defensives Selbstbestimmungsrecht – Zum Subjekt des Selbstbestimmungsrechts der Völker", 23 *Der Staat* 523 (1984); K. Doehring, "Self-Determination", in *The Charter of the United Nations – A Commentary* 47 (B. Simma ed., 2nd ed., 2002).

66 *Ibid.*, 297 *et seq.*

67 Of fundamental importance was, in this regard, T.M. Franck, "The Emerging Right to Democratic Governance", 86 *A.J.I.L.* 46 (1992). *See further* G.H. Fox, "The Right to Political Participation in International Law", in *A.S.I.L. Proc*. 249 (1992); G.H. Fox, "The Right to Political Participation in International Law", 17 *Yale J. Int'l L*. 539 (1992).
For rather prudent approaches to this issue *see* A. Rosas, "Internal Self-Determination", in *Modern Law of Self-Determination*, *supra* note 45, at 225; J. Salmon, "Internal Aspects of the Right to Self-Determination Towards a Democratic Legitimacy Principle?", *ibid.*, 253.

It has to be kept in mind that democracy is both procedure and substance.[68] The exact mixture that is required by international law is open to discussion and it could happen that a specific situation in a certain moment in time does not correspond to some standards of democracy. It has rightly been said that on the universal level, international law points less at a particular outcome that internal political processes should guarantee than at the genuineness and fairness of the related processes.[69] It is, therefore, possible that the outcome of a formally democratic process may give rise to doubts about the sense of international controls per se as they prove to be ineffective. Should thereby the impression be created that the original development of an international democratic rights movement is dying down or is giving, in any case, totally unsatisfactory results, this impression is wrong. It should rather be attempted to improve the procedural mechanism for the realization of these guarantees. Furthermore, the development of an international right to democratic government cannot do without the requirement of a minimum of substantial content. While there may be a broader spectrum of acceptable solutions, also in accordance with the fact that the circumstances for the application of this principle are widely diverging,[70] it has to be taken care that procedure is not becoming pretext and void in its meaning.[71]

VI. FURTHER DEVELOPMENTS OF THE IDEA OF SELF-DETERMINATION – THE UNIVERSAL PERSPECTIVE

In fact, seen in a broader perspective, on an international scale, the elements furthering the democratization process seem clearly predominating and the recent developments inconclusive as they may appear at first sight, at a

68 *See* J. Crawford, "Democracy and International Law", LXIV *B.Y.B.I.L.* 113 (1994), at 132: "[Democracy] is a procedural principle which embodies a substantive value ...".

69 *See, in this sense*, V. Grado, *Guerre Civili e Terzi Stati* 254 (1998); M. Zambelli, "La démocratie: principe universel et fondamental de l'ordre juridique international?", in *A.J.P./P.J.A.* 667 (2001/6). *See also* M.C. van Walt van Praag, "Self-Determination in a World of Conflict – a Source of Instability or Instrument of Peace?", in *Reflections on Principles and Practice of International Law* 265, 280 (T.D. Gill & W.P. Heere eds., 2000).

70 *See* Reports on Democratization, Supp. UN Doc. A/51/761, 20 Dec. 1996, at 3, para. 4.

71 *See* S. Wheatley, "Democracy in International Law: A European Perspective", 51 *I.C.L.Q.* 225 (2002), referring to the affirmation by the UN Secretary General according to whom democracy is "not a model to be copied but a goal to be attained" (at 235). *See* UN Secretary General, *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, UN Doc. A/52/513, 21 Oct. 1997, at 5, para. 27.

closer look can only confirm this finding. In fact, it may be true that the impetus that could be registered in the years 1989/1990 has calmed down but the flame ignited in those years has not completely died out. Instead, the activities to promote the idea of democracy on a universal level have continued without real interruption and the result was a solidification of the concept as a whole. In the ambit of this process, the protection of human rights, the furthering of the idea of democracy and the general acceptance of the concept of internal self-determination has become ever more interwoven, interdependent and partly even interchangeable. This impression can already be gained if we look at the Declaration adopted at the Human Rights Conference of Vienna in 1993 where we find the following statement:

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.[72]

In this paragraph the most important elements usually associated with the concept of internal self-determination are mentioned but nonetheless the right to self-determination is treated separately, in paragraph 2 and therefore in a more prominent position:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Considered isolately, this provision seems to grant an all-encompassing right to self-determination, both in its external and internal dimension. The following paragraphs, however, evoke a more traditional understanding of the concept of self-determination, mainly concerned with the lot of peoples under colonial or foreign domination and eager to forestall any impairment of the territorial integrity:

[72] A/CONF. 157/23, 17 July 1993, at 8, repr. in 32 *I.L.M.* 1666 (1993).

> Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.
>
> In accordance with the Declaration with the Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

In the decade which has passed since the adoption of this Declaration, the relationship between the concepts of human rights, democracy and internal self-determination has been further strengthened on a universal or nearly universal level in manifold ways.

First of all, the practice of the Human Rights Committee is to be mentioned, according to which in the examination of the State Reports presented on the basis of Article 40 of the ICCPR, Article 1 stating the right to self-determination is to be read in close relation to Article 25 guaranteeing a right to political participation.[73] The record of State Practice anticipating this relationship and therefore giving spontaneous information on the ways the single Member State has fulfilled its obligation to guarantee internal self-determination by the establishment of democratic structures[74] further strengthens this relationship.

Then there are initiatives by single States which resemble on the one hand a grass-roots movement and are, on the other hand, driven by the peer pressure of a handful of States which aspire, for different motives, to assume a leading role in the universal democratization process. One of the most important examples in this regard is the Community of Democracies Conference which took place on June 26-27, 2000 in Warsaw.[75] There, the

[73] *See* Wheathley, *supra* note 71, at 232.

[74] *Ibid*., 231 *et seq*.

[75] This Conference was organized by a Convening Group composed of such diverse countries as Poland, Chile, the Czech Republic, India, the Republic of Korea, Mali and

representatives of 107 countries committed themselves to a democratic path. In particular, they agreed "to intensify coordination and cooperation among their governments to strengthen support for democracy by and within international and regional organizations; to share best practices regarding long-term challenges; to respond to interruption of, and immediate threats to, democratic rule; and to coordinate democracy assistance".[76]

The concluding document of this Conference seems to be singular in the respect that it appears to elevate the concept of democracy to the paramount principle and that it does not even mention human rights. Upon a closer look at the text of this document, however, beneath the surface of ostensibly technical language, the issues of human rights and internal self-determination immediately reappear. In fact, the human rights organizations constitute an ideal forum where efforts in support for democracy can be coordinated. The threats to democratic rule against which the participating States agreed to respond will probably immediately touch upon human rights and participatory rights. Best practices regarding long-term challenges will most likely give pivotal importance to questions of human rights and the building of institutions assuring comprehensive participation of all members of a given society. Most clearly, the interrelatedness of democracy with other concepts and instruments appears in the statement where the participants committed themselves "to encourage international financial institutions and other appropriate economic agencies to consider the benefits of good governance, transparency, rule of law and accountability in their deliberations".[77] As will be shown later on, these elements have acquired central importance in the endeavours of the European Union to identify measures for an effective promotion of human rights and democracy.

Finally, and most importantly, any effort to describe the *status quo* of the purported universal trend towards the establishment of an entitlement to democratic government has to take into account the relevant developments on the UN level. In this context, both the Security Council and the General Assembly have made important contribution to the establishment of a right to democracy. With regard to the activities of the Security Council, there are indications that the support of democracy becomes an autonomous justification for intervention on the basis of Chapter VII of the UN Charter. This has been said to be the case for Resolution 940 (1994) concerning the situation in Haiti although there have also been strong critical voices

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the United States. The importance of this Conference for the promotion and the further development of the notion of democracy is also highlighted by Zambelli, *supra* note 69, at 672.

76 Final Communique of Community of Democracies Conference, para. 8.

77 *Ibid*., para. 8.

pointing at the fact that the Security Council has also on this occasion highlighted the exceptional circumstances of the case.[78] Security Council Resolution 1132 allowing intervention in Sierra Leone to re-establish a democratic order lends itself far more easily to an interpretation according to which the assurance of democracy has become an autonomous goal of the United Nations as the right to intervene is no more derived from the transborder (international) effects of a civil war.[79] For the moment, however, this case still seems to be an isolated one and no clear trend in this new direction can be discerned.[80] The UN General Assembly and the Commission on Human Rights have taken a more pronounced stance in this regard.[81] Thus, the Commission on Human Rights in Resolution 2002/72 of 25 April 2002 affirmed and recognized, *inter alia*,

> – that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, and that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives;
> – that democracy, respect for all human rights, including the right to development, transparent and accountable governance and administration in all sectors of society, and effective participation by civil society are an essential part of the necessary foundations for the realization of social and people-centered sustainable development;
> – that a democratic and equitable international order fosters [also] the full realization of all human rights for all.

These are only a few excerptions of a Declaration designed to evidence the intricate relationship between democracy, human rights and self-determination. In this declaration no clear hierarchy between the values mentioned is perceptible and it is not clear which value should be realized first in order to attain the most effective result. At the present time, each of

78 *See* H. Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung Humanitärer Normen (1997); H.-J. Heintze, "Völkerrecht und Demokratische Staatsordnung. Zur Wiederherstellung der Demokratie in Haiti", in *Verfassung und Recht in Übersee* 6-30 (1996); Zambelli, *supra* note 69, at 672.

79 *Ibid.*, 673.

80 *See, e.g.,* UN S.C. Res. 1497 (2003) authorizing the establishment of a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement.

81 *See, inter alia*, the Comm'n on Human Rights Res. 2001/65 of 25 Apr. 2001 and 2002/72 of 25 Apr. 2002 as well as the UN G.A. Res. 56/151 of 24 Dec. 2001 and 57/213 of 25 Feb. 2003.

these concepts remains still autonomously identifiable and they are satisfying, at least partly, different aspirations.

On the whole, how should Franck's prophetic vision about an emerging right of democracy be judged at a distance of over a decade? While the euphoria engendered by the revolutionary changes of the years 1989/1990 led to somewhat overoptimistic expectations at least with regard to the rhythm the predicted democratization should materialize, it can be said without doubt that the trend as such has been correctly forecasted.[82] The fight for democratic structures is no longer felt to be the special mission of a small group of mostly Western States but a matter of concern for the International Community. In the ambit of this fight, diverse instruments have been created among which the most advanced and trenchant is surely the institute of election monitoring[83] although it cannot be contested that this is still an exceptional instrument.

The cited General Assembly Resolutions are setting the goals far higher. It is true that these principles are still awaiting concretization but aside from that, it is very important that they have been spelled out as this has given further legitimacy and impetus to the universal struggle for more democracy. For the first time in history, the quest for self-determination no longer pits one group of States against the other or try to advance one ideology at the cost of the other but seems to be the result of a universal development and the final result of struggles that have characterized the whole 20th century.

How should these developments be seen in view of the few – but notwithstanding very famous – pronouncements of the International Court of Justice on this issue? As it is known, the ICJ in the *Nicaragua* case[84] has taken the position that for States there is no international obligation to adopt

[82] This is reflected in the number of governments that can be qualified as democratic. While only a decade ago the majority of States was still non-democratic, this has clearly changed in the meantime. It may be difficult to state in singular cases whether a specific government is to be qualified as democratic or not as this judgment is dependent on the definition of a democracy adopted; according to the American perspective 117 States are democratic. *See* http://www.state.gov/g/drl/democ/, cited according to Wheatley, *supra* note 71, at 233, n. 62.

[83] *See, e.g.,* Heintze, *supra* note 78; Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1998); J. Hartland, "The Right to Free Elections – International Election Observation as a Mean Towards Implementation", in *Karel Vasak Amicorum Liber* 243 (1999); G.H. Fox, "Election Monitoring: The International Legal Setting", [2002] *Wis. Int'l L. J.* 295.

[84] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), [1986] *I.C.J. Rep*. 14.

a democratic government, thereby remaining totally coherent with respect to its earlier jurisprudence:[85]

> However the regime in Nicaragua be defined, adherence by a State to any political doctrine does not constitute a violation of customary international law, to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[86]

In this judgment the ICJ identified a merely passive, reactive interest of international law for the internal structure of the single States: Only when the internal structure influences the external behaviour of a State and this behaviour violates basic principles of the international law of co-existence, an internally adopted ideology becomes (indirectly) a matter of concern for international law. This pronouncement was already suitable for criticism at the moment it was issued[87] and at the beginning of the 21st century it seems definitely dated. It seems arguable that the ICJ would now, if confronted again with a similar issue, take a different, and in any case far more differentiated stance which would have to consider, first of all, the revolutionary changes of the years 1989/1990 and the ensuing developments. In light of these events, the pre-existing international legal obligations, in particular those resulting from ICCPR, would also have to be re-interpreted.

VII. THE EUROPEAN PERSPECTIVE

It has already been stated that geographically seen, Europe has always been the focal point for the development of the concept of self-determination:
– It has been one of the most important breeding grounds for the philosophical underpinnings of this concept;
– Europe has been throughout the whole 20th century a central experimental fields for its realization;

85 *See, in particular*, the Western Sahara Case, where the ICJ stated that the variety of existing government structures is, in itself, proof of the lack of an international rule requiring the adoption of a democratic system; s*upra* note 26, in paras. 43-44.

86 *Supra* note 84, at 133, para. 263.

87 As Crawford has pointedly formulated, the self-proclaimed inability of the ICJ to find an "instrument with legal force [...] whereby Nicaragua has committed itself in respect of the principle or methods of holding elections" was due to the fact that it did not look very hard; *supra* note 68, at 121.

– the countries of this region have been the main opponents for the universal application of the right to self-determination and they have made important contributions to the adaptation of this concept to the needs of the 21st century.

To say "Europe" means various regional organizations composed exclusively or predominantly of European States such as the Council of Europe, the CSCE/OSCE or the European Union. Much attention has been given in literature to the contributions of the first two organisations, especially for their activities in the aftermath of the dramatic changes of 1989/1990.[88] The European Community seemed first to approach this issue with some restraint as here competences in the field of human rights were unclear[89] and a Common Foreign Policy in the form of a European Political Cooperation was only in an embryonic stage.[90] In the first years, one of her most important contributions in this field was surely the fixing of "Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union".[91] While a conditional recognition policy is not new in international law[92] the approach chosen by the European Community is exceptional in its reach and thoroughness. It has given a new meaning to the concept of self-determination both in its external and its internal dimensions. With regard to the first dimension, it has taken a basically positive attitude

88 *See, e.g.,* Thornberry, *supra* note 45; Wheatley, *supra* note 71; *Europarat und Menschenrechte* (M. Nowak ed., 1994); H. Klebes, "Demokratieförderung durch den Europarat", in *50 Jahre Europarat* (U. Holtz ed., 2000); E. Klein, "50 Jahre Europarat – Seine Leistungen beim Ausbau des Menschenrechtsschutzes", 39 *A.V.* 121 (2001); *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (W.A. Kemp ed., 2001).

89 On the development of the European Union's human rights policy *see, for example*, *EU Law, Texts, Cases* 363 *et seq.* (P. Craig & G. de Búrca eds., 2003); A.V. Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", 37 *Common Market L. Rev.* 1307 (2000).

90 On the development of the Common Foreign Policy *see, for example*, P.J.G. Kapteyn & P. V. van Themaat, *Introduction to the Law of the European Communities*, 27 *et seq*. (1998). *See also* M. Fouwels, "The European Union´s Common Foreign and Security Policy and Human Rights", 15 *Netherlands Q. Hum. Rts*. 291 (1997).

91 *Repr. in* 4 *E.J.I.L.* 72 (1993). *See* on this subject, *inter alia*, R. Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 4 *E.J.I.L.* 36 (1993); and P. Hilpold, "Die Anerkennung der Neustaaten auf dem Balkan – Konstitutive Theorie, Deklaratorische Theorie und Anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen", 31 *A.V.* 387 (1993).

92 The most notorious case may be Art. 34 of the Berlin Agreement of 1878 in which the recognition of Bulgaria, Montenegro, Romania and Serbia was placed under the condition that religious minorities be protected. On the law of recognition *see* H. Lauterpacht, *Recognition in International Law* (1948); P.K. Menon, *The Law of Recognition in International Law* (1994).

towards acts of secession happening in Europe and has given authority to the *uti possidetis* principle as a criterion for the territorial delimitation of competing "selves" also in Europe. In a long-term perspective, however, the guidelines for the recognition of new States may have even been of major relevance with reference to the issue of internal self-determination. In fact, on the whole, the conditions set for the recognition of new States aimed at stabilizing the recognition seeking countries by imposing on them minimum standards in the field of human rights, democratic government and protection of minorities that would allow for a friction-free integration of these countries in a community of States renowned for its highly developed standard of individual rights.

While the strengthening of the human rights protection within the European Union is a hotly debated issue to which the Member States have only lately tried to give an adequate response by adopting the Charter of Fundamental Rights[93] and by the drafting of a European Constitution[94] the various attempts to promote human rights, democracy and good governance coalesced much earlier into a coherent strategy even if public opinion has taken far less notice of this development.[95] The growing importance of human rights also within the European Union has given further impetus to the consolidation of these endeavours. Put briefly[96] the European Economic Community has recognized early in time that development cooperation policies can be effective only if they take place in an ordered setting of rights. In this context, the EEC has given priority to human rights as the one area of national legal systems where developing countries were least in the position to take recourse to the sovereignty exemption. Step by step the most important development cooperation project of the EEC, the Lomé-Agreements with the ACP countries[97] was transformed into a framework

[93] The Charter of Fundamental Rights was proclaimed on 8 Dec. 2000 on the occasion of the European Council of Nice.

[94] As it is known the attempt of the Italian Presidency to find an agreement for a new European Constitution failed in late 2003. The relative attempts will, however, also continue in the future.

[95] On this issue *see The EU and Human Rights*, *supra* note 33; K. Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (2000); Hilpold, "The Cotonou Agreement", *supra* note 33, at 53-72; P. Hilpold, "Human Rights Clauses in EU-Association Agreements", in *External Economic Relations and Foreign Policy in the European Union* 359 (S.S. Griller & B. Weidel eds., 2002).

[96] For a detailed account of these developments in the European External Relations *see*, *e.g.*, my articles cited in the preceding note.

[97] The first Lomé Agreement (Lomé I) was concluded in 1975. In a five-year rhythm these agreements were further developed. Finally, with the termination of Lomé IV-bis in 2000 the whole human rights approach, which had become highly sophisticated in the meantime, was totally abandoned and substituted by the Cotonou Agreement.

where aid and cooperation was made conditional on the respect of basic human rights. On an even more far-reaching level, human rights based conditionality criterions were also applied for the concession of trade preferences in the ambit of the General System of Trade Preferences (GSP).[98]

Soon, however, it was recognized that a merely reactive system meeting out punishments in the case of violations of commonly agreed human rights principles had its limits and could easily be misunderstood as a new device designed to impose Western standards on formerly dependent countries. Great efforts were therefore undertaken to switch from the so-called "negative" approach to a "positive" one where incentives are given to those countries that respect certain criteria and, therefore, make abuses less probable to happen.[99] This policy change also implied, therefore, a preference for pro-active measures over re-active ones. A further result of the first years of experience with human rights conditionality was the insight that requiring the respect of certain human rights was often pointless if these guarantees were not anchored in a solid legal frame. To use a picture, there had to be a nail where these rights could be fixed and this nail had again to be supported by a broader structure, the legal order as a whole. Therefore, the attempt to devise an effective strategy for conditionality continuously furnished new insights into the prerequisites of human rights protection. One of the most important results of this inquiry consisted in the evidencing of the intimate interdependence between the protection of human rights and the existence of a democratic system.[100] At first glance, this result may appear to be trivial, but at a closer look the consequences were enormous and the ensuing questions were of extraordinary intricateness. What is meant under a democratic system? It is clear that democracy does not consist alone in the application of the majority rule but what further guarantees are required? A closer investigation of this issue reveals very soon that something similar to effective participation is meant here and thereby we come very close to the concept of internal self-determination as described above, even though the European Union development cooperation schemes upon the first look seem to be tailored for more complex and, at the same time, unique situations. Even though in principle a substantial (and not merely a procedural) definition of the concept of democracy was adopted, the European Union

98 *See* P. Hilpold, "Das neue Allgemeine Präferenzschema der EU", in [1996] *Europarecht* 98.

99 On the advantages of ""positive" measures over sanctions, *see* B. Simma *et al.*, "Human Rights Considerations in the Development Co-operation Activities of the EC", in *The EU and Human Rights, supra* note 33, at 578 (with further references).

100 The single steps of this inquiry have been described in my articles cited *supra* note 39.

had to recognize that this concept, when applied to developing countries, had to operate under such different conditions in respect to a European reference situation that this could also have repercussions on the way this concept should be structured in order to achieve the best possible results.

It is perhaps no coincidence that the concept of good governance was first employed by an international financial institution, the World Bank.[101] For a long time the international financial organizations have grappled to identify instruments and concepts that would bring profligate borrowing countries back to the way of stability and growth. Experience has shown that the most detailed and stringent obligations developing countries have had to assume in the ambit of Structural Adjustment Programs in order to continue to be eligible for financial aid remained unsuccessful if no active, committed participation of the respective governments could be achieved. The governments of the borrowing countries should, in other words, be convinced to adopt policies that would prevent the unfolding of a crisis and therefore make adjustment policies superfluous. But what is meant by "good governance"? This concept does not lend itself to an easy explanation and herein lies both the attractivity and danger. In a Communication by the EU Commission to the Council and the European Parliament of 1998[102] good governance is defined as the management of public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law: "It encompasses every aspect of the State's dealing with civil society, its role in establishing a climate conducive to economic and social development and its responsibility for the equitable division of resources". This Communication contains a long list both of aspects of good governance and of goals to be attained by the application of this principle.[103] The nature of the causality is, however, not always

[101] It was precisely the 1989 World Bank Report where this concept was first brought up. *See* Simma, *supra* note 99, at 571-626.

[102] COM (1998) 146 final.

[103] *See*, in this context, the following statement contained in the Communication cited *ibid*.:

> Equity and the primacy of law in the management and allocation of resources call for an independent and accessible judicial system that guarantees all citizens basic access to resources by recognising their right to act against inequalities. In the specific context of governance, this involves establishing a legal and regulatory framework that encourages private enterprise and investment.
>
> The institutional capacity to manage a country's resources effectively in the interests of economic and social development implies an ability to draft, implement and supervise policies addressing the needs of the people. The government and civil society must be able to implement an equitable development model and guarantee the judicious use of all resources in the public interest. Building public and private institutional capacities is vital because it directly determines economic and social development, and especially the effectiveness of development co-operation.

convincing as some goals could easily be qualified also as prerequisites and *vice versa*. Thus it appears to be evident that there is still much to do to clarify this concept so that it can wield the importance some documents try to attribute to it. On the other hand, the attempts of clarification undertaken up to this moment put into evidence that the core understanding of the concept of good governance is strongly related to the prevailing interpretations that are given to the institute of internal self-determination. Both concepts may not be in all aspects synonymous, especially because their exact content is – in both cases – still to be determined and, may be, under certain aspects, continuously in a flow. Both aim, on the other hand, at the fostering of democracy, human rights and the participation of the broadest possible part of the population in the political decision-making processes. The most noticeable difference between them probably lies outside the concepts themselves: It is the way they are politically qualified that distinguishes them most. While the concept of internal self-determination has gained somewhat in reputation, diffidence towards it is still great and the attempt to demand unilaterally that other countries respect this principle will regularly be qualified as interference in internal affairs, however broad the basis in international law may be to justify such a claim. On the other hand, the concept of good governance is relatively new and has been conceived favourably in the ambit of development cooperation. It may therefore be that the European Union (and the international financial institutions where they take recourse to it) can achieve much of what makes internal self-determination through a new concept, that of good governance, encountering thereby far less resistance than along the traditional way. Of course, the concept of good governance will not totally replace that of internal self-determination. It will, also in the future, have its most important field of application in development cooperation. But it can make an important contribution to the realization of a sizeable part of the values self-determination stands for and thereby maybe help to allow for a definite breakthrough in the idea as a whole on an international level.

Transparency, which entails being accountable and organising effective procedures and systems for monitoring the management and allocation of resources, implies that resource management is open to scrutiny and subject to controls. It is both a key factor in establishing trust between the various agents of development and a guarantee of institutional integrity.

Public participation in the decision-making processes concerning the management and allocation of resources. Development without the participation of civil society is inconceivable. Participation calls for the various agents of development to exchange views on major decisions relating to the management and allocation of resources and development programming. This dimension also concerns the scope to be given to private initiative, enterprise and civil society in development.

VIII. CONCLUSIONS

At the end of this study the conviction may have taken hold that the issue of self-determination is a subject where enormous gaps lie between reality and potential developments, between both hopes and fears unleashed since the very creation of this concept and the factual achievements of those who relied on it. In this sense, the "golden age" of self-determination always lies before us, while the past is usually described as a time of missed opportunities and disappointing expectations. Only a few episodes, such as the decolonisation process, stand out in this overall picture while the great challenges still lie ahead. At the same time, care must be taken to make sure that the changes induced by the call for self-determination remain controllable and do not end up in a total disruption of the system. In this sense, self-determination fulfills a catalytic function for all hopes and desires to continuously improve the collective picture of the great social subdivision of mankind in fairly independent entities, the States and, at the same time, it counters fears that change would signify destruction and not merely evolution of the system. Interpreted in this way, the burden of enormous expectations lies in the concept of self-determination. Which direction do these aspirations go and will it be possible to satisfy the concomitant hopes? Before trying to give an answer to these questions we should attempt to summarize briefly the *status quo*. It has been shown that a proper right to self-determination is given to a colonial people against a colonial power and to the people of an occupied territory against the occupying power. On the other hand, a right to secession cannot be derived from international law and – according to the opinion held by this author – this is even true in the case of widespread, massive human rights violations which for some authors give rise to the so-called right to remedial self-determination. This said, it may already seem that a great part of the expectations often associated with the term self-determination have to be disappointed and it is curious to see that notwithstanding this limitations the concept of self-determination is attracting continuously more interest. First of all, it has to be said that in the discussion about self-determination there is much political rhetoric and the accompanying claims for a right are not always supported by a true *opinio juris*. There are perhaps few fields in international law where political and legal elements are so intertwined that political and legal reasoning become nearly inextricable. On the other hand, the strong political overtone of the whole discussion which appears to be inevitable should not be considered a hindrance to an objective confrontation with this issue. In fact, the political element provides the dynamic which may be conducive to the further development of the international community according to a Kantian ideal. The outcome of this discussion is, of course, not foreseeable but as long as

the presence of both elements, the legal and the political one, is openly acknowledged and therefore an abusive recourse to this instrument avoided, the discussion on self-determination is to be welcomed as an instrument to improve the international order according to the values enshrined in the UN Charter such as peace, cooperation, human rights and development. As long as this discussion is conducted on the background of the UN Charter values, self-determination can be transformed into a valuable tool to promote these very values and at the same time the potentially disruptive elements inherent in this concept can be reined in.

The multidimensionality of the discussion on self-determination entails a great advantage: The State Community cannot be neatly divided between advocates and opponents of self-determination but the attitude towards this concept differs in dependence from the specific dimension of self-determination that is at issue. At least under one perspective, each State is always in favour of self-determination, namely insofar as it is considered to be equivalent to State sovereignty. This reciprocally legitimizing and sustaining effect of the various aspects of self-determination operates also along the great dividing line between internal and external self-determination. In view of the overall conceptual unity, the claim for internal self-determination has also benefited from the great legitimacy the concept of external self-determination, or at least some aspects of it, have acquired. Thereby, on the whole, discussion on external self-determination enhances the vitality of the concept as such. In fact, there can be no question that today internal self-determination is the real contentious issue within the broader concept of self-determination and it is here where the future of this concept lies. At first glance, this shifting of the perspective should also imply a profound change of attitude towards the role of States or, respectively, their integrity on the face of demands for change. As explained above, the claim for self-determination has always found many, in part diverging, expressions but on a whole viewed from the very effects of these claims, this concept has been more in support of the integrity of States than a real threat to it.[104] This was mainly due to the fact that the antithesis to State conservation, the right to secession which should counterbalance the interpretation of self-determination as a defense of sovereignty, has essentially remained a chimera, a carrot providing the perspective of change on legal grounds but in reality denying final satisfaction. On the contrary, the recognition of a right to internal self-determination was widely opposed exactly because it was perceived as a challenge to statehood. Popular sovereignty, thought to the end, could also put at the disposal the structure wherein this sovereignty is

[104] *See* Koskenniemi, *supra* note 48, at 251.

exercised. Here again we can see that the line of separation between internal and external self-determination is, at the end, artificial and that paradoxically, it is internal self-determination where the main force for external change resides. On the whole, an increase of importance of internal self-determination as it seems to be in the offing could therefore be interpreted as a development of a potentially disruptive effect. At a closer look, however, it appears that the modern right to internal self-determination, or, more exactly, that aspect of this right that has found international recognition, has radically changed its character; it has been "domesticated" and it is no longer challenging but rather buttressing the international order.

As has been shown in this article, there are many arguments that can be brought forward in support of such a position, especially with reference to the clear tendency to grant ever-broader participatory rights, be that on the basis of international instruments, customary law tendencies or a simple factual practice. Participation exercises a strong force of cohesion and, on the contrary, the denial of participatory rights can lay the roots for a violent expression of dissent and finally to attempts of secession as the case of Yugoslavia has shown. Whether the many elements hinting at an "evolving right to democratic governance" will really materialize an international right to democracy is still not clear. In fact, the existence of a right to democracy seems to imply that we have already attained the best of all possible orders – or are at least close to it if we speak of an "emerging right" – an ideal referring to the more distant future and suggesting that the job is far from being done. Perhaps the ideal never becomes reality but the real goal is less the final attainment of a fixed ideal in the sense of an "end of history" as the continuous strife for the approach to a principle the content of which can be re-adapted over the time. By the adoption of such an approach the attainment of the ideal can be partly anticipated, at least with regard to its procedural component.

What is new, is that the State in this process is partly relegated to an instrumental role. The State and self-determination within this State has become a tool to assist the individual in his search for his actual true identity which can be a mixture of elements taken from home and abroad in varying compositions. According to the individual preferences of the bearers of this right, the result reached may be more or less stable in time. As stability and security are important values for the individual – whether alone or in association with others – there is no danger that such a conception would threaten the existing international order based on sovereign States. Adopting this change in perspective would imply the recognition that the driving force behind self-determination as an instrument of change should not be the will of a mythical group but that of the individual. The group is a mere forum where this will can be better expressed and aggregated. The results of this

ongoing search for self-determination may be perceived as incomplete and in some ways unsatisfactory but this outcome corresponds to a social reality composed of imperfections and representing a continuous "work in progress".

To interpret self-determination that way would also allow for elegantly overcoming the old dilemma described above that consists of how to make it an instrument of human rights protection. As the respective analysis has shown, there is no doubt that the right to self-determination from its very embedding in the two UN Human Rights Covenants fulfills exactly this purpose but, on the other hand, it is still not clear how a group oriented approach should consistently be put at the service of individual rights if there is no consensus on how to define the group and on how to make sure that the formation of a common will within the group sufficiently respects the interests of the individual. If self-determination is, on the contrary, interpreted as a right and attribute of the individual – and it has always been a central tenet of human rights protection that the individual person is the immediate bearer of human rights – then this dilemma could easily be solved. Furthermore, he is not only the object of these protective measures but he is the subject of this entire system in the sense that it is he who decides how and where to exercise these rights. It is still true that the Covenants with regard to the right to self-determination speak of a right of *peoples* and that, therefore, the prime reference should be the collective but international law does only take note of the fact that human society is organised in entities that have to be accepted as a reality. This does not detract from the fact that within these entities a balance has to be struck between individual and collective elements and as a rule in an individualistic order, as the human rights order is, the individual perspective has to prevail. Admittedly, this approach is a very demanding one. It moves away from the easy answers the traditional understanding of the concept of self-determination seemed to provide and leads to partially uncharted waters. Allowing the recourse to violence in cases of actual discrimination or as an instrument of *revanche* for past wrongs a group has suffered would have been a rule easy to understand and of appeal to many, however destructive the consequences were. Interpreting self-determination as a pre-condition to allow the effective exercise of human rights is a far more difficult approach which will yield success only in the longer run. This process comes to a real conclusion as it requires the creation of instruments that permit the individual to defend, live and develop its human dignity in the best possible way and under continuously changing circumstances. The act of self-determination would not lose its group-relatedness as the term "personal" or "individual self-determination" might suggest. In fact, also in a genuinely individualistic rights system the individual defines his identity to a

considerable extent through the group, be that group a social reality or a mere imaginative one. But in any case it is no more the group – or whoever is pretending to act for it – that determines the individual.[105] Interpreted this way, the right to self-determination would become in its structural essence, though not in its content, very similar to the corpus of minority rights.

Adopting this approach could help to bridge the gap between the individualistic and the group-related perspective as it makes clear that these two positions are only two sides of the same coin both of which are evidencing a distinctive characteristic of the concept as a whole and both of which are closely dependent on each other. While the adoption of the still dominant group-oriented approach leads to the inconsistencies described above, switching to the other extreme of an exclusively individual right to self-determination which disregards all group affiliations of the individual would again lead to a practically useless concept. In fact, it is the combination of the two sides that would confer on the right to self-determination the more prominent role in international law it has deserved for a long time but was never able to acquire because of the many uncertainties related to its nature and because of the fears originated by the restrictive perspective adopted in its interpretation.

The right to self-determination would no longer be a strange bedfellow of human rights but a particularly efficient instrument to further them and to create a framework where they could be firmly fixed providing a stable framework from where new challenges could be affronted. It is not yet clear whether this concept will prevail but at the end the true question is not one of terminology but of substance. In other words the International Community has to decide which way it wants to make use of a multifaceted concept that has fulfilled the most diverse functions in the course of history and that has now come into close contact with human rights. The hopes of the past that it could provide a rational criterion for the territorial delimitation of nations have vanished. Now the time has come to decide whether these attempts should further be pursued or whether it would be better to open up new avenues and to transfer this concept definitively in the realm of human rights. Notwithstanding serious periodic setbacks, the idea of human rights is thriving. Now a potential opponent to this concept which in the past has all too often pitted one nation against the other and thereby contributed to large scale human rights abuses could be turned into an important ally.

[105] In this sense, the famous dictum of Judge H. Dillard in his Separate Opinion in the Western Sahara Case (*supra* note 26, at 122), according to which it is for the people to decide over the territory and not for the territory to decide over the people could be paraphrased: It is for the individual to determine collectively the will of the group and not for the group to encroach upon the rights of the individual to implement a higher will.

JUDICIAL DECISIONS

JUDGMENTS OF THE SUPREME COURT OF ISRAEL RELATING TO THE ADMINISTERED TERRITORIES

By Fania Domb[*]

I. H.C. (High Court) 5784/03, Salama *et al*. v. IDF Commander in the West Bank *et al.*

57(6) *Piskei Din* (Reports of the Supreme Court of Israel) 721.
Administrative detention; lawful only if absolutely necessary for imperative security reasons to prevent a future security danger emanating from the detainee; preference of criminal proceedings (if possible) over use of administrative detention; importance of material judicial review by appellate instances; information and evidence presented by security forces should be examined "carefully and scrupulously"; review of the Supreme Court due to the severe infringement of the detainee's human rights caused by an administrative detention; intensity of evidence justifying administrative detention varying with the lapse of time and from original order to extension; obligation of security authorities to take into account any new information relevant to the detention, if obtainable by reasonable means; decisive question being whether the evidence possessed by security authorities points to a danger emanating from the detainee to an extent justifying further detention.

These are three petitions dealing with the question of the legality of the extension of the three petitioners' administrative detention.

The detentions were initially based on administrative detention orders issued by the respondent for a period of six months, which were later extended for additional periods of six months, and the extensions were confirmed by the Military Appeals Court (respondent 2). It follows from the data relating to the petitioners' detentions (as detailed in the judgment) that they were made pursuant to classified evidence pointing to the petitioners' activity in terrorist organization, allegedly creating a danger to the security of the Region.

The main argument set forth by the petitioners against extension of their administrative arrest was that the detention orders should be replaced by

[*] J.S.D.; Senior Lecturer, School of Law, Netanya Academic College (Israel); Associate Editor, *Israel Yearbook on Human Rights* (Y. Dinstein, ed., 1971 -).

regular criminal proceedings, which would enable them to confront the charges against them. Respondent 1 reasoned his refraining from instituting criminal proceedings against the petitioners on the ground that their administrative detention was based mainly on classified information gathered in the course of the investigation by security forces, which is inadmissible in a criminal process.

The petitions were discussed by Barak J.P., who laid down in his judgment several rulings relating to administrative detentions.

*

A. The Normative Framework

1. The authority of the respondent to order administrative detention derives from the Administrative Detentions Order (Temporary Provision) (Judea and Samaria) (No. 1226)-1988 (hereinafter: the Order). According to the Order, the respondent can order an administrative detention if it is absolutely necessary for imperative security reasons. The original detention order should not exceed six months, but the respondent may extend it for additional period of no longer than another six months. A person who is placed in administrative detention must be brought before a judge within 18 days of his detention. The judge may confirm or set aside the detention order or shorten the period of detention. The judge's decision can be appealed to the Military Appeals Court. These procedures apply also to all decisions on extension of the detention period. In proceedings before the Military Appeals Court the detainee has the right to be represented by a lawyer.

2. Indeed, it is preferable to take criminal steps against someone suspected of hostile activity of a security nature, rather than use the procedure of administrative detention.[1] In criminal proceedings the defendant, suspected of terrorist activity or of being an accomplice to such activity, can confront the evidence brought against him, a procedure that is often impossible in administrative proceedings. Yet, for reasons of protecting intelligence sources, it is not always possible to use criminal proceedings.

3. Administrative detention and criminal procedure operate on different and separate plains. The basic premise of administrative detention is the prevention of a future danger to State security or public safety. Administrative detention is not a punitive measure designed to punish acts done in the past, or to replace criminal proceedings. Indeed, it may happen that the authorities are able to collect reliable evidence that would justify an administrative detention while being unable to call witnesses that would

[1] H.C. 7015/02, excerpted in 33 *Israel Y.B. Hum. Rts*. 249 (2003).

testify to what they saw or heard, so that a criminal process is impossible.[2] Therefore, the petitioners' contention that the use of the means of administrative detention should be conditioned on carrying an investigation designed to institute criminal proceedings is untenable.

4. The detention orders under discussion are subject to the rulings delivered by the Court in regard to the Emergency Powers (Detention) Law-1979[3] (applicable in Israel), where the Court held that the purpose of the Law is not only to protect State security, but also to safeguard human dignity and freedom.[4]

Indeed, the aim of the Order is to protect the public's safety and security of the area. Yet, an administrative detention made under the Order severely infringes the freedom of the detained person. Therefore, the Order contains procedures which ensure that this infringement meets legal and constitutional criteria. Such procedures include judicial review over the decision to order an administrative detention or to extend it. The information and evidence presented by the security forces should be examined "carefully and scrupulously".[5] Judicial review over administrative detention is a material one. In the framework of this review, the detainee has the right to legal representation. The Military Court and the Military Appeals Court may question the reliability of the evidence, and not merely examine whether a reasonable authority would decide on the basis of the evidence presented.[6] "Judicial review is an integral component of the legality of an administrative detention order, and of its extension".[7]

5. Furthermore, the respondent's decision to order an administrative detention, or to extend it, is ultimately subject to the supervision of the Supreme Court. Although the Court is not an appealing instance over the judgments of the Military Court or the Military Appeals Court, it nevertheless carries out a judicial review due to the severe infringement of the detainee's human rights caused by an administrative detention. This infringement of human rights is given great weight by the Court when examining the evidential material that led the security authorities to issue an administrative detention order, as well as when examining the decisions of the appellate Military Courts.

6. The need for a proper balance between State security and protection of

2 H.C. 554/81, excerpted in 17 *Israel Y.B. Hum. Rts*. 300 (1987).
3 33 *L.S.I.* (Laws of the State of Israel, English Version) 89.
4 Cr.F.H. 7048/97, excerpted in 30 *Israel Y.B. Hum. Rts*. 340 (2000).
5 A.D.A. 4/94, excerpted *ibid.,* 318.
6 H.C. 4400/98, excerpted in 33 *Israel Y.B. Hum. Rts*. 345 (2003).
7 H.C. 3239/02, excerpted in 34 *Israel Y.B. Hum. Rts*. 307 (2004).

the detainees' human rights finds expression not merely in the existence of judicial review, but also in the method of operation of the security authorities in all that concerns ordering an administrative detention or extending it. This is especially true regarding the evidence upon which a decision for administrative detention is based. In relation to such evidence it has been observed by Mazza J. as follows:

> Information regarding a number of events is not the same as information regarding one isolated event; information from one source is not the same as information gathered from different sources; information based solely on agents and informers is not the same as information which is corroborated by documents obtained through special means by security services or by intelligence.

7. The intensity of the evidence necessary to justify administrative detention could vary with the lapse of time. Evidence that justified the original administrative detention order might not be sufficient to extend that detention; and evidence justifying an extension of administrative detention might be insufficient for a further extension. The security authorities are under obligation to take into account any new information relevant to the detention if it can be obtained by reasonable means. Yet, absence of updated evidence does not by itself prevent extension of a detention and all depends on the circumstances of the case. In any case of administrative detention it should be examined whether the evidence possessed by security authorities points to a danger emanating from the detainee to an extent that justifies his further detention. The factors that should be taken into account are, for example, the severity of the suspicions or the strength of the evidence. There will be cases in which a lack of updated evidence relating to the detainee would be detrimental to the respondent wishing to extend the administrative detention. In such cases, the Court will say that the existing evidence does not justify further extension of administrative detention.

B. From the General to the Specific

1. Whereas the petitions concern extensions of administrative detentions (second and even third), the evidence used for the extensions should be scrupulously examined. The petitioners and their legal representatives appeared before the Court and consented to the exposure of the classified evidence to the Court. The respondent presented to the Court both the evidence that existed at the time of issuing the administrative detention orders, and also additional evidence, collected later. Hence, the Court rejected the petitioners' contention that the security authorities have been negligent in gathering additional evidence against them.

2. In light of all the evidence, the Court (*per* Barak J.P.) found that it was convinced that there was no fault in the respondent's decision to extend the petitioners' administrative detention; nor was there any fault in the decision of the Military Appeals Court confirming these extensions.
3. As for petitioner 1, the Court concurred with the Military Appeals Court's conclusion that the evidence existing nowadays against him is "reliable, complete and consistent", and therefore justified the extension of his detention. In regard to petitioner 2 and petitioner 3, the Court concurred with the Military Appeals Court's opinion that the evidence tying them to terrorist organizations is "very reliable". In respect to petitioner 3, the Military Appeals Court was especially cautious due to the prolonged period of his administrative detention. Nevertheless, it found that "the administrative detention is the only means of neutralizing the danger posed by the appellant". Relying on the evidential material presented to it, the Supreme Court held that there is no ground for its interference in the conclusion of the Military Appeals Court.

Türkel J. and Rivlin J. concurred with the judgment of Barak J.P., so that all three petitions were unanimously dismissed by the Supreme Court.

II. H.C. 316/01, Bakhri v. Israel Film Censorship Council *et al.*

58(1) *Piskei Din* 249.
Prohibition of screening of a documentary film accusing the IDF of committing a massacre and war crimes in Jenin; freedom of expression recognized in Israel as a "supreme right"; includes expression of exceptional, deviant, and infuriating views; falsity of expression not a cause for its restriction; standard for restriction set forth in the "limitations clause" of the Basic Law: Human Dignity and Freedom; proportionality test; "intensity of harm" to feelings test – beyond the level of tolerance in a democratic society; infringement of freedom of expression of the petitioner – not for an "appropriate purpose" and not proportionate; in a conflict between freedom of expression and protection of public feelings, freedom of expression prevails; restriction of freedom of expression possible only in exceptional and extreme cases (such as situations of national crisis or emergency); the injury caused by the film does not reach the "extraordinary extremeness" which may justify the restriction of the freedom of cinematographic expression.

The petitioner is an Arab citizen of Israel, who produced a documentary film entitled "Jenin, Jenin", which related to Operation Defensive Shield, carried

out in April 2002 by the Israeli Defence Forces (IDF) against the terror infrastructure in the Refugee Camp of Jenin on the West Bank.[8] The film severely criticizes the IDF fighting in Jenin, and actually accuses it of committing a massacre and war crimes there.

The petitioner entered the Refugee Camp at the end of the Operation and filmed interviews with Palestinian inhabitants of the Camp and gathered commentaries about the events that took place during the Operation.

In order to put the film into commercial screening, the petitioner needed the approval of the Israel Film Censorship Council, as required by the Film and Stage Ordinance of 1927 (hereinafter: the Ordinance). The Council denied its approval on the following main grounds:

1) It is a false and distorted presentation of events, under cover of documentary truth, which may mislead the public.

2) It is a propaganda film that presents a one-sided version of the events, the position of the side with which Israel is currently in a state of war.

3) It is a film which severely offends the feelings of the public which may mistakenly think that IDF soldiers regularly and systematically commit war crimes; and this is a complete lie, as shown by investigations of the IDF and international bodies.

It was against this decision of the Council that the petition was directed. The petitioner claimed that the decision is unreasonable because it unlawfully violates his constitutional rights to freedom of speech and freedom of expression.

The Court set aside the Council's decision and allowed the screening of the film by a unanimous ruling of all three Justices: Dorner J., Procaccia J. and Grunis J. The judgment of the Court was delivered by Dorner J.

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Dorner J. opened her judgment by presenting the factual background of Operation Defensive Shield, and continued by describing the fighting that took place in Jenin:

8 "Operation Defensive Shield" had been carried out following the terrorist attack that took place on Passover Eve, 27 March 2002, in the dining room of the Park Hotel in Netanya, when a suicide-terrorist blew himself up and killed 19 guests on the spot, 11 of which died later and 160 were injured.

Two days later, the IDF began "Operation Defensive Shield", which was intended to uproot the terrorist infrastructure responsible for the unprecedented wave of terror attacks that had struck Israel. On 3 April 2002, IDF forces entered the Refugee Camp of Jenin, which served as a central base for organizing terror attacks, and from which many suicide bombers had been sent to commit such attacks all over Israel.

> After the civilian population was warned to leave the area, IDF forces engaged in intense house-to-house fighting. This was one of the IDF's most difficult battles in the Territories. Soldiers were fired on from every direction, many explosive charges were put in operation against them and booby-trapped obstacles were placed in their way. Armed Palestinians hid among civilians, a few thousand of which remained in the Camp when the fighting began. These armed men fought from civilian homes and facilities. The IDF attempted to minimize injury to civilians. It did not make use of planes or artillery, but tanks and military helicopters were utilized. After a unit of reserve soldiers was ambushed, it was decided that bulldozers would be used to destroy the houses used for fighting. During the battle in Jenin, 13 IDF soldiers were killed and about 60 were wounded. According to IDF data, the Palestinians suffered 52 dead, half of whom were civilians. Heavy damage was caused to property, and many houses were destroyed, a portion of them completely.

The Report of Human Rights Watch claimed that severe violations of human rights had occurred in the Camp, including denial of medical assistance to the wounded, mass detentions and extensive destruction of civilian property. Nevertheless, the Report repudiated the claim that the IDF had slaughtered residents of the Camp and carried out executions. Amnesty International and the Secretary General of the United Nations released findings similar to those of Human Rights Watch. In response, the IDF released a report that emphasized the restraint it had displayed and its efforts to prevent injury to civilians, despite the harm that these efforts may have caused to its soldiers. The report underscored that medical and humanitarian assistance was offered to the residents of the Camp even during the course of fighting. It also revealed that at least half of the Palestinian dead were terrorist fighters.

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Then Dorner J. started discussing the "*Normative Framework*" of the petition. The main points stated under this heading dealing with the essence of the petition (namely, freedom of expression) may be presented as follows:

1. The freedom of expression is one of the fundamental principles of Israeli democracy, and was recognized in Israeli jurisprudence as a "supreme right", which even serves as a basis for other rights.[9]

2. The meaning of freedom of expression is, first and foremost, that the government may not restrict the voicing and hearing of opinions in public, and it must prevent others from infringing upon that right. The freedom of

[9] The famous *Kol-Ha'am* case, H.C. 73/53, 7 *P.D.* 871.

expression is not only the freedom to express opinions, to write and to present, but also the right "to see and to hear".

3. Nevertheless, freedom of expression is not an absolute right, and in certain cases, the law allows its infringement. A distinction should be made between the very principle of freedom of expression (which extends to all forms of expression, and to all of the means which may be used for conveying expression) and the extent of protection, which is only partial.

4. The fact that an expression is offensive, rude, or grating cannot serve as a reason not to protect it. Freedom of expression was intended to protect not only accepted and popular opinions, expressed under peaceful conditions, but also exceptional, deviant, and infuriating views, expressed in the context of stormy events, in a callous and offensive style.

5. The mere fact that an expression is false does not constitute a cause for the removal of its protection; unlike expressions – such as racist speech – which violate a statutory prohibition, and may be lawfully restricted irrespective of their consequences. Indeed, it was established in jurisprudence that freedom of expression is not concerned with the question whether the expression is true or false. Permitting the restriction of false expressions would grant the authorities the power to determine what is true or false, and to substitute their ideas for the free market of ideas. Freedom of expression includes the freedom to present facts and interpret them, even if they are controversial and many people are sure that the presentation is erroneous and the interpretation is a falsification.

6. The standard for infringement of freedom of expression by an administrative authority is the "limitations clause" in Section 8 of the Basic Law: Human Dignity and Freedom.[10] This standard applies irrespective of whether the freedom of expression is enshrined, fully or partially, in the right to human dignity established by the Basic Law (in which case Section 8 is directly applicable), or not (in which case the limitations clause will apply by analogy or due to general administrative law).

7. The "limitations clause" permits the violation of a right only where the authority to violate that right is granted by statute, the violation is consistent with the values of the State of Israel, and it is made for an appropriate purpose and to the extent not exceeding the required. The last requirement is that of proportionality, which is based on three tests:

(a) adjustment of the measure violating a right to the purpose which the violation is designed to achieve ("suitability test");

[10] Section 8 provides as follows:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for an appropriate purpose, and to an extent no greater than is required, or pursuant to an explicit authorization by a law.

(b) the measure taken is one which violates the right in the most restricted manner ("minimal violation test");
(c) existence of a reasonable relationship between the benefits of the violation and the injury done to the person whose rights are infringed ("relativity test").

These proportionality tests of the "limitation clause" also include the balancing formulae that had been developed in jurisprudence prior to the Basic Law, and that relate to the degree of probability that the exercise of the freedom of expression would harm public interest. In this context, the rule is that freedom of expression may be infringed only when there is a "near certainty" of harm to the public.[11]

Nevertheless, these probability standards are not applicable where an expression causes harm not to public interests but to feelings. In later cases, the test of "intensity of harm" to feelings applies, meaning examination of whether the intensity of harm is beyond the level that is tolerated in a democratic society, which, in turn, has a high "level of tolerance". In the words of Barak J.P.:

> [O]nly a severe injury to feelings justifies restriction of freedom of expression and creation. A democratic society must recognize that a certain "level of tolerance" for offending feelings exists. Only where the extent of injury to feelings exceeds this "level of tolerance" can restrictions on freedom of expression and creation be justified in a democratic society. … The threshold of the "level of tolerance" is particularly high in cases where the injury to feelings is invoked to justify restriction of freedom of speech and creation.[12]

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Dorner J. proceeded to examine "*The Lawfulness of the Council's Decision*", namely, whether the Council's decision, to ban the screening of the film "Jenin, Jenin" (and, consequently, harming freedom of expression) meets the conditions of the "limitation clause". The main points stated under this heading dealing with the essence of the petition (namely, freedom of expression) may be presented as follows.

1. The first condition is that a freedom may only be infringed "by a law", or "pursuant to an explicit authorization by a law". This condition was met in the present case because the Council's decision was made pursuant to the authority vested by Section 4(1) of the Ordinance, which provides that "no

[11] *Kol Ha'am* case, *supra* note 9.
[12] H.C. 5016/96, excerpted in 34 *Israel Y.B. Hum. Rts*. 329, 335 (2004).

screening of a film may be made unless it has been approved for presentation and marked by the Council".

2. As to the condition of "appropriate purpose", the decision of the Council has a clear purpose: exposing the truth. It follows that the Council's decision was designed to protect the public by disallowing false expression and permitting, as the only available expression, what respondents believe to be the truth. The response given by Dorner J. to this reasoning was that:

> The Council, like every other government body, does not have a monopoly over the truth. It was not granted the authority to expose the truth by silencing expressions that members of the Council consider to be lies. In a free and open society, the revelation of the truth is a prerogative of the public, which is exposed to a spectrum of opinions and expression, including false expression.

Relying on American jurisprudence, Dorner J. stressed the significance of application of freedom of expression to controversial matters, such as political matters. This is the case of "Jenin, Jenin", where it is difficult to distinguish between political intentions and factual claims. The Council does not have the authority to restrict ideological or political expressions simply because the government, or part of the public, or even a majority of it, disagrees with the views expressed. According to British case-law, political expression cannot be restricted unless such restrictions are necessary for protection against violence or obscene content; and any attempt to limit criticism of governmental authorities "amounts to political censorship of the most insidious and objectionable kind".

Moreover, the Council's composition and procedure are not suitable for deciding factual controversies. Unlike a court of law, the Council is not competent to rule whether the content of a documentary film is true or false. It follows that the Council's infringement of the freedom of expression was not made for an "appropriate purpose".

3. As stated, the proportionality requirement set forth in the "limitation clause" means that a proportionate decision is one that satisfies the "suitability", "minimal violation" and "relativity" tests.

a) In all that concerns the "suitability" test, the Council believed that prohibiting the screening of the film, and ensuring that the public is not exposed to it, would reduce the danger it posed to public peace and safety. It is clear that the means chosen by the Council – prohibiting the commercial screening of the film in Israel – is not suitable for achieving the purpose of reduction of the public's access to the expression; it rather achieves the opposite. Indeed, subsequent to the Council's decision, both the film and its producer became the focus of public debates and articles in the press.

Moreover, the Council's decision affects only the commercial cinema in Israel. The Council does not have the authority to prohibit screenings in foreign countries or alternate means of viewing the film, such as television broadcasts, home cinemas, or the Internet, where a person can purchase the film for $30. These alternative means are quite able to satisfy commercial demand for the film in Israel. Consequently, the means chosen by the Council did not promote the purpose that it was intended to achieve, and may even have achieved the opposite.

b) The "minimal violation" test was also not satisfied. Prohibiting the screening of a film is not the only means available to the Council. Section 6(2) of the Ordinance provides:

> The Council may allow the presentation of any film, or part of a film … *either under specified conditions or unconditionally*, and it may refrain from allowing the presentation of the film (emphasis added).

In view of this provision, the Council could have made use of a less harmful means. It could have, for example, limited the film to viewers of a certain age, preceded the film with a warning, instructed that certain parts be struck, limited the hours for its viewing, or supplemented the film with a commentary. It seems that the Council was mistaken in not considering such alternate measures. An absolute prohibition of the screening of a film is the most harmful measure that the Council is authorized to take, and it must be a measure of last resort, used only in cases where other measures cannot achieve the desirable purpose.

c) The "relativity" test was also not satisfied because the damage caused by the Council's decision is greater than its benefit.

First, the public is not forced to view the film against its will. This is not a case of a captive audience. The viewers will reach the cinema of their own free choice, pay to view the film with their own money, and it is reasonable that they will even prepare themselves for it mentally.

Second, there is no doubt that the film injures the feelings of many members of the public, including the feelings of the soldiers who took part in the fighting and their families, especially the families of the fallen (respondents 3-32). However, it should not be said that this injury exceeds the bounds of what is tolerated in Israeli democratic society. In the words of Dorner J.:

> An open democratic society, which upholds the freedom of expression because regarding it as capable of promoting the society and not threatening it, should be ready to bear an injury – even a substantial

injury – to the feelings of the public, in the name of the freedom of expression.

4. In protecting freedom of expression, the Court allowed in the past the hanging of notices which condemned government policy in particularly sharp language; the screening of a film that could offend Christian believers by its portrayal of the character of Jesus; the broadcast on television of an allegedly biased documentary film about the events which preceded the assassination of Prime Minister Yitzchak Rabin; the hanging of notices, which condemned in rude and insulting language the head of the opposition party. Also, an especially high level of protection for the freedom of expression was established in relation to the play "Ephraim Goes Back to the Army", which was allowed to be staged despite the fact that it compared the Israeli Military Administration in the Territories to the Nazis. In all those cases, the Court ruled that, despite clear injury to public feelings, freedom of expression requires that the offensive expression not be prohibited. Such is the case in the present petition as well.

5. Respondents relied on H.C. 807/78,[13] where the Court approved the decision of the Council to ban the screening of a documentary film, which claimed that the Arabs of Israel were expelled from their land by the Jews. The Council reasoned its decision on the ground that the film was false and prejudiced, disgraced the State of Israel, weakened its position in the world, and could incite violence. Dorner J. rejected the reliance on this ruling on the ground that "this judgment was delivered in 1979, and since then times have changed, and so has the law". In light of the case-law that followed, this ruling is probably no longer valid.

Concluding her judgment, Dorner J. stated that despite the pain and sorrow of the families of the fallen soldiers, there is no way to escape the result that the Council's decision not to allow the screening of the film unlawfully infringes on the freedom of expression of the petitioner. Therefore, the film "Jenin, Jenin" should be permitted for screening so that the public can judge it by themselves.

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Though Procaccia J. concurred with the opinion of Dorner J., she nevertheless – because of "the significance of the matter" – delivered an opinion of her own.

Procaccia J. agreed that the reason for prohibiting the screening of "Jenin, Jenin" on the ground that it is a false presentation of facts, should be rejected on the ground that issues of truth in expression, including artistic

[13] Excerpted in 12 *Israel Y.B. Hum. Rts*. 304 (1982).

productions, cannot usually constitute a cause for the restriction of freedom of expression, as this freedom is a primary, constitutional right. The Court's case-law had already clearly established the rule that freedom of expression is a fundamental right that applies to even false and distorted expression, the reason being that "in the free flow of information, opinions, ideas and values, the truth will ultimately prevail over lies".

However, Procaccia J. opined that the Council's reason regarding severe injury to the feelings of the public requires special examination, because it constitutes the central issue arising in the petition. In her words:

> Does the content of the film, which presents Israeli soldiers as systematically committing war crimes in Jenin, justify prohibition of the film on the ground of seriously offending the feelings of the public; a public which completely rejects the ideas of the film, sees it as absolutely contrary to the truth, and uprises against the attempt to undermine the images of the IDF and the Israeli society as one founded upon moral values and respect for human life.

Thus the question arising in the petition is whether such substantial injury to the feelings of the public justifies prohibiting the screening of the film; or whether the Council's decision was outside the "zone of reasonability", so that it requires the Court's intervention.

Procaccia J. proceeds to refer to some of the harsh allegations in the film, and to the responses given by the IDF to them. Her conclusion was that the operation was characterized by an effort to reduce, as much as possible, the harm caused to civilians and property. Because of this policy, certain methods of fighting (such as the use of aircraft and artillery) that might have reduced the danger to the soldiers were not employed. It has been confirmed by international investigative bodies that there was no massacre at Jenin. The claims presented by the Palestinian leadership have been proven to be groundless. According to exact data, 52 Palestinians were killed, most of whom were gunmen, who fought against the IDF. Hospitals were not targeted and not damaged, and continued to operate, and were even supplied with water, electricity, and oxygen by the IDF. In all, 257 persons were wounded and transferred to the hospital in the city of Jenin; 60 were transferred to hospitals in Israel. Not a single Palestinian was run over by IDF military vehicles. There is no basis to the claim that IDF soldiers used children and intentionally harmed them. In fact, the terrorists used children to distribute explosives and conduct surveillance. Indeed, property was damaged, but not to the extent alleged by Palestinians. The damage to the houses was necessary due to the fact that terrorists made use of the houses by shooting from them. Some of the houses were even booby-trapped with

explosives. Bulldozers were indeed used to destroy houses but this was done in order to overcome terrorists' resistance. In all cases, innocent civilians were given the option and sufficient time to evacuate their homes.

Turning back to the film, Procaccia J. found it indeed offensive to the feelings of many members of the Israeli public. The documentary presentation of IDF operations as alleged war crimes severely injures the individual soldier, who fought in combat and endangered his life, while remaining committed to humanitarian values. It is damaging to the entire army, which is guided by these values. It is painful for the grieving families. It is offensive to the Israeli public, which identifies itself with the moral and humane image of the State.

Hence, the question arises whether such an injury to the Israeli public (caused by the accusation that the army engaged in inhumane military activities, an accusation that points an accusing finger directly at the moral and ideological image of the Israeli public) justifies restricting freedom of expression. This question leads to that of the limits of freedom of expression in a situation where it causes injury to the feelings of the public; and also to that of whether it is relevant if the injury is caused during times of national crisis or war.

Discussing the question of whether the Council has the authority to restrict freedom of expression, Procaccia J. referred to the Ordinance under which the Council acts. Being a government authority, the Council has to exercise its authority for the purpose for which it was established as may be ascertained from the Ordinance. According to precedents of the Court, the principal purpose of the Ordinance is to prevent the presentation of films which may disturb "public order". The concept of "public order" was in this context broadly interpreted as including "disturbing the public order, whether this disturbance is the result of a criminal act, the result of an immoral act, *or any other act which injures the feelings of the public and its safety*" (emphasis added by Procaccia J.). It follows that the sensitivities of the public are an aspect of public order.[14]

Thus, when deciding whether to permit or prohibit the screening of a film, the Council must place, on the one hand, the principle of freedom of expression, which reflects a constitutional fundamental right and, on the other hand, the need to protect public order (which includes the need to protect the public's feelings), and to strike a balance between them.

As to freedom of expression, its extent has been elaborated in case-law as freedom to voice ideas, opinions, and facts, whether true or distorted, and to

[14] As ruled, among other rulings, in H.C. 5016/96, excerpted in 34 *Israel Y.B. Hum. Rts*. 329 (2004).

see, hear and absorb them. It includes the right to criticize the government. It applies to messages expressed through any means of artistic work, regardless of its nature, content, quality, or truth. It includes the freedom to produce a work which bears a political message, whether it be true or false.

As to the protection of the public's feelings, Procaccia J. opined as follows:

> Protection of the public's feelings – being part of the concept of public safety and order – is important to both the individual and to society in general. Protecting sensitivities is as necessary as protecting a person's body or property, and sometimes even more. It protects one's spiritual property, one's cultural and moral values and his internal truth. It is intended to protect one from the desecration of his most sacred values. Protecting the sensitivities of the public is important, even if the injury causes no more than pain or anger.

Procaccia J. added that "the extent of an injury is not only connected to its content, but also to its timing", meaning that "injury during times of peace is not similar to injury during times of war. In time of emergency, the meaning of the concept of "public order" is likely to be extended, and with it also the extent of the notion of "injury to public feelings" because of the social implications involved, including the national morale.

Turning back to the issue of balancing between the conflicting values involved, of freedom of expression and the need to protect public feelings, Procaccia J. held that they should be balanced by "attributing the proper weight to each of them, according to their nature and the context". The freedom of expression and the need to protect the public's feelings are both fundamental values in the Israeli legal system. As to freedom of expression, the nature of the expression at issue must be considered. On the other hand, the injury to the sensitivities of the public should be evaluated on two levels: its severity and the probability of its occurrence. The severity of the injury must be "harsh, serious, and severe"; and the probability of the injury must reach the degree of "near certainty". In the words of Procaccia J.:

> Given the importance of freedom of expression, only an injury whose intensity is beyond the level of tolerance which people in a democratic society must bear, may justify the restriction of this freedom. As ruled in the past, only an injury which "shakes the very foundations of mutual tolerance" and "undermines basic axioms" so as to harm the nation may be prohibited.

The level of tolerance is not a permanent one, and it may vary from one freedom to another and from one value to another. The level of tolerance for the freedom of expression is a very high one, so that only extensive and exceptional injuries may justify the restriction of that freedom. In a case decided in 1997, the Court (per Mazza J.) adopted an even stricter standard, and held that freedom of expression may be restricted "only if the content of the expression is so severe, and the expected injury to public feelings so incurable, that failing to prohibit it will raise a substantial and present danger of disturbance of public order".

It follows that, as a general rule, in a conflict between freedom of expression and the value of protecting public feelings, freedom of expression prevails; and that only an incurable injury to public feelings, which may lead to a substantial disturbance of public order, may justify restriction of the expression concerned.

A similar constitutional approach to a conflict between freedom of expression and injury to the public's feelings is accepted in western democracies. Under American law, the possibility of restriction of freedom of expression on the ground of injuring the public's feelings is very limited. In England, this possibility is broader, as it is recognized that there are public interests which may justify the restriction of freedom of expression despite the "heavy weight" attached to it. In Australia, freedom of expression is seen as a means of achieving social goals, such as promoting democratic dialogue, rather than as an independent freedom. Australian case-law tends to allow restrictions on the freedom of expression where the injury concerns race, skin color, or ethnic origin. Injury to religious feelings, even a grave one, does not constitute a cause sufficient for restricting freedom of expression.

Procacia J. proceeded by addressing the point of injury during times of emergency and national crisis, and opined that:

> Times of war or national crisis attach greater weight to the public's interest in preserving public order, when this interest is in conflict with freedom of expression. In these situations, the value of protecting the public's feelings also receives special weight, which may deviate the balance between it and freedom of expression in favor of the value of public safety. However, even in such circumstances, a restriction on freedom of expression must be proportionate, meaning that it may not exceed what is necessary to ensure public order.

On this point, it was already ruled in Israel in 1953 in the famous *Kol Ha'am* case[15] *per* Agranat J. that:

> During critical periods, when the country is in a state of war or other national crisis, the matter should be decided in favor of national security. Of course, this depends on the circumstances of each case.

Indeed, times of national crisis may lead to a genuine need to restrict freedom of expression in order to protect public order. Even in the United States, freedom of expression was restricted during times of warfare if the expression could have harmed military discipline (according to the test of "clear and present danger").[16] Similarly, courts in England have recognized the constitutionality of restricting radio and television broadcasts relating to the struggle between England and Northern Ireland.[17]

It follows that a national crisis or emergency, such as an armed struggle, may change the evaluation of the relative importance of the freedom of expression *vis-à-vis* the value of protecting the public's feelings.

Procaccia J. summarizes the standards for balancing freedom of expression and the value of protecting public feelings in the following way:

> Freedom of expression will usually be given a superior status, even where it is used to injure feelings, and even where the injury is substantial. Only in exceptional and extreme cases, where the injury is beyond the level of tolerance which should be borne in a democracy, and where the injury may substantially harm public order and safety, will there be a possibility of a proportionate restriction of the freedom of expression. Situations of national crisis or emergency may be included in those exceptional and extreme cases.

Then Procaccia J. applied the principles set forth in her Concurring Opinion to the merits of the petition. The main conclusions reached by Procaccia J. may be presented as follows:

1. Even if the film "Jenin, Jenin" is one-sided, distorted and fraudulent, the point of departure is that its producers have the right to present it, a right

[15] *Supra* note 9.

[16] Schenk v. United States, 249 *U.S.* 47, 52 (1919); Whitney v. California, 274 *U.S.* 357 (1927). For an analysis of the restriction of the freedom of expression during times of national crisis in the United States, *see* the doctoral dissertation of Prof. P. Lahav, *Freedom of Expression During National Security Crises* (1973).

[17] R. v. Secretary of State for the Home Department, *ex parte Brind*, 1 *A.C.* 696 (H.L. 1991).

that is derived from freedom of expression, considered in Israel as a basic one.

2. Against this right stands the injury which large parts of the Israeli public feel as a result of the film's content. The probability of such an injury to the public's feelings is not a "near certainty", but rather an absolute certainty. Nevertheless, the question still arises of whether, according to the Court's case-law, the injury is of such severity as required for preference of protection of feelings over freedom of expression.

3. In the present circumstances, "although the injury is deep and substantial, it does not reach the high threshold required to restrict freedom of speech". Indeed, the injury is both broad as well as deep. It affects the IDF soldiers that fought in Jenin, their comrades serving in the army, the grieving families of the soldiers who fell in battle, and the Israeli public at large. It is not a "superficial injury, transient, and blowing over like the wind"; it is a real, genuine and harsh injury. Nonetheless, in the words of Procaccia J.:

> [T]he injury does not shake the foundations of human tolerance to the extent that it substantially threatens public order, thereby justifying restriction of freedom of expression.

4. Moreover, despite the fact that the injury is connected to Israel's armed struggle against its enemies, this is not a time of emergency or a severe national crisis that may justify the attribution of decisive weight to the value of protecting public order in general, and injury to the public's feelings in particular.

5. Before prohibiting the screening of the film, the Council should have taken into consideration the following:

a) Fraudulent and distorted presentations of IDF military activities have become part and parcel of the conflict between the two nations.

b) Despite the situation of continuing military operations and ravaging terror, Israel is not in a state of total war or national crisis that requires coping with issues of survival. The times, however stormy, reflect persistent security tensions and local military activities, taking place over a period of years. This reality does not justify infringement of the freedom of expression in order to protect the public's feelings.

c) The injured Israeli public has its own means of expression to present its version of the truth and of the facts. It has its sources of information – the witnesses and the soldiers who took part in the fighting can testify about the truth.

d) Aside from the medium of film, there are additional legal means of expression that can deal with the issues raised by the film, such as

newspapers, radio, and television. Prohibiting the screening of a film means banning this specific means of expression by way of censorship, while other channels of expression remain free and open, even when they contain similar injurious expressions. Moreover, "Jenin, Jenin" itself was prohibited only for commercial screening, and there is a real chance that the public will be exposed to the film on other channels of presentation. This situation actually undermines the effectiveness of the Council's censorship.

6. Examination of the Council's decision to prohibit the film in light of the conditions set out in the "limitations clause" of Section 8 of the Basic Law: Human Dignity and Liberty also leads to the conclusion that the decision is unreasonable. The "limitations clause" reflects the approach of the Israeli legal system regarding the possibility of restriction of freedom of expression on behalf of a public interest. According to the terms of the "limitation clause", such a restriction should befit the values of the State of Israel as a Jewish and democratic State; it should be made for an appropriate purpose; and should not exceed the extent required for achievement of the appropriate purpose. The condition of befitting "Jewish and democratic values" of Israel requires the Council to consider not only freedom of expression, but also the need to protect the public's feelings. Therefore, restricting the freedom of expression in extreme cases of injury to feelings, when the probability of the injury is of a degree of "near certainty", is consistent with Jewish and democratic values of the State. Still, such restrictions must have an appropriate purpose, and be proportionate. In the petition under discussion, the purpose behind the restriction – preventing injury to the public's feelings – is indeed an appropriate one. However, the scope and severity of the injury does not reach the "extraordinary extremeness" which may justify the restriction of the freedom of cinematographic expression. It follows that the restriction imposed by the Council on the freedom of expression does not meet the standard of proportionality set forth in the "limitation clause".

Procaccia J. concluded her Opinion by stating that "the freedom of expression considerably limits the authority of the censor"; and that "the way to cope with a false and injuring expression is by a good and a true one, which will ultimately prevail".

Grunis J. concurred with Dorner J. and with "the additional reasons" of Procaccia J., so that the Court unanimously held that the decision of the Council should be reversed, so that the screening of the film should be allowed.

III. H.C. 10356/02, Hess *et al.* v. IDF Commander in the West Bank

58(3) *Piskei Din* 443.
Legality of the respondent's Order for enlargement of the "worshipper's path" leading to the Machpela Cave pursuant to terrorist attacks; enlargement requiring sequestration of adjacent land and destruction of several abandoned structures; occupant's authority under Hague Regulations to act for ensuring his legitimate security interests and welfare of all the local population, Arabs Jews or foreigners; local residents' welfare including all spheres of civil life and protection of constitutional rights; concern for human rights should be in the center of the military commander's humanitarian considerations; constitutional right to freedom of religion and worship; granted to all residents of the region; including right to worship in a holy place; not an absolute right and may be balanced against other rights and values worthy of protection; constitutional right to property also granted to all residents; not expiring in time of war; property of archeological and historical value protected in time of armed conflict; right to property also not an absolute right; protection of public order and safety prevails over a constitutional right; commander's duty to take measures likely to decrease the risk to public safety; importance of the constitutional intensity of the right concerned; one constitutional right may be relatively infringed in order to allow the implementation of the other, while ensuring public safety; right to worship and right to property may be balanced by a certain infringement to the one in order to enable the relative implementation of the other; constitutional balancing standard established in the "limitation clause"; the balance underlying the Order meets the constitutional standard and the test of reasonability because enabling the exercise of the right to worship together with a relative protection of worshippers, while causing a limited-in-scope harm to private property.

The factual background of the petition may be presented as follows:

Pursuant to several terrorist attacks which took place on the "worshipper's path"[18] (a narrow pedestrian path about 730 meter long) leading from Kiryat Arba (a Jewish settlement near Hebron, on the West Bank) to the holy place of the Machpela Cave in Hebron; a path which is used by Jewish residents of Kiryat Arba to reach the Machpela Cave on foot on the Sabbath and holidays[19] in order to worship there – the respondent decided to enlarge the "worshipper's path" and to construct a protective wall

[18] Especially the attack that took place on 15 Nov. 2002, in which 12 IDF soldiers were killed.

[19] According to Jewish religion, the traveling on Sabbath and holidays is prohibited.

alongside it. To this end, the respondent issued a Land Sequestration Order (hereinafter: the Order), which provided for the sequestration of parcels of land and for the destruction of several abandoned structures located along the path. While the original Order provided for enlargement of the path to 8 meters and destruction of about 13 structures, the final Order (issued subsequently to the filing of the present petition) provided for the widening of the path between two and four meters and partial destruction of three structures.

It was against the final Order that the present petition was filed by three sorts of petitioners: the Israeli movement "There is a Limit", the Hebron Municipality and a group of six residents of Hebron to whom the land seizure instructions of the Order applied. The question discussed and determined in the petition was the legality of the sequestration and demolition Order issued by the respondent for the purpose of enlarging the path and thereby enhancing the security of worshippers on their way to the Machpela Cave.

The judgment on behalf of the Supreme Court was delivered by Procaccia J. The main rulings formulated in her judgment are the following.

*

A) Responsibility and scope of authority of the commander of the region

1. The governing powers of the Commander of the West Band Region (hereinafter: the Region) derive from three sources: from the rules of international law relating to belligerent occupation, from the local law in force in the Region (including security legislation made by the Israeli Military Administration), and from the principles of Israeli law.[20] In all that concerns international law, the acts of the commander are subject to the laws of war relating to acts of a commander of an area under belligerent occupation. In all that concerns Israeli law, the Commander is subject to the principles of public law, including the rules of natural justice and of administrative reasonability.[21]

2. The Israeli occupation of the Region is subject to the principal norms of customary international law enshrined in the 1907 Hague Regulations Concerning the Laws and Customs of War on Land (hereinafter: the Hague Regulations). Although the question regarding the applicability of the 1949 (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter: the Fourth Geneva Convention) to the Region has not been definitively decided, the humanitarian rules of the Convention

[20] H.C. 393/82, excerpted in 14 *Israel Y.B. Hum. Rts*. 301 (1984).

[21] H.C. 591/88, excerpted in 23 *Israel Y.B. Hum. Rts*. 300 (1993).

have, in fact, been adopted by the Commander of the Region. Therefore, it will be assumed that they are applicable to the petition.

3. The Hague Regulations authorize a commander of an area under belligerent occupation to act in two main spheres: a) ensuring the legitimate security interest of the occupant, and b) ensuring the needs of the local population. For this end, the term "local population" includes both Arab and Israeli residents. The first necessity is a military one, while the other is a civilian-humanitarian one. Within the second sphere, the commander is responsible not only for order and security but also for protection of the residents' rights, in particular their constitutional rights. The concern for human rights should be at the center of the commander's humanitarian considerations.

4. According to Regulation 43 of the Hague Regulations, the occupying force bears the responsibility for taking all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the area. The occupant's duty to ensure public order and safety comprises, on the one hand, the right to ensure his security interests, and on the other, to protect the interests of the civilian population. These two kinds of responsibility should be properly balanced. As was stated by Professor Dinstein, "the laws of war usually create a delicate balance between two magnetic poles: military necessity on one hand, and humanitarian considerations, on the other".[22] The Commander of an occupied area should concentrate on the needs of the area, and not on those of the Occupying State. The commander's authority to enact orders for security needs, including orders for seizure of land, is established both in international law and in Israeli law.

B) Seizure of immovable property

5. The seizure of property may be a necessary step for exercising the military commander's authority and responsibility. It may be required either for military and security needs, or for implementation of the commander's duty to protect the interests of the civilian population. The international laws of war prohibit seizure of private property in an occupied territory or its destruction, unless such destruction or seizure is imperatively demanded by the necessities of war (Article 23(g) of the Hague Regulations). It follows from Article 52 of the Hague Regulations that land may not be seized "except for the needs of the army of occupation". This exception has been interpreted by the Court in its case-law as allowing seizure of land for

[22] Y. Dinstein, "Legislative Authority in the Administrated Territories", 2 *Tel Aviv Univ. L. Rev*. 505, 509 (Hebrew, 1973).

construction of military positions, fortifications and also for paving roads for the protection of Israeli residents in the Region.[23]

6. Article 53 of the Fourth Geneva Convention prohibits the destruction by the Occupying Power of any movable or immovable property belonging to private persons or to the State, "except where such destruction is rendered absolutely necessary by military operations". This exception was explained by Pictet as follows:

> The Occupying Forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand.[24]

7. Following the spirit of this interpretation, the commander's discretion in relation to seizure or destruction of private property should be a very strict one, meaning that these acts may be done only if required by essential military-security needs, and subsequent to a proportional balance between the military need and the intensity of harm to the owner of the property. In the framework of this balance, the commander should consider alternative options, which might avoid infringing private rights. In addition, seizure of property in an occupied area may also take place in extreme cases where it is required for fulfillment of vital needs of the local population. Thus, for example, the Court recognized the legality of seizure of private land for the purpose of paving roads in an occupied territory.

8. In exceptional cases, seizure of private land may also take place in order to extend adequate protection to constitutional rights of the population when they clash with the individual's right to property. In such cases, the legality of the seizure would depend on a proper balance made according to the standards accepted in constitutional law.

9. In addition to international law, the Israeli law (applicable to the commander's acts) also requires to refrain from harming private property of local residents unless such harm is designed to attain a purpose included in the commander's authority, and is required for a vital need. It follows that both from the standpoint of international law and of Israeli public law, the Commander's authority to harm private property should be exercised for a worthy purpose, with reasonability and proportionality, while carefully weighing the vitality of the purpose to be achieved and the intensity and scope of the harm involved in its achievement.

[23] H.C. 24/91, excerpted in 23 *Israel Y.B. Hum. Rts*. 337 (1993); H.C. 401/88, excerpted *ibid*., 296.

[24] *Commentary, Geneva Convention IV* 302 (ICRC, J.S. Pictet ed., 1962).

C) Examination of the legality of the Order

10. According to the basic principle of administrative law, an administrative authority must use its authority exclusively on the basis of relevant considerations, including relevant values and principles. The use of authority on the basis of irrelevant consideration may void an administrative decision. Identification of relevant consideration should be based on the purpose of the law which granted the authority.

11. In response to the petitioners' allegation about irrelevant considerations underlying the Order, the respondent asserted that the enlargement of the "worshippers' path" is essential for security needs and indispensable for protection of human life. Under administrative law, the respondent's activity enjoys the presumption of administrative regularity, which may be rebutted by evidence to the contrary. The petitioners did not provide any factual evidence supporting their claim that the Order was made for anything other than security motives. On the other hand, the respondent's stance pointing to security grounds for the Order is on its face a reasonable one. Its reasonableness may be explained in view of the past experience of the numerous terrorist attacks that took place on the path; of the topographic conditions of the path as a narrow passage, impassable by motor-vehicles, surrounded by abandoned structures (which may easily serve as hiding places for terrorists), and used by hundreds of pedestrians.

12. As already stated, the commander of a region under belligerent occupation is responsible for the security and welfare of all residents of the area, irrespective of their identity as Jews, Arabs or foreigners. The Commander's duty to ensure regular life in the region extends beyond matters of security and daily existence, and actually applies to all spheres of civil life, such as: welfare, health, economy, education, society and similar needs of a person in a modern society. It also includes "the duty of taking all measures necessary to ensure growth, change and development".[25]

13. The commander's responsibility for the welfare of the local population includes his duty to extend – subject to the prevailing conditions – adequate protection to the constitutional rights of all the residents. The constitutional rights deserving protection include the right to freedom of movement, to freedom of religion and worship, and the right to property.

14. The commander has to exercise his authority of ensuring public order and safety while protecting human rights. Sometimes this protection requires balancing between conflicting rights. This balancing standard should meet the test of constitutionality, being that of existence of a worthy purpose and

[25] H.C. 393/82, *supra* note 20.

proportionality in infringement of one human right in order to enable the relative realization of the other.

D) Freedom of movement and freedom of religion and worship

15. All residents of the region – both Arabs and Jews residing there – possess a constitutional right to freedom of religion and worship. They also possess the freedom of movement necessary for implementation of the right of access to holy sites. The right to freedom of movement and access to holy places enjoys high constitutional intensity. In the present case, the freedom of movement is closely tied to the right to implement the freedom of religion and worship as it is supposed to enable the Jewish worshippers to reach the Machpela Cave on foot on Sabbath and holidays.

16. Freedom of worship as an expression of freedom of religion, is one of fundamental human rights. It includes the freedom of the individual to behave according to his faith while fulfilling its commands and customs. In the context of this freedom, the believer's yearning to worship in a holy place has been recognized. This recognition found its expression in the constitutional protection afforded to the freedom of access to members of different religions to the places holy to them and to their feelings with regard to these places (as provided in Section 1 of the Protection of Holy Places Law-1967[26]).

17. Freedom of religion has already been recognized by the legislator in 1922, in the Palestine Order in Council (Section 83), and in the Declaration of Independence of 1948, which proclaimed that freedom of religion and conscience will be ensured to all citizens of the State. Freedom of religion has also been recognized in the case-law of the Supreme Court as a basic constitutional right. Being a constitutional right of a supreme status, the right to freedom of religion and worship should be implemented to every possible extent by protection of the worshippers' safety and lives.

18. According to the tradition of Jews, Christians and Moslems, the Machpela Cave is the place of burial of Abraham and Sarah, Itzhak and Rebecca, Jacob and Lea, and some claim that even of Joseph. The Machpela Cave has been considered a holy site for Jews since ancient times, for generations upon generations. Nowadays, the right of Jews to worship in the Machpela Cave is regulated by several decisions adopted by the Israeli government, which created arrangements allowing the worship in the Cave both to Jews and to Muslims.

[26] 21 *L.S.I.* 76.

E) The right to property

19. However, freedom of religion and of worship is not an absolute right. It should be balanced against other rights and values which are also worthy of protection, including the value of private property. In the present case, against the constitutional right to worship in a holy place stands the right to private property of the lands and structures which are to be seized in order to enlarge the "worshippers' path".

20. The right to property is also a protected constitutional right. It is recognized in international law, both in the Hague Regulations and in the Fourth Geneva Convention. It was granted a constitutional status in Israeli law pursuant to its inclusion in Section 3 of the Basic Law: Human Dignity and Freedom. It does not expire even in time of war. In the present case, the right to property relates to abandoned structures, which allegedly possess an archeological and historical value. According to international law in general and to the 1954 Hague Convention for the Protection of Cultural Property in Time of Armed Conflict[27] in particular, a commander of an occupied territory is bound to safeguard the cultural property situated there, including property possessing an archeological value.

21. However, like the right to worship, the right to property is also not an absolute right, but rather a relative one. It may lawfully be infringed for the purpose of promoting worthy social goals, including the goal of promoting other basic constitutional rights.

F) The right to worship against the value of safety of life

22. Implementation of a constitutional right may involve a risk to public order and safety, including a risk to the safety of the person wishing to implement his right. Protection of public order and safety is a pre-condition to the implementation of all human rights. Therefore, this protection prevails over a constitutional right if there is a "close certainty" that implementation of the right would result in grave harm to public safety. In such cases, the constitutional right will give way to public safety. Following this reasoning, the Court consistently ruled against worship by Jews on the Temple Mount in Jerusalem, on the ground that their exercise of the right to worship would certainly cause harsh riots there.

23. Yet, the existence of a risk to public order and safety resulting from implementation of a constitutional right does not always justify a complete denial of the right. In such cases, a suitable balance should be made between the need to protect public safety and the importance of implementation of the

[27] 7 *Kitvei Amana* (Israel Treaty Series) 485.

constitutional right by way of taking measures which might decrease the probability of occurrence of the harm to public safety.

24. Freedom of worship is a constitutional right of great intensity in the context of balance with contradicting social values. Yet, notwithstanding the supreme status of this freedom, if its implementation creates a "close certainty" of an occurrence of grave harm to public safety, and there are no reasonable means to eliminate the risk, this freedom will be restricted and the value of public safety will prevail. However, if there are reasonable means for decreasing the risk, they should be used, especially where the right which is about to be restricted is a constitutional right of particular intensity. Hence, the stronger is the intensity of the constitutional right to be restricted, the greater is the duty to exhaust all reasonable measures in order to decrease the risk to public safety.

25. In the present case, the Jewish worshippers wish to reach the Machpela Cave on foot in order to exercise their constitutional right to worship in a holy site. It is the responsibility of the commander of the area to ensure a safe passage on the path and to protect the lives of the people passing through it. For discharging this responsibility he could choose between two options: to completely forbid the passage on foot by the worshippers on the path, or to allow passage while taking increased security measures. Considering the constitutional intensity of the right to worship at a holy site, the commander chose the second option. By doing so, he struck a reasonable balance.

G) The right to religion and worship against the right to private property

26. There are situations where one constitutional right may be relatively infringed in order to allow the implementation of another, while ensuring public safety. Such situations usually require a definition of the hierarchy between the rights involved in order to execute a proper balance between them. However, in the present case there is no need for definition of the hierarchy between the right of worship and the right to property, because irrespective of their status (as equal or as one prevailing over the other) they may be balanced by a certain infringement to the one in order to enable the relative implementation of the other. Such infringement would meet the test of constitutionality established in the "limitation clause" (Section 8 of the Basic Law: Human Dignity and Freedom[28]) if it befits accepted social values, is made for a worthy purpose, and its extent is no greater than is required. This balancing standard of the "limitation clause" is based on the

[28] Cited *supra* note 10.

approach that in a confrontation between rights of equal value, the proper balance is the one allowing their mutual restriction in order to ensure the existence of both of them.

H. From the general to the specific

Applying the above-stated rulings to the case under discussion, Procaccia J. actually summed up her opinion. She did it by the following statements:

1) The military commander of an area (under belligerent occupation) bears the responsibility for the security of his force, and for the order, safety and welfare of local residents. He is also responsible for protection of human rights of all residents of the area, Arabs and Israelis alike.

2) The constitutional human rights deserving protection include the right to freedom of religion and religious worship. In the context of this right, the Jewish residents of the area wish to worship in the Machpela Cave, which is a holy site according to Judaism.

3) The implementation of their right requires walking on foot on Sabbath and holidays from Kiryat Arba to the Machpela Cave. The danger of terrorist attacks on the path requires the commander of the Region to extend a minimal level of security and protection to the worshippers on their walk. Extension of this protection involves causing damage to the Arab residents of the area whose parcels are located alongside the path. Their right to property is also recognized as bearing a constitutional status.

4) The Order sought to proportionally balance between conflicting constitutional rights in order to enable the worshippers to exercise their right to worship in a holy place in conditions of relative safety.

5) All options for reaching the Machpela Cave on foot on Sabbath and holidays have been examined, and found to offer less security and involve even greater damage to local residents than the enlargement of the "worshippers' path".

6) In the new Order, the commander limited the injury to private property alongside the path to the minimum. This enlargement will enable only one-way travel of rescue vehicles (instead of the possibility of two-way travel planned in the original Order). This decreased enlargement of the path reduces the damage to property and provides minimal indispensable security measures.

7) All three structures to which the Order applies are abandoned, so that their destruction does not involve any evacuation of people from their homes. The destruction is to be supervised by experts in preservation of structures and archeology, in order to protect to the greatest extent possible the cultural-historical value of the environment.

8) The owners of any property infringed upon are entitled to claim rent and compensation for sequestration or destruction. Obviously, if the security

situation improves, the Order will be repealed and any restorable property will be rendered to its owner.

In light of the above, Procaccia J. reached the following conclusion:

> [I]t seems that the balance underlying the Order meets the test of constitutionality because it is balancing in a relative manner constitutional rights. It enables the exercise of the right to worship together with the relative protection of worshippers, a protection which, in turn, was possible pursuant to a limited-in-scope harm to private property, followed by compensation. This balance was made for a worthy purpose, and does not exceed the proportionality requested.
> Had the commander refrained from causing any harm to property rights, the protection of worshippers would not be possible and their right to reach the Machpela Cave on Sabbath and holidays on foot would have been totally denied. Another option would be the allowing of walking on the path without adequate protection, which would create a great risk to the thousands of worshippers, men women and children. In these particular circumstances, the balance of upholding the right to worship by extending a relative protection to the worshippers at the expense of minimal harm to the rights of the owners of property located alongside the path – meets the test of constitutional balance in a way that does not exceed reasonability.

Procaccia J. held that there is no ground for the Court's interference in the discretion of the respondent in enacting the Order for enlargement of the path. Her opinion was joined by Barak J. and Cheshin J., so that the Order was upheld and the petitions were unanimously denied.

IV. H.C. 5627/02, Sayif *et al*. v. Government Press Office *et al.*

58(5) *Piskei Din* 70.

Refusal of the Israeli GPO to issue press passes to Palestinian journalists – including those possessing permits for entry and employment in Israel – based on security grounds; rules of administrative law applicable to all the functions exercised by Israeli governmental authorities, in the State and outside it, in respect to citizens and aliens; administrative authority may take into account the fact that the person concerned is not a citizen; journalist profession not requiring press pass; absence of a press pass considerably burdening the carrying out of journalism; freedom to get information and to disseminate it equates to freedom of expression; granting a press pass as a "general public interest"; security as a basic social value, but not an absolute one; should be balanced against human rights and protected

values; special status of the Territories as an area dependent on Israel; a total refusal to grant press cards to Palestinians residents of the Territories flawed because of being the most harmful measure; avoidable by individual security check of each journalist.

These are two united petitions filed by a Palestinian journalist working for the Reuters Press Agency, and by the Al-Jazeera Satellite Channel (on behalf of Palestinian journalists employed by it), which were directed against the decision adopted by the responding authority (Israel GPO) to cease issuing of press passes to Palestinian journalists from East Jerusalem and the West Bank, including those possessing permits for entry and employment in Israel.

The background and reasons for this decision had been stated by the GPO director as follows:

> In the past, until the establishment of the Palestinian Authority, Palestinian journalists enjoyed the automatic right to get a press pass from the GPO on an equal footing with Israelis. Now, the GPO decided to equalize their status to that of foreign journalists. … At the base of this decision had been the events which occurred last year, including: coverage according to the Authority's instructions, creation of provocation around security forces, false reporting encouraging revenge instincts, praising terrorists' acts of suicide and murder; incitement to murder Israeli citizens and annihilation of the State of Israel. The GPO decided that such acts will no longer be done by people carrying a press pass granted by the State of Israel.

In response to the Court, it was stated on behalf of the GPO that the main reason for the denial of press passes to Palestinians was a security reason, based on the risk emanating from them, as Palestinians, who by means of their press passes would have access to governmental offices, to press conferences of governmental officials, and to Israeli public figures in general.

The judgment of the Court in the petitions was delivered by Dorner J. The main points of her decision may be presented as follows.

*

1. The rules of administrative law are applicable to all the functions exercised by governmental authorities, both to those exercised in relation to Israelis and in relation to foreigners. This is the rule when an Israeli authority acts outside the borders of the State of Israel (such as the military

commander of an area under belligerent occupation, who is subject to the Israeli administrative law[29]); and moreover this is the rule when an administrative authority exercises its functions in respect to Israelis or foreigners within the territory of Israel.

2. Indeed, when exercising its discretion, an administrative authority may, in certain cases, take into account the fact that the person concerned is a foreigner, not a citizen nor a resident of the State. For example, the basic Law: Freedom of Occupation grants freedom of occupation only to Israeli citizens or residents. In other cases, this fact is of restricted relevancy, or even completely irrelevant. Thus, for example, most of the rights provided for in the Basic Law: Human Dignity and Freedom are granted to every person.

3. Like any other administrative authority, the GPO, too, has to act in regard to the petitioners according to the rules of administrative law, notwithstanding the fact that they are not Israeli citizens or residents. The GPO requirement that applicants for a press pass possess an entry and work permit is a quite reasonable one. The question is whether the total denial of press passes even to Palestinians having an entry and work permit is a reasonable one.

4. The journalist profession is a "free profession", not requiring a special permit, so that the refusal to issue a press pass does not prevent a person from engaging in this profession. However, absence of a press pass considerably burdens the engagement in this profession because it is needed for obtaining information from the authorities, which is indispensable for practicing journalism. As has already been ruled by the Court, "the citizen's freedom to get information and to disseminate it equates to freedom of expression". Moreover, according to case-law, the press pass possesses a great practical importance, which should justify classification of its obtaining as "an economic interest worthy of protection".

5. Without ruling whether obtaining of a press pass forms part of the basic right to freedom of expression, it may certainly be ruled that "obtainment of such a card forms part of a protected social interest for a free press". This interest is not of journalists, of media means or of news agencies, but rather it is of "general public interest", which serves the revealment of truth, the democratic process and the social stability. Governmental authorities – including the GPO – are bound to take this interest into account and to attach to it appropriate weight in their decisions.

6. In all that concerns security considerations (which served as a basis for the GPO's refusal to issue the press passes), indeed, security is a basic

[29] H.C. 393/82, *supra* note 20.

value in our society. Without security, it is not possible to observe human rights and other protected values. However, like human rights, so is the value of security not an absolute one. In situations of conflict between it and other protected right and interests, a balance should be made. As ruled by Barak J.P. in the *Ajuri* case:

> In this balance [between human rights and security needs] human rights cannot receive complete protection, as if there were no terror; and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy.[30]

7. Indeed, in a state of war, a belligerent State does not allow citizens of the opposite belligerent State to enter and to work in it, and it obviously does not grant them press passes. However, the relationship between Israel and the Palestinian residents of the Territories is a more complex one. As the GPO itself stated, in the past it granted Palestinians press passes because of the special status of the Territories as "an area under Israeli protection". Yet, this special status still exists, as even today large areas in the Territories are still under Israeli belligerent occupation, and dependence of residents of the Territories on Israel persists. This situation is the basis of the Israeli policy of granting entry and work permits, subject to security examination of each and every application.

8. A total refusal to grant press passes to Palestinian residents of the Territories – including those holding entry and work permits – points to absence of balance between considerations of freedom of expression and information on the one hand, and considerations of security, on the other. Such a total refusal (without any individual examination), based on alleged existence of an inherent risk posed by all Palestinian journalists from the Territories – is the most harmful measure available. This measure harshly injures the interest of free press – an injury that could be avoided by means of an individual security check regarding the "security risk" posed by each applicant, notwithstanding his having passed the security checks required for obtaining an entry and work permit.

9. Indeed, it can always be claimed that a situation whereby a Palestinian journalist from the Territories holding a press pass creates a particular security risk. Such a risk exists even if that person passed the security check required for obtaining an entry and work permit, and even the check required for obtaining a press pass, too. Yet, this particular risk is a small and

[30] H.C. 7015/02, excerpted in 33 *Israel Y.B. Hum. Rts*. 249 (2002).

theoretical one, which does not justify a certain injury to the protected interests of free expression and free information. Nor does it justify a distinction – actually creating a discrimination – between foreign Palestinian journalists and all other foreign journalists.

Applying these rulings to the petitions, Dorner J. instructed the GPO to continue issuing its press passes to Palestinian journalists possessing entry and work permits; but allowed the issuance of the press pass to be subject to individual security checks in respect to each applicant.

V. H.C. 1890/03, Bethlehem Municipality *et al.* v. IDF Commander in the West Bank *et al.*

Not yet published.

Legality of the respondent's Order of sequestration of parcels of land in the Bethlehem area for the purpose of paving a bypass road surrounded by a protective wall for the safety of Jewish worshippers traveling from Jerusalem to Rachel's Tomb located in the area; infringement upon the petitioners' freedom of movement; military commander's authority under the Hague Regulations and the Fourth Geneva Convention to seize land; discretion for use of the authority subject to requirements of reasonability and proportionality; security considerations not contradicted; freedom of religion and religious worship recognized in Israeli legal system as a fundamental human right; not absolute but relative and may be restricted in order to safeguard public interests or other basic rights; freedom of movement also recognized as one of the basic human rights in Israeli legal system; also not absolute and must be balanced against other rights and interests; horizontal balance required between these two basic rights (of freedom of worship and freedom of movement), allowing co-existence of both; sub-tests for examination of the extent of infringement of the petitioners' freedom of movement; right to property also recognized as a basic human right; the respondent's duty to find a solution which ensures the realization of the worshippers' freedom of worship without causing a substantial injury to the petitioners' freedom of movement and property rights.

In the present petition the Municipality of Bethlehem, together with 21 private citizens, challenged the legality of a Land Sequestration Order (hereinafter: the Order), issued in August 2004 by the Commander of the IDF Forces in the Judea and Samaria Area. The Order provided for the sequestration of parcels of land in the Bethlehem area, for the purpose of paving a bypass road surrounded by a protective wall for the safety of Jewish worshippers wishing to travel from Jerusalem to Rachel's Tomb located in

the area. The petitioners complained that the road and the wall constitute an injury to their freedom of movement and property rights; and challenged the Order on the ground of unreasonableness and disproportionality, because it was not based on a proper balance between the rights of the worshippers and the rights of the local population. The petitioners also claimed that the respondent took into account irrelevant considerations because the real objective of the Order is not the ensuring of the worshippers' security against terrorist attacks, but rather the "annexation" of Rachel's Tomb to Jerusalem.

Responding to the petition, the respondent asserted that the paving of the bypass road is designed exclusively for the security needs of protecting the lives of Jews visiting Rachel's Tomb. He pointed to the numerous terrorist attacks directed at the Tomb which have taken place since September 2000, including sniper fire, explosive charges, throwing of Molotov cocktails and rioting.

The arguments of the parties and the dispute arising in the petition were summed up by Beinisch J. (on behalf of the Supreme Court) as follows:

> The point of departure for our discussion is that petitioners do not contest the worshippers' right of access to Rachel's Tomb. However, they argue that this access should be ensured without impairing their freedom of movement in Bethlehem and their property rights. As for the respondents, they recognize their duty to minimize the injury to the freedom of movement and to the property rights of the petitioners resulting from the steps taken to ensure the worshippers' freedom of access. The main dispute is, therefore, whether the respondent exercised a proper balance between the rights of the worshippers and those of the local population.

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Beinisch J. started discussing this dispute by stressing the distinction between the principal *authority* of the respondent to issue the Order and his *discretion* involved in issuing it.

The general authority of a military commander to seize land on the basis of the 1907 Regulations Concerning the Laws and Customs of War on Land, (hereinafter: the Hague Regulations), and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter: the Fourth Geneva Convention), subject to conditions established in international and Israeli law, has been recognized by the Court in a series of judgments. Indeed, the petitioners do not contest the respondent's authority to issue the Order; they only challenge his discretion on the ground of being used in an unreasonable and disproportional manner. According to the basic rules of administrative law, even when acting within his authority, the military commander must use his authority according to the

principles of reasonableness and proportionality, and his discretion is subject to the review of the Court. Hence, the present judgment consists of a judicial review of the military commander's discretion.

The Argument Regarding Irrelevant Considerations

Beinisch J. started by referring to the petitioners' claim that the Order was based on the irrelevant consideration of "annexation" of Rachel's Tomb to Jerusalem, rather than on the consideration of protecting the worshippers from terrorist attacks.

Discussing this claim, Beinisch J. stressed that "indeed, it is a rule that an administrative authority must act in every case exclusively on the basis of relevant considerations, and for the purpose for which the authority was granted to it". Indeed, in his affidavit given to the Court, the respondent asserted that the Order was issued on the basis of security reasons only (namely, the need to secure the lives of those coming to pray at the Tomb). He explained the security needs by pointing to the current threats to worshippers on the existing access road to the Tomb, and by reviewing the events since September 2000 as indicating an ongoing Palestinian attempt to strike at the Jewish sites which remain in the Territories, including Rachel's Tomb, at Jewish worshippers visiting these sites, and at IDF forces protecting them. He also stated (by relying on the GSS – General Security Services – report) that Bethlehem has recently turned into a center of terror, thus increasing the danger of terrorist attacks directed against traffic to the Tomb.

Whereas these security considerations were not contradicted by the petitioners on any factual basis, the claim of irrelevant considerations was rejected by the Court.

Then Beinisch J. proceeded to examine the central claim raised by the petitioners, namely, that the Order does not attach sufficient weight to the injury to the petitioners' basic rights, and therefore is defective because of unreasonableness and disproportionality.

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1. Freedom of Worship

Freedom of religion and of religious worship is recognized in the Israeli legal system as a fundamental human right. This freedom was already mentioned in Section 83 of the Palestine Order in Council-1922, and in the (Israeli) Declaration of Independence of 1948. Freedom of religion and worship was recognized by this Court in its case-law long ago. Freedom of worship has been recognized as an expression of freedom of religion, and as an extension of freedom of expression. Some even see it as an aspect of human dignity. It has also been recognized that freedom of religion and of worship includes the wish of the believing person to worship in a place holy

to him; and also the freedom of access of members of different religions to places holy to them. This last freedom was recognized and is protected by the Israeli Protection of Holy Places Law-1967[31] (Section 1 and Section 2(b)).

The Court has recently defined the status of freedom of worship in the Israeli legal system in the *Hess* case,[32] where an issue very close to the one under consideration was discussed. In that case the Court said that "the worshippers wishing to get to the Machpela Cave by foot on Sabbath and holidays wish to exercise their constitutional right to freedom of worship in a holy place".

It is uncontested that Rachel's Tomb is a holy place to Jews and that it has been recognized as such for generations upon generations. There is much evidence of the site's holiness to Jews and of pilgrimages to it ever since ancient days. Rachel is a holy figure in Judaism, who symbolizes motherhood, mercy, redemption, and the return to the land of Israel in the Bible and in Jewish tradition. Her Tomb is considered to be the third holiest site to Jews after the Temple Mount and the Machpela Cave. The rights of Jews to possess the site and pray at it were officially recognized in the *Firman* (decree) of the Sultan of Turkey in the mid 19th century. During the period of the British Mandate, the *status quo ante* at the site was preserved, and Jews were allowed to visit the tomb and worship there. After the (Israeli) War of independence, while the Tomb was under the control of the Kingdom of Jordan, access of Jews to the Tomb was impossible. After the Six Day War, the control of Rachel's Tomb returned to Israel, and was given the status of a site of religious worship. As such, it became a magnet for worshippers and tourists. Even according to the Interim Agreements between Israel and the PLO, in which the control of Bethlehem was transferred to the Palestinian Authority, the right of Jews to exercise freedom of worship at the places holy to them was preserved. According to these Agreements, the security control over Rachel's Tomb and the access roads to it was left to Israel.

Yet, freedom of worship is not an absolute freedom but rather a relative one, which "may be restricted when confronted by public interests or other basic rights". The Court already ruled in the past that "freedom of conscience, belief, religion, and worship is a relative freedom", and that "one must balance between it and other rights and interests which are also worthy of protection, like private and public property, freedom of movement, and also public order and safety".

31 *Supra* note 26.

32 H.C. 10356/02, excerpted above in this Volume.

In the present case, against the worshippers' right to freedom of worship stand the petitioners' right to freedom of movement and their property rights, which are likely to be impaired as a result of the measures taken to preserve the security of worshippers. Therefore, the questions arising are whether the Order was based on a proper balance between the worshippers' freedom of worship and the petitioners' freedom of movement; and between the worshippers' freedom of worship and the petitioners' property rights.

2. Freedom of Worship against Freedom of Movement

Freedom of movement is one of the basic human rights and it is recognized in our legal system both as an independent right and as a right derived from the right to liberty. In addition, some view this freedom as deriving also from human dignity.

The status of freedom of movement in the Israeli legal system was discussed in the *Horev* case,[33] where Barak J.P. stated that freedom of movement is "among the more basic rights", that it "stands in the front row of human rights", and that it is "a freedom located at the highest level of the hierarchy of rights in Israel". Barak J.P. added that "usually, the freedom of movement within the borders of the State is placed on a constitutional level similar to that of freedom of expression". Similar opinions about the status of freedom of movement were expressed even in the minority opinions delivered in the *Horev* case.

Freedom of movement is also recognized as a basic right in international law. Intrastate freedom of movement is protected in a long line of international conventions and declarations on human rights [*e.g.*, the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 12; the 1948 Universal Declaration of Human Rights, Article 13; the 1963 Fourth Protocol to the 1950 European Convention on Human Rights, Article 2]; and it seems also to be a part of customary international law.

However, like freedom of worship and almost all other freedoms, the freedom of movement is also not absolute but relative – so that it must be balanced against other interests and rights. This is the position both of Israeli constitutional law and of the international human rights law. An example for this position may be found in the two paragraphs of Article 12 of the ICCPR, which provides as follows:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . .
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> . . .

[33] *Supra* note 14.

> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

An additional example is Article 4 of the ICCPR, which provides for the possibility of restricting the rights listed in the Covenant in time of "public emergency". Irrespective of the question of applicability of the principles of Israeli constitutional law and international human rights conventions in the Judea and Samaria area (a question which has not been raised by the parties), the military commander's duty to exercise his discretion reasonably includes the duty to consider the interests and rights of the local population, including the need to minimize infringement of its freedom of movement.

3. Balancing between the right to freedom of movement and the right to freedom of worship

Whereas the military commander has to balance between the basic right of freedom of movement and the basic right of freedom of worship, the question arises regarding the proper standard for balancing between these two freedoms. As ruled in H.C. 2481/93,[34] and previously in H.C. 448/85,[35] "the balancing formulae vary according to the essence of the conflicting values", and "the proper standard is not a permanent and uniform one for all cases". Rather, a suitable test should be found for each case, by taking into account the essence and importance of the competing principles, and the level of protection they deserve.

In the present case, a clash exists between two basic rights of equal weight because both freedom of worship and freedom of movement have been recognized in case-law as belonging to the highest level of the hierarchy of rights. Moreover, both freedom of worship and freedom of movement have been recognized as having a weight equal to that of freedom of expression. In addition, an identical balancing standard – consisting of the "near certainty" test – is employed for both of them in balancing them against public interests.

As ruled in H.C. 2481/93, in a case of a clash between two basic rights of equal status, the appropriate balance should be a horizontal one, consisting of a reciprocal waiver, whereby each right must make a concession to the other in order to allow the coexistence of both. Therefore, freedom of

[34] Excerpted in 34 *Israel Y.B. Hum. Rts*. 322 (2004).
[35] H.C. 448/85, excerpted in 17 *Israel Y.B. Hum. Rts*. 301 (1987).

worship cannot be exercised at the expense of complete denial of freedom of movement. Rather, a reciprocal limitation of the scope of protection granted to each of these freedoms is needed, so that the "breathing room" of each of the competing values will be preserved. The proper balance should allow the essential exercise of freedom of worship, without essentially impairing the freedom of movement. The horizontal balance should preserve the "nucleus" of each of these freedoms, and limit each of them only at its "shell". In addition, the intensity and essence of infringement of each freedom must be considered.

4. The extent of infringement of the petitioners' freedom of movement

The intensity of infringement of the petitioners' freedom of movement within the city of Bethlehem – in the area adjacent to Rachel's Tomb – may be examined by a number of subtests developed in case-law. These are mainly: the geographic scope of limitation of freedom of movement; the intensity of the limitation; the duration of the limitation; and the interests injured by the limitation of freedom of movement.

The subtest regarding the *geographic scope of the restriction* of movement was explained by Türkel J. in H.C. 4706/02[36] as follows:

> [T]he most severe infringement of the freedom of movement … is the imprisonment of a person, pursuant to an arrest or imprisonment order, and the restriction of his movements between the walls of the prison. Lesser is the restriction of movement to a particular place of residence, such as an alternative to detention confining a person to a certain address ("house arrest"). Even lesser is the restriction of movement to the boundaries of a certain city, and lesser than that is the restriction of movement by forbidding entry into the boundaries of a certain city. Lesser still is the limitation of freedom of movement by forbidding a person to leave the country. … Lesser still is the restriction of freedom of movement by forbidding a person's entry into a certain country, such as an enemy country.

As to the subtest of *intensity of restriction of movement*, it is obvious that the injury caused by a complete denial of freedom of movement is more severe than that resulting from a partial restriction of freedom of movement; and as the level of restriction lessens, so does the intensity of injury. Thus, for example, it has been ruled that the severity of injury to freedom of movement due to a closing of a road varies according to the situation where

[36] H.C. 4706/02, excerpted in 34 *Israel Y.B. Hum. Rts*. 316 (2004).

the road closed is an exclusive access road or where adjacent alternative roads remain open. Indeed, total prevention of movement is not the same as delay of movement or burdening of it, and as the level of burden decreases, so decreases the intensity of the injury to freedom of movement. Likewise, it has been ruled in the *Beit Sourik* case[37] that assessment of the severity of the injury caused by the Separation Fence must take into account such considerations as: the number and locations of exit gates and passage points planned in the Fence, the distance between them and the places of residence and work of the local residents, including the comfort and speed of passage through those gates and passage points.

According to the subtest regarding *duration of the restriction*, the longer the period of the limitation on freedom of movement, the greater the severity of the injury. A curfew denying a person's right to exit his home for a few hours is not the same as a house arrest denying a person the right to leave his home for a number of weeks or even months. Similarly, a restriction of the right to leave the country for a few days is not the same as a restriction of this right for a number of months or even years. A partial closing of a street during times of prayer is not the same as its closing for the entire Sabbath.

Within the subtest regarding *the person's interest in exercising the freedom of movement,* the purpose of the movement restricted is examined, together with the intensity of the interests whose realization depends upon that movement. For example, it was ruled in the *Beit Sourik* case that where the route of the Separation Fence separates farmers from the lands which provide their livelihood, it severely infringes their freedom of movement.

It is against these standards that the petitioners' allegation concerning infringement of their freedom of movement will be examined.

From the General to the Specific

While according to the first and second Order, the road and the wall would considerably infringe the petitioners' freedom of movement, the infringement caused by the new Order is far lesser both in terms of the number of residents affected and in terms of the severity of the injury. As a result of alteration of the route of the road made in the new Order, the freedom of movement of most of the petitioners living along the Hebron Road would no longer be disturbed since the road will bypass their homes (and pass in an undeveloped area). According to the respondents' estimation, the number of residents whose freedom of movement will be infringed has been reduced, since the original order, by approximately 70%.

37 H.C. 2056/04, excerpted in 35 *Israel Y.B. Hum. Rts*. 340 (2005).

Nevertheless, examination of the parties' arguments, and of maps and aerial photographs attached to them, reveals that the Order causes infringement of freedom of movement to dozens of residents who reside proximate to Rachel's Tomb. Yet, according to the new Order, these residents will no longer be surrounded by walls, and their movement to other parts of Bethlehem will be free, with no need to pass a checkpoint.

Examination of the new Order in light of the abovementioned subtests developed for determining the intensity of the infringement of freedom of movement reveals that the severity of its infringement to freedom of movement is considerably reduced in two aspects: in the geographic scope of the restriction and in its intensity.

As for the subtest relating to the *geographical scope* of the limit on movement, none of petitioners will be left in a zone surrounded by walls. The restriction to the movement of the residents is now limited to a restriction of their travel into Jerusalem, and even this restriction does not stem directly from the Order under consideration.

As for the subtest dealing with the *intensity of the restriction* of movement, the movement of all petitioners within Bethlehem will be free and direct, with no need to pass checkpoints. The movement of residents of this zone to the west will also be completely open, whereas their movement east, to the other side of the Hebron Road, will require the bypassing of Rachel's Tomb and the walls protecting access to it from the south. Indeed, this bypass lengthens the journey of residents of the zone on their way to the eastern part of Bethlehem by a few hundred meters; and this will cause some extent of burden and discomfort. However, this is a level of burden which a person is liable to be subject to in the context of regular daily life, when entrance to a road is blocked due to traffic considerations or considerations of public order.

As to the subtest regarding *interests whose realization depends on freedom of movement* (meaning in this context the most basic daily activities, like: going to work and to school, purchase of food, medical care, etc.), the restriction of movement from the zone under discussion and into it has been significantly reduced by the new Order, so that there will also be significant easing in the daily lives of petitioners living in the zone.

Indeed, in all that concerns the subtest regarding the *duration of the restriction*, the new Order involves no change from the previous Orders. Although the respondents emphasize that the steps taken under the Order are temporary, and that the walls will be dismantled when the security situation improves, and the threat to the lives of the worshippers visiting the tomb decreases – the length of this period is unknown, and depends on the situation in the area, which is likely to remain as it is for a long time.

Concluding this examination, Beinisch J. ruled as follows:

> The conclusion is, therefore, that even though the new Order still creates a certain infringement of the freedom of movement, … we are convinced that this infringement – a certain lengthening of a small number of petitioners' route to the eastern part of Bethlehem – is not a severe and substantial infringement of freedom of movement, which exceeds the zone of proportional and reasonable means which the respondents, as those responsible for security and daily life in the area, are permitted to employ.

Notwithstanding this conclusion, Beinisch J. proceeded and examined the petitioners' allegations that the objective of the Order – the creation of safe access for worshippers to Rachel's Tomb – could have been realized through other means whose injury to petitioners would be a lesser one, such as driving worshippers in a bulletproof bus with military escort, or digging a tunnel to the Tomb. The first suggestion was rejected by the respondents on the ground that it does not provide a suitable security response to the danger posed to the lives of the worshippers and the soldiers escorting them due to intelligence information that a Palestinian terrorist cell planned to carry out an attack against a bulletproof bus of worshippers using a car bomb. In relation to the proposal to dig a tunnel to the Tomb the respondents claimed that it is unclear whether such a solution can be implemented from the engineering standpoint. In any case, the digging of a tunnel under a hostile area is not a good solution, because it involves the danger of infiltration of terrorists into the tunnel or the setting of an explosive charge there, which may turn the tunnel into a deathtrap for those inside it. Moreover, a tunnel would actually have the characteristics of a permanent solution, whereas the respondents wish to find a temporary solution for a given security situation.

It follows that the parties disagree regarding the suitable security means for realizing the objective of the Order. As already ruled in the *Beit Sourik* case,[38] in a dispute regarding military-professional questions, in which the Court does not have its own judicial knowledge, it will attach great weight to the professional opinion of a military official, who has the professional expertise and with whom the responsibility for security lies. In the present case, the petitioners did not lift the burden of convincing the Court that their opinion regarding the efficacy of the means they proposed is to be preferred over that of the military commander. Indeed, there may be a number of ways to realize an objective, all of which are proportional and reasonable. It is for the military commander to choose between such ways, and as long as he

[38] *Id.*

does not exceed the "zone of proportionality" or the "zone of reasonability", the Court will not interfere with his discretion.

Freedom of Worship v. Property Rights

Responding to the petitioners' claim relating to the alleged infringement of their property rights, Beinisch J. ruled at once that:

> … the right to property also belongs to basic human rights. This right has been recognized as a basic right worthy of protection in the case-law of this Court,[39] and has also received an explicit constitutional expression in Section 3 of the Basic Law: Human Dignity and Freedom. This right is recognized also in international law. In all that concerns belligerent occupation, this right is anchored in the Hague Regulations and in the Fourth Geneva Convention.

However, a property right is not an absolute right, and it sometimes gives way when faced with public interests and other basic rights.

Although the balance between freedom of worship and private property was recently discussed in the *Hess* case,[40] the Court refrained from stating a decisive position regarding the conceptual hierarchy between the right of worship and property rights, and did not answer the question of how to balance between them in case of a clash. This was so because in the circumstances of that case it reached the conclusion that the horizontal balance performed by the respondent passed the test of constitutionality.

In the view of Beinisch J., this approach should be followed in the present case, because the Court was convinced that the infringement upon private land in this case is "completely marginal" (as asserted by the respondents). In fact, the petitioners centered on infringement of their freedom of movement, and did not even indicate any concrete infringement upon their property rights. The respondents claimed that in planning the route an effort was made to use the existing boundaries of land parcels, so that only few petitioners suffered damage to their property as a result of land sequestration; and even then, the sequestration applied only to small parts of parcels. The respondents further pledged that compensation will be paid for such sequestration.

In light of the above, Beinisch J. ruled that the Court was convinced that the balance between freedom of worship and property rights in this case did not exceed the zone of reasonableness, even under the assumption that both

[39] H.C. 390/79, 9 *Israel Y.B. Hum. Rts*. 345 (1979).

[40] Excerpted above in this Volume.

rights are of equal weight, for which the proper balancing is a horizontal balancing.

Conclusion

The conclusion for the petitions was formulated by Beinisch J. (on behalf of the Supreme Court) as follows:

> The Jewish worshippers have the basic right to freedom of worship at Rachel's Tomb, and the respondent is responsible for securing the realization of this right, including protection of the security and lives of the worshippers. In examining the means for realization of this purpose, the respondent must take into consideration the basic rights of petitioners, including freedom of movement and property rights, and balance adequately between them. The ultimate solution adopted by the respondent indeed ensures the realization of the worshippers' freedom of worship without causing a substantial injury to the petitioners' freedom of movement and property rights. We, therefore, have not found that the final arrangement is defective by an unreasonableness justifying our intervention.

Rivlin J. and Chayuti J. concurred with the judgment of Beinisch J., so that the petitions were unanimously denied.